# Social rights in the age of illiberalism:
# A study of the transformation of welfare provision in Poland

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| CEDAW | Convention on the Elimination of All Forms of Discrimination against Women |
| CEE | Central and Eastern Europe |
| CESCR | Committee on Economic, Social and Cultural Rights |
| CIT | Corporate Income Tax |
| CJEU | Court of Justice of the European Union |
| CoE | Council of Europe |
| Constitution | Constitution of the Republic of Poland |
| ECHR | European Convention on Human Rights |
| ECtHR | European Court of Human Rights |
| Istanbul Convention | Council of Europe Convention on Preventing and Combating Violence Against Women and Domestic Violence |
| IVF | in vitro fertilization |
| NCJ | National Council of the Judiciary |
| NGO | Non-governmental organization |
| PACE | Parliamentary Assembly of the Council of Europe |
| PIT | Personal Income Tax |
| RFIL | *Rządowy Fundusz Inwestycji Lokalnych* (Local Investment Fund) |
| SKO | *Samorządowe Kolegium Odwoławcze* (Self-government Board of Appeal) |
| SPZOZ | *Samodzielny Publiczny Zakład Opieki Zdrowotnej* (Independent Public Healthcare Facility) |
| UN | United Nations |
| Venice Commission | European Commission for Democracy through Law |

# Introduction

## 1. Research problem

For over three decades since the demise of communism in Poland, social rights have constituted one of the central themes in the domestic constitutional law and human rights scholarship, and in the legal-political debates more broadly.

Under the communist rule, social safety nets were embedded in the domestic legal framework on a large scale, yet the state's commitment to the provision of welfare was illusory. The Constitution of the Polish People's Republic [1] of 1952 contained a broad catalogue of social rights but it was a sham unenforceable[2] document which paid mere lip service to the idea of universal welfare while the socio-economic developments on the ground remained poor.[3] Despite this stark contrast between the political propaganda and the reality of social rights provision, the conviction regarding the universality of legal claims to basic material security became deeply ingrained in both the domestic legal culture and collective consciousness of the Polish society.[4]

The socio-economic reality worsened during the transition from communism to democracy, when society had to face the dire circumstances of a collapsed economy such as hyperinflation, declining real wages, soaring unemployment, and the dysfunctional healthcare and social security systems.[5] It was at that juncture when the socio-economic struggles turned into day-to-day experience. Accordingly, social rights became a theme in the domestic political discussions and the intensity of the debates over the ways in which the necessary social minimum could be secured reinforced in the mid-1990s, during the constitution-making process. A widespread pushback occurred, referring largely to the former communist rhetoric of universal welfare, against the dismantling of the broad social safety nets. The public demanded the state to commit to the provision of at least some basic social entitlements under the new constitutional system. More

[1] The Constitution of the Polish People's Republic of 22 July 1955.
[2] C.R. Sunstein, 'Something Old, Something New', 1 *East European Constitutional Review* (1992) p. 18-19.
[3] For an overview of the system of welfare provision under communism, *see* J. Elster et al., *Institutional Design in Post-communist Societies. Rebuilding the Ship at Sea* (Cambridge University Press 1998) p. 204 et seq.
[4] W. Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2014) p. 254.
[5] Elster et al., *supra* n. 3, p. 207 et seq.

specifically, large sections of society were advocating for explicit constitutional protection of social rights.

Given the communist "economic legacy"[6] of deep structural inequality, unemployment and poverty which, on the one hand, was calling for increased social protection, but on the other, hindered the latter's immediate effective realization, the design of the future welfare system has quickly become one of the most contested issues when drafting the new constitution.[7] The discussion on whether to constitutionalize social rights was comprehensive and vigorous but the political consensus has long remained unachievable.[8] Simultaneously, the early-democratic constitutional adjudication struggled to delineate the extent of the protection of basic social rights when scrutinizing the far-reaching transitional reforms implemented in various social policy fields. The role of the Constitutional Tribunal's jurisprudence was especially profound in the areas of old-age pensions[9], protection of labor[10], but also in matters concerning gender equality[11], disability rights[12] or tax law[13].

The political forces engaged in the constitution-making process were divided over the issue of social rights constitutionalization, with strong voices against it coming from the domestic and international academics advising the government during the transition process.[14] The opponents feared that the entrenchment of positive welfare rights in the new constitution which, contrary to the communist one, was to be enforced, will end up in the state making promises on which it cannot

[6] W. Sadurski, 'Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights', 2 *Law and Contemporary Problems* (2002) p. 228

[7] W. Osiatyński, 'A Bill of Rights for Poland', 1 *East European Constitutional Review* (1992) p. 31.

[8] H. Schwartz, 'Do Economic and Social Rights Belong in a Constitution', 10 *American University Journal of International Law and Policy* (1995) p. 1234.

[9] *See* for instance, Judgment of the Constitutional Tribunal of 5 July 2010, P 31/09; Judgment of the Constitutional Tribunal of 11 February 1992, K 14/91.

[10] *See* for instance, Judgment of the Constitutional Tribunal of 26 April 1999, K 33/98; Judgment of the Constitutional Tribunal of 2 October 2012, K 27/11; Judgment of the Constitutional Tribunal of 7 May 2013, SK 11/11.

[11] Judgment of the Constitutional Tribunal of 24 September 1991, Kw. 5/91; Judgment of the Constitutional Tribunal of 29 September 1997, K 15/97; Judgment of the Constitutional Tribunal of 5 December 2000, K 35/99; Judgment of the Constitutional Tribunal of 13 June 2000, K 15/99; Judgment of the Constitutional Tribunal of 28 March 2000, K 27/99.

[12] Judgment of the Constitutional Tribunal of 30 November 1988, K 1/88.

[13] Judgment of the Constitutional Tribunal of 18 October 1994, K 2/94; Judgment of the Constitutional Tribunal of 11 April 1994, K 10/93.

[14] Sunstein, *supra* n. 2, p. 18-19; U.K. Preuss, 'Patterns of Constitutional Evolution and Change in Eastern Europe' in J.J. Hesse and N. Johnson (eds.), *Constitutional Policy and Change in Europe* (Clarendon Press 1995) p. 103; of an opposite opinion was Herman Schwartz, *see* H. Schwartz, 'Do Economic and Social Rights Belong in a Constitution', 10 *American University Journal of International Law and Policy* (1995).

deliver, ultimately leading to the underenforcement of the constitution's social provisions.[15] Through different lens, increased constitutional review of social policy could lead to institutional distortion by undermining the separation of powers principle.[16] This would end in the decrease of the authority of the constitution as the supreme law of the land. Nevertheless, it soon became clear that to completely phase out welfare provision was impossible[17] since even those advocating against the constitutionalization of social rights were not opposing their protection by the state as such[18]. Eventually, the Constitution of the Republic of Poland[19], adopted in 1997, provided a catalogue of social rights[20]. However, these provisions were formulated not as directly enforceable positive rights but mainly[21] as programmatic norms and state policy directives of limited legal weight, which was deemed to afford an illustration of the constitution's "realistic approach" to the issue of social rights.[22]

Looked at from a political perspective, over the years, the government's engagement in the realization of the constitutional policy directives through provision of direct entitlements to social goods and services differed considerably depending on the ruling majority. Regardless, however, of the rotations in power, the issues of social nature have unceasingly held a central position in the domestic political debates. For the policy choices advocated by the consecutive governments on highly contested social matters such as abortion, in vitro fertilization, or the universal pensionable age, had a deeply symbolic meaning. They had the biggest influence on the political preferences of the population and consequently, people's electoral choices that have repeatedly shaped the domestic legal-political landscape.

By 2015, the popular disenchantment with the social and economic outcomes of the democratization processes peaked, exacerbated by the negative implications of the European economic and migrant crises.[23] This dissatisfaction with the effects of the domestic politics must also be viewed in the context of the stringent neoliberal economic policy of the government in

[15] For a comprehensive overview of the arguments against the constitutionalization of social rights see W. Sadurski, *Myślenie Konstytucyjne* (Presspublica 1994) p. 49 et seq.
[16] Sadurski, *supra* n. 4, p. 259.
[17] Sadurski, *supra* n. 6, p. 228; Sadurski, *supra* n. 4, p. 253.
[18] H. Schwartz, 'In Defense of Aiming High', 1 *East European Constitutional Review* (1992).
[19] The Constitution of the Republic of Poland of 2 April 1997 (hereafter: the Constitution).
[20] The subchapter on Economic, Social and Cultural Freedoms and Rights comprising Articles 64-76.
[21] The Constitution contains several enforceable social rights. This aspect will be laid out in Chapter 2.
[22] W. Osiatyński, 'A Brief History of the Constitution', 6 *East European Constitutional Review* (1997) p. 75.
[23] L.J. Cook and T. Inglot, 'Central and Eastern European Countries' in D. Béland et.al. (eds.), *The Oxford Handbook of the Welfare State* (Oxford University Press 2021) p. 884.

power at the time, leading to considerable cuts on welfare expenditure with adverse impact on the scope of social security guarantees.[24]

Considering the above, it did not come as a surprise that in the parliamentary elections of 2015, society endorsed a political faction which had committed to reform and broaden the domestic welfare structures. Consequently, in October 2015, a new government formed by the Law and Justice party came to power. Earlier that year, a candidate of the same political faction, Andrzej Duda, won the presidential elections, which allowed for the concentration of the legislative and executive powers in the hands of one political formation. It is only with the benefit of hindsight that one may now refer to this political change in terms of a critical juncture in the history of Poland's liberal constitutionalism.[25]

The scholarship asserts that the prior lack of adequate political response to the accumulating social problems has played a significant role in the electoral victory of a different political formation.[26] Research indicates that the shift took place owing to the Law and Justice's commitment to pursue thorough state reforms aimed at improving the level of general welfare.[27] Politicians amplified the mounting social dilemmas such as the widening economic inequalities, the underdevelopment of domestic family policy, the increasing housing unaffordability, or the marginalization of the elderly and persons with disabilities. From a moral standpoint, they fueled religious attitudes with a view to mobilizing their supporters to oppose the availability of abortion and IVF. And since the general conviction was that the standard of social rights protection had failed to keep up with the economic development, the new governing majority came to power with a strong mandate to implement wide-ranging social reforms.

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[24] *Ibidem*, p. 884; M. Laruelle, 'Illiberalism: a conceptual framework', 2 *East European Politics* (2022) p. 312.

[25] G. Capoccia, 'Critical Junctures' in O. Fioretos, T.G. Falleti and A. Sheingate (eds.), *The Oxford Handbook of Historical Institutionalism* (Oxford University Press 2016) p. 89; C.H. Stefes, 'Historical institutionalism and societal transformations' in W. Merkel, R. Kollmorgen and H.-J. Wagener (eds.), *The Oxford Handbook of Political, Social and Economic Transformation* (Oxford University Press 2019) p. 100; G. Capoccia and R.D. Kelemen, 'The Study of Critical Junctures. Theory, Narrative, and Counterfactuals in Historical Institutionalism', 3 *World Politics* (2007) p. 348 et seq.

[26] B. Bugarič, 'The Populist Backlash against Europe. Why Only Alternative Economic and Social Policies Can Stop the Rise of Populism in Europe' in F. Bignami (ed.), *EU Law in Populist Times. Cases and Prospects* (Cambridge University Press 2019).

[27] M. Stambulski, 'Constitutional populism and the rule of law in Poland' in M. Krygier, A. Czarnota and W. Sadurski (eds.), *Anti-Constitutional Populism* (Cambridge University Press 2022) p. 339; D. Adamski, 'The social contract of democratic backsliding in the "new EU" countries', 3 *Common Market Law Review* (2019) p. 627.

From 2015 onwards, the government has introduced multiple social policies, thus changing the domestic welfare structures in unprecedented ways.[28] Already in 2015, a law was passed providing for a monthly family benefit delivered in cash, amounting to PLN 500 and addressed to families with at least two children. The scope of the program was extended in 2019, and the allowance has since then been granted already for the first child. Beyond families, the government has adopted several elderly-friendly schemes. First, to tackle the problem of low old-age pensions, the so-called 13th pension was introduced, granting one additional annual payment of a predetermined amount equal for all pensioners. Another program aimed at the elderly was the scheme offering free medicine to persons over the age of 75. Furthermore, the government has passed an amendment to the tax law exempting taxpayers up to the age of 26 from personal income tax. The tax-free threshold was increased. Moreover, the political majority has raised the minimum wage and introduced the minimum hourly wage for civil law workers. Another notable rearrangement was the lowering of the universal retirement age and differentiating in this respect between men and women. The central state has also engaged in large-scale social housing construction. Finally, the most widely commented change in the area of social law, which has also been subject to increased international scrutiny, was the restriction of the law on abortion.

As evidenced, the government has addressed some of the long-standing social and economic needs of the domestic population. The new social policies lifted Poland to the top positions in the European rankings of family policy expenditure.[29] Even if the overall social security expenditure is still lower than the EU average, Poland remains a leader among the CEE countries.[30]

Several factors determine the overall weight of the above reforms and demand that they are considered as amounting to a significant social rights transformation. First, the changes were comprehensive and occurred in several social policy fields, including old-age pensions, housing, social assistance, and healthcare. The reforms tackled highly contested issues, such as abortion

[28] N. Lendvai-Bainton and P. Stubbs, 'Austerity, populism and welfare retrenchment in Central and South Eastern Europe' in B. Greve (ed.), *Handbook on Austerity, Populism and the Welfare State* (Edward Elgar 2021) p. 216; Cook and Inglot, *supra* n. 23, p. 886.
[29] Cook and Inglot, *supra* n. 23, p. 889.
[30] *See* the Eurostat statistical data on the total government expenditure on social protection, https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Government_expenditure_on_social_protection, visited 13 June 2024.

availability or the regulation of pensionable age and encountered public protests.[31] The amendments were all passed in a relatively short period of two parliamentary terms. As the cases of abortion, policy reversal regarding pensionable age, and an unprecedented centralized social housing construction scheme clearly demonstrate, the reforms opposed the previous practice in the relevant fields. Finally, they have also led to the adoption of legal solutions which run against both international tendencies[32] and the European legal protection standard[33].

Equally relevant as the substance of this social rights transformation are the particular legal-constitutional circumstances in which it occurred. For coinciding with the increase of the state's presence in the social realm was the widespread rearrangement of the domestic constitutional system. Since the new government came to power in late 2015, Poland's legal framework has undergone multiple structural reforms with adverse impact on, among others, the operational capacity of the Constitutional Tribunal, judicial independence, protection of individual rights, separation of powers, decentralization and, more generally, the rule of law.[34]

The changes to the constitutional system were so far-reaching that Poland has faced multiple infringement proceedings before the CJEU for an alleged failure to comply with the obligations stemming from the EU law[35] and has become the first EU member state with respect to which the EU rule of law framework of Article 7 TEU was triggered. The Polish case of systemic transformation became the central point of reference for the global studies of democratic regression and constitutional decline.

Due to the reforms' pernicious nature and their negative implications for the state of liberal constitutionalism, the comparative constitutional scholarship has started to consider the situation in Poland as indicative of illiberalism. For subverting liberal constitutionalism makes up the core of illiberalism's institutional and normative activity.[36] Consequently, Poland's government which

[31] P. Cullen and E. Korolczuk, 'Challenging abortion stigma: framing abortion in Ireland and Poland', 3 *Sexual and Reproductive Health Matters* (2019) p. 11.
[32] The European tendency to liberalize the right to abortion is meant.
[33] Gender-based pensionable age is contrary to the EU laws on gender equality and the prohibition of discrimination in employment; see CJEU 5 November 2019, Case C-192/18, *European Commission* v *Poland*.
[34] For a general overview see W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019); for a detailed account on the reforms' implications for the European rule of law principle see L. Pech, P. Wachowiec and D. Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action', 1 *Hague Journal of the Rule of Law* (2021).
[35] For instance, CJEU 5 June 2023, Case C-204/21, *Commission* v *Poland*; CJEU 24 June 2019, Case C-619/18, *Commission* v *Poland*.
[36] Illiberalism is defined in Chapter 1.

proceeded with the sweeping reforms despite international criticism[37] and a stream of binding rulings of the European courts deciding on the changes' unlawfulness[38], has routinely been referred to as illiberal.

The relationship between the transformation of social rights and the rearrangement of the underlying system of government is the focus of the present dissertation. The question arises whether, beyond the mere temporal coincidence, there exists a substantive link between illiberalism and social rights change. Undoubtedly, considering that the domestic legal framework has been marked by illiberalism, social rights have been operating in a new institutional and normative reality. Whether this incremental transformation of the constitutional system was reflected in the recent social rights reforms is a scientific dilemma that will be addressed throughout the present research.

## 2. State of the art

This dissertation is devoted to the study of two significant developments. First, a large-scale reform of social law. Second, an incremental illiberal transformation of the domestic liberal constitutional framework, whereby illiberalism is understood as a phenomenon subverting the normative and institutional basics of liberal constitutionalism.[39] Consequently, the scholarly literature covering these phenomena, both separately and in relation to one another, will be relevant for the following analysis.

We shall begin by pointing out concrete strands of the extant scholarship addressing the above-outlined research problem. First, crucial is the literature on illiberalism. Second, research dissecting the content of the reforms of Poland's legal system remains of relevance, irrespective

[37] *See* for instance Opinion on the Draft Act amending the Act on the National Council of the Judiciary; on the Draft Act amending the Act on the Supreme Court, proposed by the President of Poland; and on the Act on the organisation of Ordinary Courts of Poland, adopted by The European Commission for Democracy Through Law (hereafter: Venice Commission), 8-9 December 2017, Opinion No. 904/2017, CDL-AD(2017)031, https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)031-e, visited 4 July 2024; See also an open letter concerning the same issue addressed to the Vice President of the European Commission; G. de Búrca and W. Sadurski, 'Open Letter to Vice-President Frans Timmermans', *Verfassungsblog*, 9 June 2018, https://verfassungsblog.de/open-letter-to-vice-president-frans-timmermans/, visited 13 June 2024.

[38] For instance, ECtHR 7 May 2021, No. 4907/18, *Xero Flor* v *Poland*; CJEU 19 November 2019, Case C-585/18, C-624/18 and C-625/18, *A.K. and Others* v *Poland*; CJEU 6 October 2021, Case C-487/19, *W.Ż.* v *Poland*.

[39] Illiberalism is defined elsewhere but for the most general overview of its basic tenets see the Preface to A. Sajó, R. Uitz and S. Holmes (eds.), *Routledge Handbook on Illiberalism* (Routledge 2022).

of whether the changes are studied under the concrete conceptual heading of illiberalism. Finally, the literature on social rights informs the present dissertation. It comprises both the research on the domestic social rights changes as well as on social rights and social policy reforms in non-liberal jurisdictions. Considered jointly, all these fields of inquiry are central to the investigation of the links between social rights and illiberalism in that they allow to conceptualize illiberalism, discern and describe it in the domestic context, and explore the nature of the recent social rights reforms.

Moving along the above-indicated strands of scholarship, it must first be noted that the scholarly interest in the development and operational practices of non-liberal regimes has surged over the past decade as many governments worldwide began to question the basic tenets of the liberal democratic order[40]. The far-reaching negative impact of this backlash on both, the domestic constitutional frameworks and the supranational integration processes, gave strong impetus to the emergence of a new field of critical scientific inquiry. As part of this scholarly mobilization guided by the intent to respond to the global crisis of liberal democracy, illiberalism as well as the related legal-political phenomena of illiberal constitutionalism[41] and illiberal democracy[42], have been widely addressed.

Thus, there is a growing body of research on illiberalism which studies the phenomenon from a variety of legal standpoints such as human rights[43], judicial independence[44] and the rule of

[40] *See* T. Ginsburg and A. Huq, 'How to Lose a Constitutional Democracy', 78 *UCLA Law Review* (2018) where the authors explain this global phenomenon in-depth; see also T. Ginsburg, A.Z. Huq and M. Versteeg, 'The Coming Demise of Liberal Constitutionalism?', 2 *University of Chicago Law Review* (2018).
[41] M. Wyrzykowski and M. Ziółkowski, 'Illiberal Constitutionalism and the Judiciary' in Sajó, Uitz and Holmes, *supra* n. 39.
[42] Ground-breaking research of Fareed Zakaria must be mentioned; F. Zakaria 'The Rise of Illiberal Democracy', 6 *Foreign Affairs* (1997); *see* also P.A. László and A. Śledzińska-Simon, 'The rise of illiberal democracy and the remedies of multi-level constitutionalism', 1 *Hungarian Journal of Legal Studies* (2019); A. Śledzińska-Simon, 'Public reason and illiberal democracy' in U. Belavusau and A. Gliszczyńska-Grabias (eds.), *Constitutionalism under stress: essays in honour of Wojciech Sadurski* (Oxford University Press 2020).
[43] T. Drinóczi and A. Bień-Kacała, *Illiberal Constitutionalism in Poland and Hungary. The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law* (Routledge 2022); T. Drinóczi and A. Bień-Kacała, 'Democracy and Human Rights in Illiberal Constitutionalism' in M. Belov (ed.), *Populist Constitutionalism and Illiberal Democracies. Between Constitutional Imagination, Normative Entrenchment and Political Reality* (Cambridge University Press 2021).
[44] P. Bárd and A. Śledzińska-Simon, 'On the principle of irremovability of judges beyond age discrimination: Commission v. Poland, 5 *Common Market Law Review* (2020).

law[45], or dissects its institutional logic[46]. But there are also more specific approaches to illiberalism, exploring for instance, the moral views it espouses, its implications for the liberal-democratic processes[47], its reinterpretation and abuse of the constitutional theory[48] and outcomes for regime type classifications[49]. Especially, by the time the work on this dissertation was finished, two comprehensive edited volumes on illiberalism were published, providing an abundance of research devoted to the conceptualization of the phenomenon and insightfully explaining its operational logic.[50]

Hence, the institutional and normative reforms in Poland took place at the time of vigorous global discussions on the state of liberal constitutionalism and were therefore instantly brought to the forefront of the scholarly attention. The Polish case has become a leading example of illiberalism's presence in Europe. Due to significant substantive and procedural commonalities and the shared political aspirations, the Polish illiberal trajectory has often been juxtaposed with the rearrangements adopted in Hungary.[51]

It must be mentioned, however, that the worldwide institutional and normative assaults on the constitutional systems, pushing back against the nearly ubiquitous post-war commitment to liberal constitutionalism as the ultimate form of government, have also been explored under different conceptual headings. Primarily, these anti-liberal movements have often been classified as examples of populism. What is more, attempts have been made to explain the mutual positioning of populism and illiberalism[52]. Furthermore, research on illiberalism overlaps with the scholarship

[45] T. Drinóczi and A. Bień-Kacała (eds.), *Rule of Law, Common Values, and Illiberal Constitutionalism. Poland and Hungary within the European Union* (Routledge 2021); L. Pech and K.L. Scheppele, 'Illiberalism Within: Rule of Law Backsliding in the EU', *Cambridge Yearbook of European Legal Studies* (2017).
[46] P. Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe', 1 *European Constitutional Law Review* (2019); W. Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', 1 *Hague Journal on the Rule of Law* (2019).
[47] A. Sajó, *Ruling by Cheating. Governance in Illiberal Democracy* (Cambridge University Press 2021).
[48] A. Sajó, 'The Constitution of Illiberal Democracy as a Theory About Society', 4 *Polish Sociological Review* (2019).
[49] C. Mudde, 'Populism in Europe: An Illiberal Democratic Response to Undemocratic Liberalism', 4 *Government & Opposition* (2021); Laruelle, *supra* n. 24.
[50] Sajó, Uitz and Holmes, *supra* n. 39; M. Laruelle (ed.), *The Oxford Handbook of Illiberalism* (Oxford University Press 2023).
[51] T. Drinóczi and A. Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland', 8 *German Law Journal* (2019); J. Fiala-Butora, A.L. Pap and A. Śledzińska-Simon, '„Intimate citizenship" and illiberalism: lessons from Hungary, Poland, and Slovakia', 1 *Anti-Discrimination Law Review* (2018); G. Halmai, 'Illiberalism in East-Central Europe' in Sajó, Uitz and Holmes, *supra* n. 39.
[52] *See* for instance, P. Blokker, 'Populism and Illiberalism' in Sajó, Uitz and Holmes, *supra* n. 39.

on democratic backsliding[53] and constitutional decay[54] being two similar forms of anti-liberal backlash which can hardly be distinguished from illiberalism in a clear-cut manner. Authoritarianism is yet another common point of reference in the studies devoted to the backlash against constitutionalism.[55] Although the present research considers illiberalism best suited to describe the domestic legal transformation and explain the social rights change coinciding therewith, it is true that the breadth and, at the same time, the conceptual ambiguity renders all the above-mentioned notions suitable to describe anti-liberal national settings. Similarly, in the domestic context, there is no consensus regarding the proper depiction of the central government's practices. Consequently, the scholarly classifications oscillate between illiberalism, populism[56], and authoritarianism[57].

Contrary to the fairly broad research on the notion of illiberalism as well as the institutional and normative rearrangements implemented in Poland, the domestic transformation of social rights has been understudied. Comprehensive inquiry into the social law reforms as well as their overall impact on the effective provision of welfare is missing. The recent substantive legal research on social rights has mostly been constrained to the analysis of abortion restrictions.[58] Beyond that, the lowering of the retirement age[59] and the introduction of the universal child benefit[60] have received

[53] Path-breaking research of Nancy Bermeo is crucial in this context; N. Bermeo, 'On Democratic Backsliding', 5 *Journal of Democracy* (2016).
[54] T.G. Daly, 'Democratic Decay: Conceptualizing an Emerging Research Field', 1 *Hague Journal on the Rule of Law* (2019); T.G. Daly, W. Sadurski and A. Stone, 'Special Issue Editorial: Assessing Constitutional Decay, Breakdown and Renewal Worldwide', 8 *Constitutional Studies* (2022).
[55] G.A. Tóth, 'Constitutional Markers of Authoritarianism', 1 *Hague Journal on the Rule of Law* (2019).
[56] W. Sadurski, *A Pandemic of Populists* (Cambridge University Press 2022); A. Śledzińska-Simon, 'Learning Lessons from the Populist Defeats: From Negative to Positive Constitutionalism, 6 *Social and Legal Studies* (2023); Stambulski, *supra* n. 27; W. Sadurski, 'Populism and Human Rights in Poland' in G. Neuman (ed.), *Human Rights in Poland in a Time of Populism. Challenges and Responses* (Cambridge University Press 2020).
[57] Wojciech Sadurski speaks of populist authoritarianism, *see* Sadurski, *supra* n. 34, p. 242 et seq.
[58] A. Gliszczyńska-Grabias and W. Sadurski, 'The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill). 'Judgment' of the Polish Constitutional Tribunal of 22 October 2020, K 1/20'', 1 *European Constitutional Law Review* (2021); A. Krajewska, 'Connecting Reproductive Rights, Democracy, and the Rule of Law: Lessons from Poland in Times of COVID-19', 6 *German Law Journal* (2021); M. Bucholc, 'Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon', 1 *Hague Journal on the Rule of Law* (2022); A. Krajewska, 'Revisiting Polish Abortion Law: Doctors and Institutions in a Restrictive Regime', 3 *Social & Legal Studies* (2022).
[59] A. Bień-Kacała and J. Kapelańska-Pręgowska, 'Niższy wiek emerytalny kobiet: przywilej czy dyskryminacja? Perspektywa prawnomiędzynarodowa i konstytucyjna', 1 *Praca i Zabezpieczenie Społeczne* (2022); R. Pacud, 'Ryzyko emerytalne kobiet i mężczyzn' in B. Godlewska-Bujok et al. (eds.), *Między ideowością a pragmatyzmem. Tworzenie, wykładnia i stosowanie prawa. Księga jubileuszowa dedykowana Profesor Małgorzacie Gersdorf* (Wolters Kluwer 2022); A. Górnicz-Mulcahy and M. Lewandowicz-Machnikowska, 'Społeczne i prawne aspekty dyskryminacji płacowej kobiet' in R. Babińska-Górecka et al. (eds.), *Prawo pracy i prawo socjalne. Teraźniejszość i przyszłość* (E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa 2021).
[60] D. Szelewa, 'From Implicit to Explicit Familialism: Post-1989 Family Policy Reforms in Poland' in D. Auth, J. Hergenhan and B. Holland-Cunz (eds.), *Gender and Family in European Economic Policy* (Springer 2017); P. Radzik,

some attention, although mainly from the social policy and economic standpoints.[61] Moreover, it must be added that this research was mostly published in Polish and as such remains inaccessible to the wider international public. Finally, it escaped the scholars' attention that the reforms of social law spanning different fields of social policy might be considered jointly, as forming a broader social policy agenda and that this could generate further insights for categorizing and explaining the emerging domestic form of government.

Following the outline of the literature on illiberalism and the social rights change, we must turn to the research addressing the intersection of this phenomena, meaning the illiberal approaches to social law. This subject has received moderate scholarly attention, albeit outside the legal field. There is economic[62] and social policy[63] research on social welfare in illiberal and other types of non-liberal regimes. Especially, this scholarship has focused on a particular illiberal approach to welfare marked by broad provision of social rights addressed exclusively to the native population, depicted as welfare chauvinism.[64] The frequent research themes have likewise been austerity and

'Wpływ rządowego programu "Rodzina 500+" na współczynnik aktywności zawodowej kobiet', *Studia Ekonomiczne Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach* (2018); M. Gajewicz, 'Aktywność zawodowa kobiet a świadczenie wychowawcze', 1 *Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu* (2019); I. Magda et al., '„Rodzina 500+" – ocena programu i propozycje zmian', Instytut Badań Strukturalnych (2019), https://ibs.org.pl/wp-content/uploads/2022/12/Raport_500plus.pdf, visited 15 June 2024.

[61] M. Brzezinski and K. Sałach-Dróżdż, 'Prudent Populists? the Short-Term Macroeconomic Impact of Populist Policies in Poland', *SSRN Electronic Journal* (2023).

[62] A. Toplišek, 'The Political Economy of Populist Rule in Post-Crisis Europe: Hungary and Poland', 3 *New Political Economy* (2020); K. Bluhm and M. Varga, 'Conservative Developmental Statism in East Central Europe and Russia', 4 *New Political Economy* (2020); M.A. Orenstein and B. Bugarič, 'Work, Family, Fatherland: the Political Economy of Populism in Central and Eastern Europe', 2 *New Political Economy* (2022); M. Feldmann and M. Popa, 'Populism and Economic Policy: Lessons from Central and Eastern Europe', 2 *Post-Communist Economies* (2022); L. Csaba, 'Illiberal Economic Policies' in Sajó, Uitz and Holmes, *supra* n. 39.

[63] N. Lendvai-Bainton and D. Szelewa, 'Governing new authoritarianism: Populism, nationalism and radical welfare reforms in Hungary and Poland', 4 *Social Policy & Administration* (2021); G. Fitzi, 'Populism' in B. Greve (ed.), *De Gruyter Handbook of Contemporary Welfare States* (De Gruyter 2022); P. Stubbs and N. Lendvai-Bainton, 'Authoritarian Neoliberalism, Radical Conservatism and Social Policy within the European Union: Croatia, Hungary and Poland', 2 *Development and Change* (2019); G. Hooijer and D. King, 'The Critics of Welfare: From Neoliberalism to Populism' in Béland et.al., *supra* n. 23.

[64] B. Greve, *Welfare Populism and Welfare Chauvinism* (Bristol University Press 2019).

retrenchment[65], immigration in the context of exclusionary tendencies[66], political clientelism[67], and labor policies.[68]

Having said that, it must be underscored once again that beyond the fragmentary research on select social reforms, there is no comprehensive *legal* research on the social rights change in Poland in the specific context of illiberalism.

It is further noteworthy that while illiberalism is often associated with backlash against equality, women's rights[69], the rights of LGBTQ persons[70], with the specific socio-economic tendencies of familialism[71], or increased intervention in the economy[72], all these aspects have been omitted in the domestic and international debates on social rights transformation in Poland. Hence, the scholarship has paid little, if any, attention to conceptualizing the social side of illiberalism despite the phenomenon's visible connections to social rights.

Against the backdrop of the above-outlined state of the art, it must be concluded that the coincidence between the domestic emergence of illiberalism and the social rights transformation constitutes an understudied phenomenon. The premise that the lack of substantive legal research on the social aspect of illiberalism impoverishes the legal debate on illiberalism and social rights, underlies the present dissertation. For many theoretical and empirical questions concerning the mutual relationship between these phenomena remain unanswered and call for an in-depth scholarly exploration. The following context-specific study of social rights transformation in a changing constitutional landscape will address this research gap, thereby contributing to the scholarly discussions on illiberalism and social law reform in Poland.

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[65] B. Greve (ed.), *Handbook on Austerity, Populism and the Welfare State* (Edward Elgar 2021).
[66] J. Van der Waal, W. De Koster and W. Van Oorschot, 'Three Worlds of Welfare Chauvinism? How Welfare Regimes Affect Support for Distributing Welfare to Immigrants in Europe', 2 *Journal of Comparative Policy Analysis: Research and Practice* (2013).
[67] I. Mares and L.E. Young, *Conditionality and Coercion. Electoral clientelism in Eastern Europe* (Oxford University Press 2019); R. Markowski, 'Creating Authoritarian Clientelism: Poland After 2015', 1 *Hague Journal on the Rule Law* (2019).
[68] K.D. Ewing, 'Right-Wing Populism, Illiberal Democracy, Trade Unions, and Workers' Rights' in A.B. Cornell and M. Barenberg (eds.), *The Cambridge Handbook of Labor and Democracy* (Cambridge University Press 2022).
[69] M. Bogaards and A. Pető, 'Gendering De-Democratization: Gender and Illiberalism in Post-Communist Europe', 4 *Politics and Governance* (2022); E. Holzleithner, 'Reactionary Gender Constructions in Illiberal Political Thinking', 4 *Politics and Governance* (2022); A. Pető, 'Gender and Illiberalism' in Sajó, Uitz and Holmes, *supra* n. 39; W. Grzebalska and A. Pető, 'The gendered modus operandi of the illiberal transformation in Hungary and Poland', *Women's Studies International Forum* (2018).
[70] E. Korolczuk, 'The fight against 'gender' and 'LGBTQ+ ideology': new developments in Poland', 1 *European Journal of Politics and Gender* (2020).
[71] G. Meardia and I. Guardiancich, 'Back to the familialist future: the rise of social policy for ruling populist radical right parties in Italy and Poland', 1 *West European Politics* (2022).
[72] L. Csaba, 'Illiberal Economic Policies' in Sajó, Uitz and Holmes, *supra* n. 39.

## 3. Research objectives

The immediate objective of this dissertation is to inquire whether there is a substantive relationship between illiberalism and the social rights transformation. The present research hypothesizes that the transformation of social rights was determined by illiberalism as defined above.[73]

Beyond seeking to validate the central hypothesis, the following investigation spanning the fields of social law, constitutional law, human rights, and occasionally, political theory and social policy, addresses a wide range of supplementary issues that, altogether, clarify the nature of the domestic legal-constitutional and social transformation as well as illiberalism's role therein. Primarily, the present dissertation sets out to define illiberalism in the domestic context and determine its interaction with the framework for social rights provision. Furthermore, the investigation seeks to delineate the social policy fields affected by illiberalism, explain the mechanisms employed to adopt the reforms, and determine the relationship between illiberalism and social law by ascertaining whether the changes introduced under illiberalism are illiberal *per se*, and if so, what renders them such. Further research objectives involve addressing which inherently illiberal features determine illiberalism's propensity for interference with social rights and delineating the content of an illiberal social rights agenda. Finally, the goal is also to explore how the said social transformation affected the level of social rights protection by addressing whether the latter improved or deteriorated.

However, next to considering the social rights changes in the context of illiberalism, the present dissertation also seeks to offer a comprehensive overview of social rights protection in Poland. To this end, the scope of social rights granted in the relevant policy fields will be addressed with an emphasis on their availability and accessibility. Moreover, the mechanisms of social rights enforcement will be discussed, including the role of judicial review and constitutional jurisprudence. The dissertation therefore draws a broader dynamic of a changing social rights landscape extending over two consecutive parliamentary terms and covering the timeframe between October 2015 and October 2023.

[73] Illiberalism is defined in-depth in Chapter 1.

## 4. Research method

In terms of methodology, considered broadly, the present dissertation is a normative theory-based[74] research, studying the social rights transformation in Poland against the backdrop of liberal constitutionalism.[75] On the other hand, the research's explanatory approach materializes in seeking to lay out the phenomenon of social rights change within the confines of illiberalism.

Several more detailed methodological choices underlie the analysis conducted in the present dissertation and were determined by the main research objective being to establish a relationship between social rights and illiberalism.

First, the present investigation is theory-driven, meaning that the entire analytical endeavor consisting in defining illiberalism and explaining its impact on the domestic framework for social rights provision (Part 1), scrutinizing the post-2015 social rights changes (Part 2) and tracing them back to illiberalism (Part 3) is grounded in liberal constitutional theory. It is against the backdrop of the underlying liberal constitutional system that both illiberalism as the study's central theoretical construct, and the social rights transformation as an empirical phenomenon, are approached.[76]

The question concerning the selection of the underlying theory may arise given that the investigation is likewise embedded in illiberalism. Precisely because the present dissertation defines illiberalism as a legal, political, and social phenomenon repudiating liberal constitutionalism, and thus, underlines illiberalism's relational nature, illiberalism itself cannot act as the theory employed to scrutinize the social rights change. Only by analyzing the individual social rights transformations against the liberal constitutional framework and, in the next step, asserting that they contradict the liberal constitutional assumptions of institutional and normative nature, social rights' links to illiberalism may be traced.

It is likewise intentional that, despite its framing in illiberalism, the following analysis occasionally refers to the relevant scholarship on the anti-liberal phenomena other than illiberalism, such as populism or authoritarianism. The investigation makes use of this scholarship

[74] L. McConnell, 'Legal theory as a research methodology' in L. McConnell and R. Smith (eds.), *Research Methods in Human Rights* (Routledge 2018) p. 43 et seq.
[75] S. Taekema, 'Theoretical and Normative Frameworks for Legal Research: Putting Theory into Practice', *Law and Method* (2018) p. 6-7.
[76] McConnell, *supra* n. 74, p. 45.

only when it deals with developments of immediate interest to the present inquiry, and is therefore indispensable to gain further insights, but where the events in question were simply categorized under different conceptual headings.

Further on, to ensure that the liberal-constitutional theoretical premises are adequately applied to the legal empirical evidence[77] gathered throughout the substantive analysis of social rights reforms, the theoretical and empirical parts of the study were separated. Accordingly, the chapters dissecting changes introduced to different social policy fields are grounded in liberal constitutionalism with no references to illiberalism.

There is yet another reason for conducting the analysis of social rights reforms separately from their linking to illiberalism. Such an approach protects the substantive analysis of social rights change from being "polluted" with references to illiberalism, thereby leaving Chapters 3-7 as an intrinsically valuable, autonomous overview of the most weighty reforms in the realm of social rights adopted within the past eight years. As such, it provides the reader with a broad picture of the level of social security afforded in the main fields of social welfare provision. This further means that a significant part of the present research endeavor would remain relevant even if the main hypothesis, regarding the illiberal nature of the social rights change, was rejected.

Moving on to another crucial methodological choice, the in-depth substantive analysis of social rights transformation is doctrinal in nature.[78] It covers several fields of social law and within these chunks of research, various aspects and processes comprising the domestic social security system were subject to a critical examination following the rules of legal argumentation and logical reasoning. The core analytical focus is on the constitutional and administrative jurisprudence (disability rights), social policy implementation (housing), policy reversals (housing, pensions), legislative inaction and its implications (disability rights), administrative preconditions for the local provision of social rights (municipal welfare provision), gendered policy outcomes (old-age pensions), availability versus access to social rights (abortion), as well as the lived experiences of a lowered human rights protection standard (abortion).

[77] Based on the assertion that "phenomena which are observed and studied by legal scholars are in fact their empirical data"; M. Van Hoecke, 'Legal Doctrine: Which Method(s) for What Kind of Discipline?' in M. Van Hoecke (ed.), *Methodologies of Legal Research. Which Kind of Method for What Kind of Discipline?* (Bloomsbury 2011) p. 6.
[78] S. Egan, 'The doctrinal approach in international human rights law scholarship' in McConnell and Smith, *supra* n. 74, p. 27 et seq.

To enrich this traditional "black-letter" approach[79], the analysis in Chapters 3-7 makes normative claims, for instance regarding the reforms' regressive nature compared to the previous domestic, and the overarching European, human rights standards (pensions, abortion). It moreover explores the avenues for future reforms and development in the field (housing), studies the inconsistencies in the jurisprudential and academic understanding of law (persons with disabilities), and highlights extra-legal adverse implications of the implemented policies (abortion).

The empirical investigation encompassed selectively chosen reforms and was structured according to the respective policy areas. The pattern employed to single out the reforms that shall be subjected to scrutiny followed three main criteria. First, taken into account was the weight of the pertinent transformation measured with regard to severity of its legal implications and/or the high degree of social polarization it entailed. Second, crucial in selecting the reforms was their broad targeting at the whole sectors of population, such as persons with disabilities, women, low- and middle-income earners etc., which jointly translated into the universal relevance of the studied transformation. The third and final decisive feature was the reforms' inherent potential to provide a cross-cutting perspective on the domestic landscape of social rights protection. Considered jointly, the individual chapters' focus on disability rights, pensions, reproductive rights, housing, and the provision of welfare by municipalities not only offers a substantively diverse representation of changes, but also a comprehensive recapitulation of the state of domestic social rights protection.

Next to the above three specific criteria, as well the theoretical assumptions elaborated in Part 1 proved helpful in streamlining the substantive focus of the analysis in Part 2. Especially, the analytical framework developed in Chapter 2, based on illiberalism's interactions with the domestic framework for welfare provision and delineating the social policy fields in which illiberalism has been most profoundly present, informed the process of reforms' selection. It allowed to single out such rearrangements which are most likely to be traceable to illiberalism.

Another approach adopted in the present dissertation which, although commonly accepted internationally, is nevertheless still absent in Polish social rights scholarship[80], concerns

[79] L. McConnel and R. Smith, ''Mixing methods': reflections on compatibility' in McConnell and Smith, *supra* n. 74, p. 152.

[80] Social law is not regarded as a separate field of law. It is nevertheless worthwhile to mention some scholarly attempts to delineate the scope of the domestic social law; see I. Sierpowska, 'Z rozważań nad wyodrębnieniem i metodologią

terminology and sets out to study a variety of social rights under the common heading of social law. Accordingly, the present research is innovative to the extent that it endorses a concrete, broad understanding of the domestic social law which, beyond the fields of social insurance, social assistance, and healthcare - traditionally considered to form the social security system - encompasses the domains of housing and reproductive rights.[81] Throughout the analysis, the notions of "social policy fields" and the "fields of welfare provision" are used interchangeably, just as the terms "social rights provision" and "social welfare provision".

Finally, a separate methodological approach was employed in the last chapter of this dissertation to confirm the study's central hypothesis by linking the social rights transformation to illiberalism. Because it is devoted to the study of a social process taking the form of a legal transformation[82], this chapter undertakes an analysis the form and arrangement of which were inspired by the qualitative within-case method of process-tracing.[83]

It must be noted at the outset, that the very nature of legal research renders the *sensu stricto* process-tracing inapplicable to the present study as a method designed to establish causality between social phenomena. The legal empirics gathered throughout the present investigation differ considerably from the datasets accumulated in social inquiries tailored to reconstruct causality.

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prawa socjalnego', 8 *Studia Erasmiana Wratislaviensia* (2014); W. Muszalski, *Prawo socjalne* (Wydawnictwo Prawnicze PWN 1995); A. Przybyłowicz, 'Prawo socjalne' in H. Szurgacz (ed.), *Wielka Encyklopedia Prawa. Tom XII. Prawo socjalne* (Fundacja Ubi societas ibi ius 2017) p. 202; D. Dzienisiuk, 'W poszukiwaniu kryteriów wyodrębniania prawa socjalnego' in B. Godlewska-Bujok and K. Walczak (eds.), *Różnorodność w jedności. Studia z zakresu prawa pracy, zabezpieczenia społecznego i polityki społecznej. Księga pamiątkowa dedykowana Profesorowi Wojciechowi Muszalskiemu* (C.H.Beck 2019); A. Górnicz-Mulcahy, 'Charakter prawny zasiłku rodzinnego według koncepcji prawa socjalnego' in Godlewska-Bujok and Walczak (eds.), *Różnorodność w jedności. Studia z zakresu prawa pracy, zabezpieczenia społecznego i polityki społecznej. Księga pamiątkowa dedykowana Profesorowi Wojciechowi Muszalskiemu* (C.H.Beck 2019); S. Nitecki, 'Znaczenie orzecznictwa sądów administracyjnych z zakresu spraw socjalnych w demokratycznym państwie prawa' in A. Matan and A. Nita (eds.), *Sądownictwo administracyjne w umacnianiu państwa prawa* (Wolters Kluwer 2022) p. 292-293; D. Lach, Pojęcie zabezpieczenia społecznego a przedmiot prawa socjalnego in Z. Niedbała and M. Skąpski (eds.), *Problemy zatrudnienia we współczesnym ustroju pracy. Księga Jubileuszowa na 55-lecie pracy naukowej i dydaktycznej Profesora Włodzimierza Piotrowskiego* (Wydawnictwo Naukowe Uniwersytetu im. Adama Mickiewicza 2009); M. Lewandowicz-Machnikowska, 'Regulacja prawna socjalnego wsparcia dla osób o niskich dochodach', *Prawnicza i Ekonomiczna Biblioteka Cyfrowa* (2013); J. Oniszczuk, 'Problemy realizacji wolności i praw socjalnych gwarantowanych w Konstytucji RP' in L. Wiśniewski (ed.), *Wolności i prawa jednostki oraz ich gwarancje w praktyce* (Wydawnictwo Sejmowe 2006) p. 200.

[81] For a similar categorization, *see* Sierpowska, *supra* n. 80, p. 124.

[82] S. McInerney-Lankford, 'Legal methodologies and human rights research: challenges and opportunities' in B.A. Andreassen, H.-O. Sano and S. McInerney-Lankford (eds.), *Research Methods in Human Rights. A Handbook* (Edward Elgar 2017) p. 53 et seq.

[83] D. Beach and R.B. Pedersen, *Process-Tracing. Methods Foundations and Guidelines* (The University of Michigan Press 2019); D. Collier, 'Understanding Process Tracing', 4 *Political Science and Politics* (2011); A. Bennett and J.T. Checkel, *Process Tracing. From Metaphor to Analytic Tool* (Cambridge University Press 2015).

The data from the social rights' substantive analysis is therefore inappropriate for performing a state-of-the-art process tracing.

First, unlike the social phenomena traditionally studied with the use of the process-tracing method, the independent variable of illiberalism lacks sufficiently clear-cut defining features which would make it traceable in social science terms. Likewise, the indications of illiberalism's presence within the concrete reforms are not explicit enough to draw causal links. For illiberalism is never used as a self-description, not in the domestic context anyway[84]. Since the current government openly presents itself as liberal and asserts that the prevailing form of government is liberal constitutionalism, this rules out the possibility of explicit mentions of illiberalism. We will thus not find illiberalism in the legislative history of the social law reforms. Such hints would have to be made to assert, in social science categories, that illiberalism determined the legal transformation at hand. The above has further consequences. It renders the legal data inadequate for empirical tests forming part of the process-tracing[85] and precludes the formulation of alternative explanations for social rights change.[86]

Most crucially, however, contrary to the central analytical objective of the proper process tracing, this scrutiny does not claim causality. Its ambition is rather to construct a plausible argument grounded in the theoretical assumptions about the definition (Chapter 1) and operational logic (Chapter 2) of illiberalism, in order to assert that, with high likelihood, the social law changes infer from illiberalism. The broader conclusion to be drawn is that the occurrence of an illiberal regime increases the probability of social rights' considerable change. And for upholding the above claims, a causality-seeking *sensu stricto* process tracing is not suitable. It is far more appropriate to make use of the method's features which are, first, applicable to legal research and second, most

[84] Victor Orbán openly declared that his intention was to transform Hungary into an illiberal state; see V. Orbán, Speech at the 25th Bálványos Summer Free University and Student Camp, 26 July 2014, https://2015-2019.kormany.hu/en/the-prime-minister/the-prime-minister-s-speeches/prime-minister-viktor-orban-s-speech-at-the-25th-balvanyos-summer-free-university-and-student-camp, visited 14 June 2024.

[85] Meaning the hoop test, the straw-in-the-wind test, the smoking-gun test and the doubly decisive test; see S. van Evera, *Guide to Methods for Students of Political Science* (Cornell University Oress 1997) p. 30-32; A. Bennett, 'Process tracing and causal inference' in H.E. Brady and D. Collier (eds.), *Rethinking Social Inquiry. Diverse Tools, Shared Standards* (Rowman & Littlefield 2010) p. 211.

[86] Process tracing requires putting forth alternative explanations for the studied phenomena to test the viability of the asserted causal explanations; see Bennett and Checkel, *supra* n. 83, p. 23 et seq.; M.S. Ulriksen and N. Dadalauri, 'Single case studies and theory-testing: the knots and dots of the process-tracing method', 2 *International Journal of Social Research Methodology* (2016) p. 230; A.L. George and A. Bennett, *Case Studies and Theory Development in the Social Sciences* (MIT Press 2005) p. 217; R.K. Yin, *Applications of Case Study Research* (Sage 2012) p. 14.

useful to achieve the study's main objectives.[87] In a nutshell, the analysis conducted in Chapter 8 undertakes *de facto* process tracing without claiming to rely on the established methodological apparatus.

Consequently, adapting the process tracing to the present legal investigation required splitting the individual analyses of the five social changes into two further steps. The first was devoted to performing the reforms' *normative* assessment against the legal-constitutional framework, to assert that the social rights changes are at odds with the basic assumptions of liberal constitutionalism. The second step has taken on an *explanatory* approach to advance the opposite claim, that the reforms can be traced back to the domestic emergence of illiberalism. Through different lens, the first stage of the analysis follows a *deductive* approach aiming to test the changes against the liberal constitutional theory, whereas the second stage is *inductive* in that, by linking the changes to illiberalism, it reconstructs the fundamental assumptions about illiberalism's operation in the social rights sphere.[88]

Hence, it is noteworthy that illiberalism, being the central theoretical construct, enriches the standard doctrinal analysis of social rights change by going beyond the one-dimensionality of a normative legal research, towards an investigation tackling the nature of the social rights change and the social policy objectives behind it. Ultimately, such an approach enables us to not only refute the changes' liberal provenance, but to explain them within the confines of a concrete legal-political phenomenon.

## 5. Research structure

This section summarizes the content of the individual chapters. Before turning to the detailed overview, it bears explaining the analysis' overarching division into three parts. This choice can be best clarified against the backdrop of the study's main research objective. For the verification of the central hypothesis requires undertaking three distinct research endeavors consisting in first, defining and explaining the operation of illiberalism to provide theoretical and conceptual background for the subsequent analysis of social rights (Part 1). Second, engaging in a substantive

[87] N.R. Davidson, 'Process-tracing the meaning of international human rights law' in R. Deplano and N. Tsagourias (eds.), *Research Methods in International Law. A Handbook* (Edward Elgar 2021) p. 228 et seq.
[88] Egan, *supra* n. 78, p. 25.

analysis of social rights change in different policy fields (Part 2). Finally, discerning the links between the former and the latter phenomena (Part 3). Accordingly, the division was necessary to separate the distinct analytical parts leading to the validation of the main hypothesis.

Chapter 1 provides a definition of illiberalism to be applied throughout the following investigation, pointing to illiberalism's institutional and normative dimensions. The analysis first delivers an overview of illiberalism's most frequent institutional targets, explains the various forms of legal transformation undertaken by illiberal majorities as well as their cumulative impact on the preexisting legal framework, amounting to an informal constitutional change. Next, the analysis canvasses the substantive, normative illiberal goals and clarifies their instrumentality for entrenching a concrete social structure and for diminishing the protection of individual rights.

Chapter 2 furthers the conceptual foundations. It asserts illiberalism's presence in the domestic legal context by dissecting the reforms which transformed Poland's legal-constitutional system. However, to tailor this overview to the ensuing analysis of social rights, its focus is only on the reforms relevant to the study of social welfare. More precisely, the structure of the investigation follows the institutional and normative logic of social rights provision. Accordingly, the analysis explores the illiberal reforms of the legislature, executive and the judiciary and clarifies their immediate connection to the provision of social rights. With respect to the interferences with the legislative power, the investigation demonstrates illiberalism's influence on the law-making and provides an overview of the illiberal social policy objectives. With respect to the executive, the illiberal phenomenon of executive aggrandizement is explained which sets out an interference with the horizontal (executive versus the judiciary) and vertical (executive versus the local government) power dynamics, with adverse impact on the protection of social rights. The illiberal reforms of the judiciary include the capture of the Constitutional Tribunal, the politicization of judicial appointments and the rearrangement of the Supreme Court. They are considered in the context of their overall impact on the legality of judicial decisions issued nationwide. Next, under the normative heading, illiberalism's influence on the three major constitutional principles governing the provision of social rights - the rule of law, equality, and social market economy - is examined. The analysis asserts that illiberalism interfered with all of them and explains the pertinent processes of the rule of law substitution with "illiberal legality", the discriminatory and gendered practices of illiberalism, and the incompatibility of the illiberal economic policies with the fundamental assumptions of the social market economy.

Chapter 3 opens up the part of analysis devoted to the study of the social rights change by examining the rights of persons with disabilities. More precisely, it tackles the regulation of cash benefits for informal caregivers and dissects the inconsistencies occuring in the jurisprudence of the nursing benefit. The analysis provides an overview of the eligibility criteria for the cash-for-care benefits, asserting that their common features are familialism, embeddedness in the risk of disability as opposed to long-term-care dependency, and exclusion of work-care reconciliation. It further explains that such legal framing of the eligibility requirements has led to the occurrence of jurisprudential inconsistencies of severe impact on the individual rights of caregivers. The investigation explores these ambiguities in-depth and shows that despite the constitutional court's adjudicative efforts to correct the legal *status quo*, the lack of pertinent legislative action hinders regulatory improvements in the field.

Chapter 4 examines re-introduction of the old-age policy differentiating between men and women in terms of pensionable age. Its aim is twofold: to scrutinize whether the lower pensionable age set for women is consistent with the constitutional demands for equality and to examine whether this law enhances gender equality, thus amounting to a so-called positive measure. To investigate the policy in question, the analysis takes the economic disparities between men and women as a starting point and demonstrates the differentiation's negative impact on women's economic standing. It explains that in the domestic model of benefit calculation, shorter period of assets accumulation translates in lower benefits. Consequently, the investigation raises the argument that the end goal of achieving substantive equality of men and women cannot be realized by means of the domestic policy of pensionable age differentiation. The analysis takes the opposite view and argues that the lower pensionable age additionally widens the preexisting economic gaps. It dissects the solution's seemingly gender-sensitive nature and its *de facto* discriminatory character.

Chapter 5 investigates the abortion law restrictions. It explains the legal *status quo* on abortion effective prior to the K 1/20 judgment which nullified the fatal fetal disability ground for pregnancy termination. The investigation outlines the previous domestic practice and, with reference to the ECtHR jurisprudence, highlights the systemic deficiencies which have long been curbing effective access to abortion in legally prescribed circumstances. Next, the investigation comments on the substance of the K 1/20 ruling, assessing its viability against the backdrop of the constitutional provisions. The remainder of the analysis canvasses the abortion regime effective

since the K 1/20 ruling, focusing on the practice of abortion law. It shows that a considerable chilling effect occurred, impeding access to abortion based on the remaining legal provisions.

Chapter 6 discusses two major housing policies implemented one after another, which pursued starkly opposite aims of social construction and homeownership promotion. It explores both, the policies' substance and their implementation. The analysis explains the mechanisms for centralized construction of social dwellings adopted as part of the Housing Plus scheme and discusses how, following its failure, the government instantly diverted toward the ownership-supporting housing policy model by introducing a new initiative called Safe Loan 2%, offering direct interest rate subsidies to mortgage loans. The investigation concludes by evaluating, based on the available housing output data, the effectiveness of the policies in countering the housing availability and affordability crises.

Chapter 7 turns to the prerequisites for effective local delivery of social rights. More specifically, it explores the impact of the local government reforms on the capacity to provide social rights to the local populations. First, the scrutiny tackles the changes to the local government financing, implemented through statutory law as well as those occuring in the practice of concrete resource allocation mechanisms. It shows that politically driven and arbitrary decision-making patterns appeared within the mechanism for intergovernmental financing. Next, changes to the scope of municipal responsibilities are investigated, including those limiting municipal duties and the opposite ones, forcing the local authorities to take up new obligations without additional finances directed to this end. The local government's altered financial and functional capacity is then considered against the backdrop of rights' provision in the fields of essential social infrastructure, healthcare financing, family benefits, housing, and reproductive healthcare.

Chapter 8 delineates the core of the previously studied social rights transformations and draws the links to illiberalism by undertaking a systematic, two-step analysis. First, it tests the changes against the underlying liberal institutional and normative assumptions. Second, it traces them back to illiberalism.

The first transformation occurred in the field of disability rights and consisted in the non-implementation of the constitutional judgments that should have taken place to root out the adjudicative inconsistencies in the practice of the nursing benefit, and the lack of which led to a diminished protection of the rights of informal caregivers. The analysis demonstrates that the non-implementation runs against the constitutional notion of the rule of law. More precisely, legislative

passivity remains at odds with the rule of law-derived requirements of formal nature. The analysis asserts that disregard for the formal rule of law-related requirements is indicative of "illiberal legality", an alternative reading of the rule of law advanced by illiberal regimes.

The second change was the social policy reversal in the field of old-age pensions. The investigation demonstrates that the overarching aim of the introduced gender-based differentiation was to redefine the constitutional notion of gender equality. This is then analyzed in the context of illiberalism's propensity for infusing the law with conservative, familialist views on gender roles.

With regard to abortion law, the analysis underscores that the change resulted from a constitutional review process. It demonstrates that the nullification of one of the legal grounds for performing abortion was possible only due to the prior institutional capture of the Constitutional Tribunal. The constitutional court's dismantling is portrayed as the very essence of illiberalism.

The state's increased involvement in the provision of social housing is considered against the backdrop of the principle of social market economy. The targeting patterns of both housing programs turn out contrary to the social market economy-derived stipulations regarding the scope of admissible social intervention and the allocation patterns dictated by the principles of equality and subsidiarity. Consequently, the links to the illiberal economic policies of full-fledged interventionism and centralization are evident.

Finally, a set of legal reforms interfering with the local government's financial and functional independence is scrutinized against the constitutional demands for decentralization. The investigation tackles the changes' compatibility with the constitutional stipulations regarding intergovernmental financing and municipal discretion with respect to the realization of the assigned public tasks. The analysis explains the top-down backlash against local autonomy by referring to the illiberal propensity for recentralization.

Chapter 8 concludes by considering whether, in light of the developed argumentation, it can be asserted that illiberalism triggered the domestic transformation of social rights.

The final section provides a summary of the research's substantive findings and draws several overarching conclusions regarding the nature of the discerned illiberal social transformation.

# PART 1

## Chapter 1
## Illiberalism

The notion of illiberalism is central to the present research and underlies the study's main question of whether the recent transformation of social rights in Poland has been illiberal. Accordingly, by defining illiberalism, this chapter seeks to provide theoretical foundation for the investigation of the domestic social law reforms.

It bears outlining at the outset that illiberalism is a contested concept which lacks universal definition. While some understand illiberalism as a governing system[1], others view it as an ideology[2] or a result of pernicious political practices[3]. The importance of illiberalism goes beyond a single field of study. It is explored under the headings of political science, law, sociology, and economy. Crucially, illiberalism is a global, yet context-specific phenomenon. Its concrete manifestations differ from one jurisdiction to another. Therefore, to render the notion applicable to the following investigation, the definition of illiberalism articulated below was tailored to reflect the study's focus on Poland. Hence, explained is a Central Eastern European account of illiberalism.

That said, throughout the present investigation illiberalism is understood as a legal, political, and social phenomenon opposing the institutional and normative arrangements of liberal constitutionalism. In institutional terms, the legal reforms undertaken by illiberalism reject the fundamentals of liberal constitutionalism such as the separation of powers or checks and balances, leading to the change of the preexisting constitutional system.[4] Substantively, illiberalism subverts the liberal-democratic values of pluralism, individual autonomy, and protection of minority rights to instead advance a conservative, gendered, majoritarian, and anti-pluralist political agenda, and

[1] B. García-Holgado and A. Pérez-Liñán, 'The Weaknesses of Illiberal Regimes' in A. Sajó, R. Uitz and S. Holmes (eds.), *Routledge Handbook on Illiberalism* (Routledge 2022) p. 925.
[2] M. Laruelle, 'Illiberalism: a conceptual framework', 2 *East European Politics* (2022) p. 303.
[3] G. Scheiring, 'The Social Requisites of Illiberalism' in Sajó, Uitz and Holmes, *supra* n. 1, p. 600.
[4] G. Halmai, 'Illiberalism in East-Central Europe' in Sajó, Uitz and Holmes, *supra* n. 1, p. 814.

to entrench a predefined social arrangement. These two constitutive aspects of illiberalism are of equal relevance and reinforce one another. Illiberal institutional reforms allow the implementation of the moral agenda, while the latter moral commitments drive the institutional rearrangements. In the following, the investigation goes on to explain in-depth how illiberalism incrementally pursues its institutional and normative goals.

## 1. Introductory remarks

We must begin by reiterating the obvious. Liberal constitutionalism has been a dominating system of government in Western democracies. Yet, contrary to what many scholars suggested in the 1990s when observing democratic transition of the former soviet bloc, it did not turn out to be the final governing system.[5] Basic tenets of liberal constitutionalism are currently challenged in many jurisdictions around the world and the adverse impact of this phenomenon reaches far beyond individual institutional designs. For an open critique of liberal constitutionalism undermines legitimacy of the regional and global multi-state projects founded on a postwar commitment to the liberal world order.[6]

Over the years, many terms have been coined within the literature to explain these systemic attempts to subvert liberal constitutionalism. The most recognized notions are democratic backsliding[7], democratic regression[8], illiberal turn, and constitutional breakdown[9]. Likewise, classifications of the emerging models of governance proliferated, such as populism[10], populist constitutionalism[11], illiberal democracy[12], or authoritarian populism[13]. In the European context, wherein the most prominent examples of a virtually complete rejection of liberal constitutionalism

[5] *See* F. Fukuyama, *The End of History and The Las Man* (Free Press 1992).
[6] Such projects as the European Union; *see* T. Ginsburg and A. Huq, 'How to Lose a Constitutional Democracy', 78 *UCLA Law Review* (2018).
[7] N. Bermeo, 'On Democratic Backsliding', 5 *Journal of Democracy* (2016).
[8] T. Ginsburg, *Democracies and International Law* (Cambridge University Press 2021) p. 7.
[9] W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019) p. 3 et seq.
[10] M.A. Orenstein and B. Bugarič, 'Work, family, Fatherland: the political economy of populism in Central and Eastern Europe', 2 *Journal of European Public Policy* (2022).
[11] P. Blokker, 'Varieties of populist constitutionalism: The transnational dimension', 3 *German Law Journal* (2019).
[12] *See* A. Sajó, *Ruling by Cheating. Governance in Illiberal Democracy* (Cambridge University Press 2021).
[13] P. Norris and R. Inglehart, *Cultural Backlash. Trump, Brexit, and Authoritarian Populism* (Cambridge University Press 2019).

are discerned in the large-scale reforms introduced in Hungary and Poland[14], the notion of illiberalism figures centrally in the academic discussions and is rightly claimed to afford the most suitable depiction of the ongoing developments.[15]

Before zooming in on the institutional and normative end goals of illiberalism, it bears invoking historical context of its appearance and popularization. Illiberalism came to broader scholarly attention in the 1990s when Fareed Zakaria published his groundbreaking article advancing the concept of "illiberal democracy".[16] Zakaria claimed that, despite the still widespread belief in Fukuyama's "end of history", liberal democracy ceased to be a "regime without alternative".[17] He sketched out a potential scenario, which he thought was especially likely to appear in the countries of Latin America and Eastern Europe, whereby governments would come to power as a result of democratic elections but would nevertheless repudiate liberal principles of pluralism, individual freedom, or checks and balances.[18] Such countries – with free elections but without liberal institutions – constitute what Zakaria called "illiberal regimes". To hinder such constitutional crises, the author emphasized the significance of the processes of liberalization, as opposed to the back then ubiquitous emphasis on democratization.[19]

In line with a common assertion that there is no democracy which is illiberal, since democracy assumes liberal constitutionalism, Zakaria's notion was initially considered an oxymoron.[20] But owing to the emergence of a contentwise broader concept of "illiberalism", all

[14] Recently, Romania has joined Poland and Hungary; *see* O. Kadlec and D. Kosař, 'Romanian version of the rule of law crisis comes to the ECJ: The *AFJR* case is not just about the Cooperation and Verification Mechanism', 6 *Common Market Law Review* (2022) p. 1823-1826; However, the problem is by no means geographically reduced to the countries of the CEE region. Scholars discern signs of illiberalism in established Western democracies. Those include Brexit, Donald Trump's presidency, high electoral scores of Marine Le Pen's *Rassemblement nationale* and the Spanish *Vox*. Illiberalism is also associated with Turkey governed by President Recep Tayyip Erdoğan, as well as the Philippines run by Rodrigo Duterte; *see* R. Smilova, 'The ideational core of democratic illiberalism' in Sajó, Uitz, and Holmes, *supra* n. 1, p. 177; Bermeo, *supra* n. 7, p. 5.

[15] For an in-depth explanation of the theoretical differences between the various concepts utilized to describe the constitutional situation in Poland, *see* T. Drinóczi and A. Bień-Kacała, *Illiberal Constitutionalism in Poland and Hungary. The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law* (Routledge 2022) p. 17-45.

[16] F. Zakaria, 'The Rise of Illiberal Democracy', 6 *Foreign Affairs* (1997); although thanks to Zakaria's contribution the term reached wider public, it had been coined earlier as a framework to study the political systems of Pacific Asia; see D.A. Bell et al., *Towards Illiberal Democracy in Pacific Asia* (Palgrave Macmillan 1995).

[17] Fukuyama, *supra* n. 5, p. 42; I. Krastev and S. Holmes, *The Light that Failed: A Reckoning* (Penguin Books 2020) p. 4-6.

[18] Zakaria, *supra* n. 16, p. 30.

[19] Laruelle, *supra* n. 2, p. 304.

[20] J.-W. Müller, 'The Problem with 'Illiberal Democracy', *Project Syndicate*, 21 January 2016, https://www.project-syndicate.org/commentary/the-problem-with-illiberal-democracy-by-jan-werner-mueller-2016-01, visited 17 June 2024; Smilova, *supra* n. 14, p. 187; Halmai, *supra* n. 4, p. 814; J.H.H. Weiler, 'Not on Bread Alone Doth Man Liveth

the illiberalism-related depictions have incrementally made it to the mainstream academic debates about the global anti-constitutional and anti-liberal movements.

It bears noting that already Zakaria elucidated that the process of decline into illiberalism involves a twofold repudiation of the institutional structures, such as the separation of powers, and the classic liberal moral commitments to pluralism, individual freedom, and human rights. These two facets of illiberalism are subject to scrutiny below.

## 2. Illiberal institutional reforms

First, we turn to the institutional aspect of illiberalism. In a nutshell, the analysis shall demonstrate that, by deeply reforming liberal democratic institutions and subordinating them to the power of the executive, illiberalism violates separation of powers, distorting thus the underlying liberal constitutional framework.

### 2.1. Institutional targets of illiberal transformation

To understand how an illiberal institutional change unfolds on the ground, we must first explain illiberalism's focus on specific institutions as well as the content of illiberal reforms which cumulatively allow for a smooth and incremental capture of central liberal democratic bodies.

Conventionally, illiberalism begins the transformation by reforming the judiciary. The emphasis on this branch of government is driven by the intent to weaken its role as a significant check on the political power which further leads to a shift in the overall powers division, benefiting the executive.[21] Institutional reforms disregard the constitutional guarantees of judicial independence, rearrange organizational structures within courts as well as interfere with the processes for appointing new judges. The most radical form of the latter practice occuring under illiberalism is a complete political takeover of the national authority appointing judges, allowing for full control over the process of selecting the candidates to join this legal profession. Such institutional capture paves the way for installing subservient judges in the highest judicial bodies

(Deut. 8:3; Mat 4:4): Some Iconoclastic Views on Populism, Democracy, the Rule of Law and the Polish Circumstance' in A. von Bogdandy et.al. (eds.) *Defending Checks and Balances in EU Member States* (Springer 2021) p. 6.

[21] Halmai, *supra* n. 4, p. 813-814.

as well as in the lower courts nationwide, which is a commonly known illiberal practice labelled as the "court-packing". If carried out successfully, the reforms' large-scale outcomes are direct political interreference with the process of adjudication and control over the content of judicial decisions.

However, the transformation affects not only the courts but also judges personally. A hostile political narrative is spread, aiming to intimidate judges and weaken public trust in the judiciary as a whole.[22] Judges who criticize the government are threatened and often face disciplinary proceedings. "Disobedient" judges can also be forced out of courts, for instance through legal reforms lowering pensionable age or making continued service subject to political discretion exercised by the members of the executive or the legislature.

What concerns the reforms' arrangement, given that the core illiberal objective is to abolish the existing constraints on the legislative and executive power, the changes first target the constitutional court.[23] Once the structural rearrangements end up in the latter being packed with a number of politicized judges willing to cooperate with the government and adjudicate in line with the prevailing political agenda, illiberal majority typically moves on to reforming the lower courts.

Beyond the judiciary, although still within the confines of the justice system, illiberal majorities subordinate public prosecution. This is typically done by nominating a loyal head of the domestic national prosecutorial office or, as in the Polish case, merging the position of the prosecutor general with that of the minister of justice. The reforms lead to accumulation and centralization of the general prosecutor's competences, mainly those regarding promotion, dismissal, or transfer of prosecutors. Such institutional arrangement equals an entirely politicized prosecution and consequently, straightforward power of the executive to press charges against the enemies of the political regime (the so-called strategic prosecution[24]) or to drop them with respect to individuals affiliated with the ruling party.[25]

Outside the system of justice, illiberals incrementally wield control over all state structures anchored in the Constitution as well as other central state institutions. These are staffed with

[22] Sadurski, *supra* n. 9, p. 98.
[23] L. Garlicki, 'Constitutional Court and Politics. The Polish Crisis' in C. Landfried (ed.) *Judicial Power* (Cambridge University Press 2019) p. 161.
[24] R. Uitz, 'Constitutional Practices in Times "After Liberty"' in Sajó, Uitz, and Holmes, *supra* n. 1, p. 457.
[25] D. Schneiderman, 'Parliaments in an Era of Illiberal Executives' in Sajó, Uitz, and Holmes, *supra* n. 1, p. 477; M. Wyrzykowski and M. Ziółkowski, 'Illiberal Constitutionalism and the Judiciary' in Sajó, Uitz, and Holmes, *supra* n. 1, p. 523.

political appointees willing to realize the will of the incumbent. The examples of such takeovers allowing further entrenchment of power, extend to the following institutions: human rights commissioners, central banks, state audit offices, electoral commissions, media commissions and other oversight bodies. Another crucial target of illiberal majorities is the civil service. Typically, becoming a member of this apolitical administrative state apparatus follows highly restrictive merit-based recruitment procedures. Illiberalism questions this premise by massively replacing civil servants and dramatically lowering recruitment standards in order to intentionally weaken the overall competence of public sector employees.[26]

Next, illiberalism by its very nature attacks commercial media and captures public media outlets, transforming the latter into sources of pro-government propaganda. For instance, since 2010, the Hungarian government managed to assume control over around 80% of public media.[27] Such takeover allows the governing majority to effectively spread its political narrative given that, especially in the rural areas, households often have no access to commercial TV stations for economic reasons. It follows logically that any public watchdog, such as the civil society organizations, NGOs, or journalists, providing access to unbiased information or otherwise controlling and reporting on the government's activity, likewise become the targets of illiberal assaults. These practices typically involve economic pressures, but more aggressive techniques have been in use as well. The most prominent example to name would be the "stop-Soros" Hungarian law directed against the NGOs by criminalizing the act of helping the asylum seekers.[28]

Finally, standing in the way of the illiberal assumption of power are as well the local authorities which enjoy far-reaching political and financial discretion. Illiberal governments view subcentral independent power holders as posing a threat to the position of the executive. They resort to various strategies to subordinate them to the central state power, a phenomenon noted already by Zakaria and which he called a "vertical usurpation".[29] This may be achieved by interfering with the local elections as to guarantee electoral success of subordinate political representatives[30], but also through limiting the scope of locally discharged responsibilities, or

[26] Sadurski, *supra* n. 9, p. 136 et seq.
[27] *See* Reporters without Borders, Report on Hungary, https://rsf.org/en/country/hungary, visited 17 June 2024.
[28] The law was found incompatible with the EU law, *see* CJEU 16 November 2021, Case C-821/19, *Commission* v *Hungary*.
[29] Zakaria, *supra* n. 16, p. 31.
[30] For an illustration of this tactic in the Hungarian context, *see* K.L. Scheppele, 'Autocratic Legalism', 2 *University of Chicago Law Review* (2018) p. 551.

curbing public subsidies flowing from the central state to the local budgets as to hinder the proper functioning of local governments.[31]

### 2.2. Formal versus informal constitutional change

Having delineated the targets of illiberal institutional assaults, we must address the formal side of the reforms' implementation as well as their implications for the underlying constitutional system.

Crucially, illiberalism implies a *legal* transformation in the sense that the reforms are implemented by legal means and instigated by a democratically elected incumbent. This is a consequence of the fact that illiberalism is a relational phenomenon and its institutional assaults target the prior liberal constitutional design.[32] What follows, illiberal governments operate within the standard legal-constitutional framework and must also resort to such traditional mechanisms when amending the institutions.[33] It is thus the substance and not the form of the legal changes that rejects the fundamental tenets of liberal constitutionalism.[34]

This latter aspect was clearly visible in the above-indicated set of most common illiberal institutional reforms. The rearrangements violated a myriad of substantive constitutional provisions regulating specific aspects of the functioning of state apparatus, but the overarching institutional target that they were after was the separation of powers principle. For ensuing from the rearrangements is a diminished role of the judiciary as well as other independent state bodies, on the one hand, and an enormously expanded political power of the executive, on the other. Especially, all constitutional checks on majority rule are nullified. Hence, the cumulative impact of the above individual reforms is the transformation of the prior constitutional design based on the fundamental premise of divided state powers.

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[31] In the Hungarian context, where illiberalism correlates with welfare retrenchment, "the remaining forms of social assistance were delegated to the local municipalities, most often without any funding resources on a discretionary basis"; *see* N. Lendvai-Bainton, 'Radical politics in post-crisis Hungary: illiberal democracy, neoliberalism and the end of the welfare state' in P. Kennett and N. Lendvai-Bainton (eds.), *Handbook of European Social Policy* (Edward Elgar 2017) p. 409.

[32] H. Alviar García and G. Frankenberg, 'Authoritarian Structures and Trends in Consolidates Democracies' in Sajó, Uitz, and Holmes, *supra* n. 1, p. 164; A. Bień-Kacała, 'Legislation in Illiberal Poland', 3 *The Theory and Practice of Legislation* (2021) p. 278.

[33] M. Stambulski, 'Constitutional populism and the rule of law in Poland' in M. Krygier, A. Czarnota and W. Sadurski (eds.), *Anti-Constitutional Populism* (Cambridge University Press 2022) p. 337.

[34] Uitz, *supra* n. 24, p. 445; K.D. Ewing, 'Right-Wing Populism, Illiberal Democracy, Trade Unions, and Workers' Rights' in A.B. Cornell and M. Barenberg (eds.), *The Cambridge Handbook of Labor and Democracy* (Cambridge University Press 2022) p. 71.

What this further means is that the varieties of illiberal institutional transformation follow the fundamental divide between formal and informal constitutional change. Obviously, if the government disposes of sufficient constitutional majority, the change might be straightforward and formal. If a formal amendment provides for an exceptionally robust transformation, the term "constitutional replacement" is used to depict its extensive character. Such was the nature of the constitutional change undertaken by the Hungarian Fidesz party in 2011, which culminated in the adoption of a new constitution.[35] In that sense, the formal constitutional changes undertaken by illiberal majorities are legal but nevertheless repudiate the core of liberal constitutionalism by rejecting substantive limitations on public power.[36]

Given the extraordinary character of a formal constitutional change and the far-reaching formal requirements linked thereto, informal ways of amending constitutions are much more common under illiberal regimes.[37] The notion of an informal constitutional change has become essential to illiberal legal transformation. It denotes legislative reforms of sub-constitutional nature the content of which contravenes the underlying constitutional arrangement to such an extent that their implementation leads to *de facto* modification of the constitutional order.[38] Informal change is usually undertaken by means of an abuse of the structural weaknesses or regulatory vagueness ingrained in the constitutional texts.[39]

Concrete illustrations of the sweeping legislative reforms adopted in a variety of fields and amounting to an informal constitutional change will be provided in Chapter 2 when outlining the Polish illiberal transformation. One illustrative domestic example can nevertheless be named here. It concerned an attempt to shorten the term of office of the Chief Justice of the Supreme Court by lowering the retirement age of all Supreme Court judges. This amendment was implemented even though the term of office of the Chief Justice of the Supreme Court is explicitly defined in the

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[35] G. Halmai, 'From "Rule of Law" to an Illiberal Democracy in Hungary' in M. Sachs and H. Siekmann (eds.), *Der grundrechtsgeprägte Verfassungsstaat. Festschrift für Klaus Stern zum 80. Geburtstag* (Duncker & Humblot 2012) p. 1081; R. Dixon and D. Landau, *Abusive Constitutional Borrowing* (Oxford University Press 2021) p. 14.

[36] W. Waluchow and D. Kyritsis, 'Constitutionalism' in E.N. Zalta and U. Nodelman (eds.), *The Stanford Encyclopedia of Philosophy* (Summer 2023 Edition), https://plato.stanford.edu/archives/sum2023/entries/constitutionalism/, visited 17 June 2024; I. Pogany, 'A New Constitutional (Dis)Order for Eastern Europe?' in I. Pogany (ed.), *Human Rights in Eastern Europe* (Edward Elgar 1995) p. 218; W. Murphy, 'Constitutions, Constitutionalism, and Democracy' in D. Greenberg et.al. (eds.), *Constitutionalism and Democracy. Transitions in the Contemporary World* (Oxford University Press 1993) p. 3.

[37] W. Sadurski, 'Institutional Populism, Courts and the European Union' in Krygier, Czarnota and Sadurski, *supra* n. 33, p. 514 citing D. Landau, 'Populist Constitutions', 2 *University of Chicago Law Review* (2018) p. 527.

[38] Garlicki, *supra* n. 23, p. 158; Scheppele, *supra* n. 30, p. 574; Dixon and Landau, *supra* n. 35, p. 14.

[39] Scheppele, *supra* n. 38, p. 570.

Constitution.[40] Hence, the political majority sought to circumvent the constitutional provisions by amending a sub-constitutional ordinary legislation and applying it instead of the constitutional provisions to the case of the Chief Justice.

A further notable characteristic of an illiberal constitutional transformation is that it keeps the façade of liberal constitutionalism and eschews complete nullification of the institutions.[41] It does not replace the preexisting structures with new ones but reforms them. Reformed, the institutions are no longer capable of performing their prescribed functions, which has been most visible regarding the constitutional courts' reforms. This technique of "dismantling" or "hollowing out" is characteristic of illiberalism.[42] Consequently, the latter does not offer a full-fledged alternative to liberal constitutionalism but forces a view on what constitutes a proper constitutional logic by subverting the deep-seated structures.[43] This is yet another confirmation of the fact that illiberalism is relational.

Precisely because the ensuing constitutional change is informal and disguised as the statutory law reforms, it remains hard to spot. Since the changes are of sub-constitutional nature and adopted within the confines of the law-making power, they may appear consistent with the overarching legal framework.[44] This practice of keeping a liberal cloak allows illiberalism to skillfully mimic compliance with liberal constitutional standards while in fact disregarding the constitution as the supreme law of the land.[45]

Finally, given that the institutional reforms culminate in a constitutional change, a question may arise whether the notion of "illiberal constitutionalism" as opposed to illiberalism should be employed to depict the described processes. While is true that *de facto* constitutional arrangement arrived at through illiberal reforms might be described in terms of an "illiberal constitutionalism" the present analysis avoids this phrase because it considers modern constitutionalism to be liberal

[40] Article 183(3) of the Constitution.
[41] D. Landau, 'Myth of the Illiberal Democratic Constitution' in Sajó, Uitz and Holmes, *supra* n. 1, p. 431.
[42] Lech Garlicki referred to this technique in terms of "appearance of constitutionality and legality"; *see* Garlicki, *supra* n. 23, p. 160; K.L. Scheppele, 'The Opportunism of Populists and the Defense of Constitutional Liberalism', 3 *German Law Journal* (2019) p. 315; G. Halmai, 'Aufstieg und Niedergang verfassungsrechtlicher Normenkotrolle in Ungarn und Polen. Die Einflüsse von Hans Kelsen und Carl Schmitt' in C. Schmidt and B. Zabel (eds.), *Politik im Rechtsstaat* (Nomos 2021) p. 235.
[43] Dixon and Landau, *supra* n. 35, p. 14; A. Czarnota, 'Populist constitutionalism or new constitutionalism', 1 *Krytyka Prawa* (2019) p. 50; Landau, *supra* n. 41, p. 425.
[44] Dixon and Landau, *supra* n. 35, p. 14; Scheppele, *supra* n. 38, p. 547.
[45] A. Dzięgielewska, 'A Mimicry of International Law Compliance: How the Abusive Interpretation of International Norms Serves Poland's Illiberal Regime', 1 *Chicago Journal of International Law* (2022) p. 91.

by design. Obviously, illiberalism aims to challenge this fundamental assertion that a constitutional order is liberal in nature. Nevertheless, an illiberal attempt to subvert a liberal constitution does not advance a genuine constitutional theory and cannot be viewed as such.[46] Therefore, both in this chapter and in the remainder of the analysis the term "illiberalism" is preferred to any other illiberalism-related depictions.

## 3. Substantive illiberal agenda

As stated at the outset, illiberalism is driven not only by institutional change, but equally so by moral and political goals. It is noteworthy that the overview of illiberal assaults on the institutional structures did not tell us anything about the general moral orientation of the legal change undertaken by illiberalism. This issue is tackled below, zooming in on the value commitment of illiberal laws adopted in various fields of statehood.

Three overarching themes were discerned in the substantive agenda of illiberalism. This format demonstrates that the realization of moral commitment unfolds sequentially, and that its individual aspects follow and complement one another. The analysis shows that illiberalism bolsters a concrete hierarchy of moral values, locating some at the top of its agenda while rejecting the other. Based on this substantive commitment, illiberalism pursues a concrete social arrangement. Finally, the corollary effect of the latter two features is that illiberalism undermines chosen aspects of human rights protection.

### 3.1. Illiberal value commitments

One of the most overexploited claims regarding illiberalism is that it opposes the values of liberal constitutionalism.[47] Yet, it is rarely explained what this opposition means and how it is advanced. This section addresses these questions by clarifying that foundational to the activity of an illiberal incumbent is a concrete hierarchy of values and, where necessary, a rejection of their liberal

[46] Landau, *supra* n. 41, p. 426, where the author argues in a similar way that there is no distinctive category of an illiberal democratic constitution; *see* G. Halmai, 'Illiberal Constitutional Theories', 25 *Jus Politicum* (2021) p. 151.
[47] Zakaria, *supra* n. 16.

understanding. The claim is thus that, next to implementing a distinct set of moral commitments, illiberalism also abuses the typical liberal ones by redefining them to suit its political ends.

To begin with, illiberalism is fundamentally at odds with the traditional liberal values of pluralism, personal autonomy, openness, and tolerance as these place too much emphasis on individuals and their rights versus the state. Liberal values impinge upon the majoritarian nature of illiberal rule[48] and hinder the way towards the achievement of the "common good".[49] Adhering to notions of autonomy or pluralism and thus, allowing individuals to pursue their varied and possibly "modern" lifestyle choices, is seen as potentially threatening the national culture, religion, and identity.[50] Illiberalism curbs the basic right to individual self-government and substitutes for individuals in taking decisions which affect them directly. In place of liberal values, "illiberal societies prioritize community interests and actively promote a particular vision of community life."[51] Under these headings, illiberal polities typically underscore the importance of a traditional family as a basic social structure responsible for cultivating national identity. They also give priority to the value of religion and the institution of the Catholic Church. As such, illiberalism marks links to conservative thought.[52]

Regarding the broad spectrum of other values which figure prominently in liberal constitutions, but their understanding does not advance illiberal objectives, they become repurposed to serve illiberal ambitions. Illiberal interpretations of liberal constitutional values such as equality, gender equality, social justice, or constitutional identity, are context-based and irrespective of whether in the lawmaking or adjudication, can advance any given illiberal political end. This is a primary illiberal mechanism deployed "to remove the liberal content from constitutionalism."[53] For instance, the values of religious freedom or protection of family in conjunction with equality would be invoked to discriminate against sexual, religious, or ethnic minorities. Similarly, constitutional identity can be invoked to deny domestic effectiveness of international law to legitimize reforms which are contrary to the EU law.[54] The notion of human

[48] For an overview of the majoritarian concept of democracy endorsed by illiberal regimes, *see* Bień-Kacała, *supra* n. 32, p. 278; *see* also W. Merkel and F. Scholl, 'Illiberalism, Populism and Democracy in East and West', 1 *Czech Journal of Political Science* (2018) p. 12-13.
[49] Smilova, *supra* n. 14, p. 193.
[50] As suggested by P. Blokker, 'Populism and Illiberalism' in Sajó, Uitz and Holmes, *supra* n. 1, p. 269.
[51] L. Thio, 'Constitutionalism in illiberal polities' in M. Rosenfeld and A. Sajó (eds.), *The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2013) p. 134.
[52] Blokker, *supra* n. 50, p. 268 and the cited literature.
[53] Scheppele, *supra* n. 38, p. 556.
[54] Judgment of the Constitutional Tribunal of 14 July 2021, P 7/20.

dignity was employed to justify criminalization of homelessness in Hungary.[55] Finally, illiberal governments will reinterpret gender equality to introduce outdated policies which hinder the achievement of *de facto* equality between men and women.[56] All these are illustrations of how the value-laden principles may be redeployed to serve the ends fundamentally opposing their core purpose in liberal constitutional settings.

Finally, we must tackle the illiberal stance on the ultimate liberal value of individual freedom. For contrary to what the term itself might suggest, limiting individual freedom is not the primary aim of illiberalism. Obviously, assaults on the above-mentioned values, such as individual autonomy and pluralism, ultimately lead to encroachment upon individual freedom, however this implication do not exhaust the illiberal moral objective, neither does it depict its core.[57] In essence, it is true that limitations of individual freedom ensue from the institutional transformation and the normative agenda bolstered by illiberalism, but they do not constitute the end goal.

It thus must be underscored at this point that illiberalism in its understanding advanced by the present analysis must be viewed as a phenomenon rejecting liberal constitutionalism, rather than targeting the political philosophy of classical liberalism advocated by John Locke and Adam Smith and founded on the value of individual liberty. In the following, the term "illiberal" will be employed to describe a government which tampers with individual freedom, but also one which nullifies the constitutional constraints on the executive power, undermines judicial independence and curbs protection against discrimination.

### 3.2. Illiberal social arrangement

As explained above, the value system of illiberalism is premised on two objectives. First, a rejection of political neutrality following from the liberal values accommodating a spectrum of lifestyle choices. Second, adherence to traditional communitarian and family values, foundational to upholding national identity. A further consequence of this moral commitment is a particular social arrangement actively pursued by illiberal governments.

[55] Judgment of the Constitutional Court of Hungary of 4 June 2019, III/1628/2018.
[56] More on gender equality in the context of illiberalism, *see* Bień-Kacała, *supra* n. 32, p. 281 et seq.
[57] "In practice illiberalism is not necessarily based on denial: for illiberal governments most claims concerning liberty are simply irrelevant"; see the preface to Sajó, Uitz and Holmes, *supra* n. 1.

Illiberal vision of the social order constitutes a response to the "threats" emerging in modern societies, following from conceptions of multiculturalism and non-heteronormativity. To preserve the national culture and tradition, illiberal governments attach great weight to the cultivation of a traditional understanding of family. In the Central Eastern European context, this means reliance on the Christian conceptions of family and marriage. The latter, for instance, is understood exclusively as a union between a woman and a man. With its strong attachment to patriarchal roots, illiberalism demands respect for traditional gender roles stipulating women's responsibility for bearing children and caring for them whereas viewing men's role to be to provide for the family. In this context, illiberalism must be considered an anti-gender phenomenon because it actively hinders the achievement of gender equality.[58]

Illiberalism pursues the above family structure through legal, mostly gender-conservative means, because "social policies are treated not only in financial but also in ideological terms. It is about creating a normative vision of the family as the basis of society."[59] Illiberalism therefore expands family policy in ways discouraging women from engaging in professional work. For instance, it will not invest in development of day care facilities or otherwise incentivize women's labor market participation, but rather hand out direct cash subsidies.[60]

Illiberal emphasis on the traditional family values equals simultaneous hostility towards different, especially non-heteronormative, family models. Illiberalism is strongly against gay marriage and same-sex parenting. Moreover, it rejects informal ways of cohabitation and nontraditional family arrangements. In this regard, the narrative of the Polish government has been especially pernicious, suggesting that persons identifying with LGBTQ+ community are prone to pedophilia.[61]

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[58] There is a growing body of literature classifying illiberalism as an "anti-gender movement"; see A. Pető, 'Gender and Illiberalism' in Sajó, Uitz and Holmes, *supra* n. 1, p. 319.

[59] Stambulski, *supra* n. 33, p. 348.

[60] The government's flagship monthly child benefit of PLN 500 was followed by the introduction of many different one-time allowances for families. For instance, a direct cash subsidy to co-fund vacations for families with children was provided ("bon turystyczny") as well as an annual allowance for all children attending school in the age between 7 and 20 ("wyprawka 300+"); *see* also Stambulski, *supra* n. 33, p. 347.

[61] Poland's Human Rights Commissioner intervened in this regard; see the report from the respective intervention, Biuletyn Informacji Publicznej RPO, 15 June 2019, https://bip.brpo.gov.pl/pl/content/osoby-homoseksualne-utozsamiono-w-tvp-info-z-pedofilami-interwencja-rpo, visited 17 June 2024; *see* also Rzeczpospolita, 'RPO sprawdza, czy dla rzecznika dzieci LGBT+ to pedofilia', 25 July 2023, https://www.rp.pl/prawo-dla-ciebie/art38779161-rpo-sprawdza-czy-dla-rzecznika-dzieci-lgbt-to-pedofilia, visited 17 June 2024.

Finally, deeply ingrained in illiberal consciousness is an image of a decent and hard-working citizen which allows to easily divide society between the deserving "in-groups" and the lazy outsiders making up the margins of the society. In some illiberal polities specific laws sanction this divide. Hungarian government faced strong international criticism for its controversial decision to criminalize homelessness, a regulation which was domestically declared to be in compliance with the Hungarian Constitution.[62]

### 3.3. Protection of human rights under illiberalism

The ultimate illiberal technique allowing to force a hierarchy of values and a social structure upon the nation is through differentiated protection of human rights. Selective and opportunistic application of human rights mechanisms, undertaken by illiberalism, most vividly illustrates its value preferences and a favored model of society. As dividing society according to the above value-judgments is underwritten by inequality, challenging egalitarian structures constitutes a leading normative goal of the illiberal human rights abuses.

It bears noting that the overall phenomenon of a diminished protection of human rights visible under illiberalism has been studied under the common label of human rights "illiberalization", mostly discussed in the Polish and Hungarian contexts.[63] Under this heading, scholarship names the examples of domestic interreferences with civil and political rights, such as the right to assembly[64], freedom of political speech, or freedom of academic research. Here, on the other hand, we only tackle such human rights practice which is specifically bent to advance a predefined social arrangement.

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[62] Judgment of the Constitutional Court of Hungary of 4 June 2019, III/1628/2018; *see* also N. Chronowski and G. Halmai, 'Human Dignity for Good Hungarians Only: The Constitutional Court's Decision on the Criminalization of Homelessness', *Verfassungsblog* 11 June 2019, https://verfassungsblog.de/human-dignity-for-good-hungarians-only/, visited 17 June 2024.

[63] In this context, it must be reiterated that according to its proper understanding, 'illiberalization' is used to depict a result of illiberal practices, and not necessarily an act of limiting individual freedom; *see* 3.1; *see* also Drinóczi and Bień-Kacała, *supra* n. 15, p. 124 et seq.

[64] For instance, the Act of 13 December 2016 on Peaceful Assembly (Journal of Laws of 2017, item 579) was enacted, creating a privileged position of the assemblies devoted to patriotic, religious, and historic events, a formulation which in the domestic circumstances referred to the assemblies organized or supported by the government. The law made it illegal for the counter-assemblies to take place within the immediate proximity of the regular assemblies; *see* Sadurski, *supra* n. 9, p. 151 et seq.

Illiberal human rights protection follows the above strands of religiousness, anti-genderism[65], and opposition to the LGBTQ+ community[66]. Hence, protection mechanisms are triggered at the expense of individuals or groups falling outside the preferred moral categories. The specific egalitarian objectives to be achieved are to hinder the application of gender equality-enhancing and anti-discrimination structures. Discriminatory human rights protection is implemented through laws and later enforced by the captured courts, politicized public prosecution, and subordinate state police.

Several examples of these practices are worth mentioning. First, in illiberal states, protection of religious beliefs is always given priority when clashing with other rights. This can be illustrated by invoking court proceedings instigated in Poland against artists referring to catholic motives in their work[67] or against women who protested in church against abortion restrictions[68]. Next, consequential of gender-conservative attitude are significant restrictions upon women's rights to reproductive healthcare, with a special emphasis on abortion and assisted reproduction, equal participation in labor market and individual autonomy. They become replaced with family policies, a phenomenon also referred to as a shift from gender mainstreaming to family mainstreaming.[69] Finally, discrimination against LGBTQ+ community extends beyond the hostile political discourse. LGBTQ+ persons are being assaulted, arrested, and prosecuted for taking part in peaceful assemblies[70]. LGBTQ+ activists are often subject to Strategic Litigation Against Public Participation, the so-called SLAPPs, aiming to discourage their activity. They face severe obstacles in daily life when confronted with administrative state apparatus. Especially, Poland's lack of legal

[65] S. Mancini and N. Palazzo, 'The Body of the Nation: Illiberalism and Gender' in Sajó, Uitz and Holmes, *supra* n. 1, p. 405.
[66] For an identical pattern described with respect to illiberal Brazil under Bolsonaro, *see* M. Rabelo Queiroz, T. Bustamante and E. Peluso Neder Meyer, 'From Antiestablishmentarianism to Bolsonarism in Brazil' in Sajó, Uitz and Holmes, *supra* n. 1, p. 781.
[67] I. Jędrzejowska-Schiffauer, 'Nein zur „Ideologie"? Das rechtspopulistische Ziel einer homogenen und queer-feindlichen Gesellschaft in Polen', 1 *Zeitschrift des Deutschen Juristinnenbundes* (2023) p. 20; *See* also Rzeczpospolita, 'Matka Boża z tęczową aureolą trafi na wokandę Sądu Najwyższego', 16 January 2022, https://www.rp.pl/prawo-karne/art19291481-matka-boza-z-teczowa-aureola-trafi-na-wokande-sadu-najwyzszego, visited 17 June 2024.
[68] J. Theus, 'Sąd uniewinnił 32 osoby, które przerwały mszę po wyroku TK. "Protest musiał odbyć się w kościele"', *Oko Press* 13 March 2023, https://oko.press/sad-uniewinnil-32-osoby-ktore-przerwaly-msze-po-wyroku-tk-protest-musial-odbyc-sie-w-kosciele, visited 17 June 2024.
[69] A. Bień-Kacała, J. Kapelańska-Pręgowska and A. Tarnowska, 'Rise and Fall of Gender Equality in Poland' in I. Spigno et al. (eds.), *The Rights of Women in Comparative Constitutional Law* (Routledge 2023) p. 96.
[70] See Drinóczi and Bień-Kacała, *supra* n. 15, p. 140-141.

recognition of same-sex relationships has recently been found by the ECtHR to be in breach of the right to respect for private life.[71]

The above shows that although the European account of illiberalism is rarely associated with serious human rights violations, the discriminatory practices in the protection of rights of women as well as sexual and religious minorities show that, to achieve its moral goals, illiberalism is willing to resort to coercion.

## 4. Conclusion

Starting from Zakaria's initial concept of "illiberal democracy" and moving towards the phenomenon's most recent, Central Eastern European manifestations, this Chapter explained the concept of illiberalism. Primarily, given that the advanced definition emphasized that illiberalism is based on a rejection of the institutional and normative tenets of liberal constitutionalism, these two aspects were dissected throughout the analysis.[72]

When exploring the institutional dimension of illiberalism, it turned out that although its primary targets are the varied liberal democratic institutions, the implications of the sweeping legislative reforms undertaken by illiberal governments reach far beyond the mere institutional modifications. Sub-constitutional illiberal changes of statutory nature impose a new institutional arrangement by circumventing constitutional provisions. Thus, even in the absence of sufficient constitutional majority, the outcome of illiberal transformation is a change of the prior constitutional system based on separated state powers and institutional checks and balances.

Next, illiberal opposition to the values of liberal constitutionalism, making up the normative aspect of the studied phenomenon, was illustrated as consisting not only of a rejection of liberal values, but their instrumental repurposing aimed at bolstering an alternative moral agenda. Illiberalism was demonstrated to imply conservatism, familialism and anti-gender attitudes. This worldview is what illiberalism seeks to translate into a universally biding social arrangement and it does so by resorting to selective and opportunistic human rights protection at

[71] ECtHR 12 December 2023, No. 11454/17, *Przybyszewska and Others* v *Poland*.
[72] Some authors go on to claim that illiberalism has already developed into a full-fledged ideology, *see* Smilova, *supra* n. 14, p. 189 et seq; Laruelle, *supra* n. 2, p. 310 et seq.

the expense of chosen individuals and societal groups considered as a threat to the illiberal state order.

Hence, illiberalism consists of an institutional and a normative dimension, a division which will continue to serve as a framework for the application of illiberalism to the present study. Each time we will invoke "institutional transformation" and "constitutional change" or "value commitment" and "moral agenda", it will be in the context of illiberalism's two defining features. Finally, when any of these aspects will be preceded by an adjective "illiberal", it will always be used descriptively, to label certain practices as characteristic of an illiberal phenomenon, rather than normatively, to condemn political or legal activity of governments for violating the fundamentals of liberal constitutionalism.

## Chapter 2
## Constitutional arrangements for welfare provision under illiberalism

Building on the definition of illiberalism outlined earlier, the present chapter examines how the illiberal phenomenon manifests itself domestically. However, to investigate all fields of statehood in which illiberal reforms took place would be inaccurate considering the study's exclusive focus on social rights. Consequently, the presence of illiberalism will be traced by following the institutional and normative arrangements of the constitutional framework for welfare provision.

This chapter lays the groundwork for studying social rights in the context of illiberalism in that it filters out the specific constitutional law aspects with which illiberalism interferes, and which therefore must be tackled later in the analysis to discern illiberalism within social rights. Hence, whereas Chapter 1 provided us with a theoretical background, this one builds on it to lay down an analytical frame for the substantive analysis of social rights.

Investigating illiberalism's interaction with the domestic system for welfare provision is necessary because, even though certain social rights aspects occurred when defining illiberalism, these references were only fragmentary. Especially, within the established definition, no general overarching social rights agenda emerged as attached to illiberalism. Given that elucidating illiberalism's social agenda makes up the leading objective of the entire research endeavor, discerning the links between social rights and illiberalism on the level of constitutional law constitutes the starting point for the investigation.

To understand the importance of constitutional law for drawing out the links between social rights and illiberalism, we must note that constitutionalism substantively connects these two phenomena in the first place. While social rights in Poland have been traditionally functioning within a liberal constitutional setting[1], illiberalism remains at odds with its basic tenets. Therefore, the overlap between social rights and illiberalism undoubtedly has a constitutional background.

[1] One of the basic premises of the present research is that prior to the illiberal transformation, the domestic form of government adhered to the principles of liberal constitutionalism. This follows a dominating view that modern constitutional systems are liberal in nature; "Generally, in the mainstream literature, the meaning of constitutionalism is reduced to liberal constitutionalism - which, for almost forty years, has been the dominant paradigm in constitutional theory and constitutional practice (…) Political elites in the 1990s literally copied constitutional institutions from the Western world. These processes created, not only in the general public but also in the community of constitutional lawyers and political scientists, the opinion that there is only one form of constitutionalism – namely, liberal constitutionalism."; *see* A. Czarnota, 'Sources of Constitutional Populism – Democracy, Identity and Economic Exclusion' in M. Krygier, A. Czarnota and W. Sadurski (eds.), *Anti-Constitutional Populism* (Cambridge University Press 2022) p. 495-496; *see* also L. Thio, 'Constitutionalism in illiberal polities' in M. Rosenfeld and A. Sajó (eds.),

Finally, it bears recalling that, while this chapter prepares the ground for discerning the links between the phenomena, it does not establish them. It is the exclusive role of the following chapters to analyze in-depth the social rights' post-2015 reforms (Chapters 3-7) and to confirm or overturn the premise regarding their illiberal provenance (Chapter 8). That is to say, the illustrations of illiberal social law making, illiberal constitutional review, or any other examples of illiberalism in the enactment, implementation, or adjudication of social rights might only be spotted when engaging with the specific social law reforms.

## 1. Institutional framework

The institutional structure of the domestic social rights protection is complex and multi-level. Although social rights are enshrined in the Constitution, they are adopted by the legislature through ordinary laws. Central and local administration implements social laws, whereas ordinary and administrative courts adjudicate them. Finally, the Constitutional Tribunal reviews the constitutionality of social legislation and holds the power to strike down the laws deemed incompatible with the Constitution.

To explore how illiberalism interferes with this institutional logic, fundamental constitutional arrangements are laid out alongside the illiberal reforms, highlighting areas where the impact on social rights has been most likely. The analysis follows the format of separated state powers, allowing to trace illiberal interference with the social obligations of the respective government branches.

### 1.1. Legislature

Given that law-making constitutes an instrument of social rights integration into the domestic system, legislature's role in welfare provision is profound. Consequently, this investigation begins

*The Oxford Handbook of Comparative Constitutional Law* (Oxford University Press 2013) p. 133; G. Halmai, 'Illiberal Constitutional Theories', 25 *Jus Politicum* (2021) p. 143; Fundamental tenets of the Polish account of liberal constitutionalism comprise limited government, explicit commitment to the protection of individual rights, a tripartite system of separated state powers as well as a system of checks on the executive and the legislature ensuring constitutional compliance of state's actions; for the fundamental tenets of liberal constitutionalism in general, *see* A. Sajó and R. Uitz, *The Constitution of Freedom. An Introduction to Legal Constitutionalism* (Oxford University Press 2019) p. 13; G. Sartori, 'Constitutionalism. A Preliminary Discussion', 4 *The American Political Science Review* (1962) p. 855.

by dissecting illiberal interference with the law-making powers. First, it provides an overview of the social responsibility of the legislature. Next, it discerns specific illiberal legislative tendencies and asserts that their impact on social law can be discerned both in the formal procedure leading to the adoption of law and in the law's substance, including the articulated policy objectives.

### 1.1.1. Social responsibility of the legislature

Considering that one subchapter of the Constitution was devoted to socio-economic rights[2], this explicitly obligates the state, including the law-making power, to engage in the public provision of welfare. Hence, to delineate the scope of the legislature's social commitment, we must first address the issue of constitutional social rights.

Following heated debates held since the collapse of communism, the constitution-maker eventually opted for including social rights in the text of the new constitution. The liberal democratic Constitution of 1997, the adoption of which was the crowning achievement of the post-communist transition, contains a wide range of welfare rights, however of limited legal "weight".[3] These provisions were entrenched not as "strong form" justiciable social rights, but as directive principles of state policy. Therefore, although grounded in the Constitution are all areas of welfare provision – protection of labor, including the right to choose one's occupation[4], social insurance[5], social assistance[6], healthcare[7], the rights of persons with disabilities[8], family support including maternity rights[9], as well as housing[10] and education[11] – no specific regulatory obligations accompany them. This legal framing was chosen, because explicit constitutionalization of the

[2] It is a subchapter on the "economic, social and cultural freedoms and rights" that extends from Article 64 to Article 76 of the Constitution and is located within Chapter II of the Constitution on "the freedoms, rights and obligations of persons and citizens".
[3] W. Sadurski, *Rights Before Courts. A Study of Constitutional Courts in Postcommunist States of Central and Eastern Europe* (Springer 2014) p. 264.
[4] Article 65 of the Constitution.
[5] Article 67 of the Constitution.
[6] Article 67 of the Constitution.
[7] Article 68 of the Constitution.
[8] Article 69 of the Constitution.
[9] Article 71 of the Constitution.
[10] Article 75 of the Constitution.
[11] Article 70 of the Constitution.

state's social responsibilities would have distorted the separation of powers by constraining the legislature to act in a concrete manner within a field in which it shall enjoy fullest discretion.[12]

The Constitution goes only as far as to stipulate a general duty of the legislature to regulate specific aspects through ordinary laws, an obligation which is reflected in the manifold by-law clauses enshrined next to the pertinent rights provisions. For instance, Article 65(4) stipulates that the minimum wage is regulated in the statute. Likewise, Article 67(1) states that the scope and forms of social security are laid down in the statute. Hence, the Constitution requires that the legislature regulates, but it does not specify how it shall do it.

Crucially, the above does not mean that constitutional social rights are exclusively unenforceable. Their partial enforceability was *a contrario* derived from Article 81 of the Constitution which declares certain social rights provisions – such as the right to minimum wage, safe working conditions, or the rights of persons with disabilities – enforceable only within the scope of the respective statutory laws. By contrast, social provisions not mentioned in Article 81 have been agreed upon as having substantive constitutional content, and therefore, as affording enforceable constitutional social rights.[13] Such status was attached to the right to healthcare[14], the right to choose one's occupation as well as the right to social security.[15]

The partial enforceability notwithstanding, the ultimate decision on the scope of social rights protection – whether through provision of benefits or services, production of goods or regulation[16] – rests with the Parliament. The role of the legislature must also be considered against the backdrop of the specific requirements regarding formal prerequisites binding the law-making when regulating human rights issues. More precisely, the individual rights and obligations can

[12] L. Garlicki, Remarks on economic, social, and cultural freedoms and rights in L. Garlicki (ed.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom III* (Wydawnictwo Sejmowe 2003) p. 2.
[13] W. Sadurski, 'Postcommunist Charters of Rights in Europe and the U.S. Bill of Rights', 2 *Law and Contemporary Problems* (2002) p. 237; see also Judgment of the Constitutional Tribunal of 19 April 2011, P 41/09.
[14] Judgment of the Constitutional Tribunal of 2 March 1999, K 2/98 in which the Tribunal stated that a subjective right to the protection of health follows from Article 68(1) of the Constitution; *see* also S. Jarosz-Żukowska, 'Prawo do ochrony zdrowia i dostępu do świadczeń opieki zdrowotnej' in M. Jabłoński (ed.), *Realizacja i ochrona konstytucyjnych wolności i praw jednostki w polskim porządku prawnym* (E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa 2014) p. 670 et seq.
[15] P. Kuczma, 'Prawo do zabezpieczenia społecznego' in Jabłoński, *supra* n. 14, p. 600.
[16] Especially in the fields of housing, labor and social protection, public activity does not always imply direct provision of benefits or services. In the context of labor and social protection, of equal importance are the regulatory measures, whereas in the field of housing, the state can engage directly in the production of goods; *see* Sadurski, *supra* n. 3, p. 255; W. Osiatyński, 'Introduction' in N. Udombana and V. Beširević (eds.), *Re-thinking Socio-Economic Rights in an Insecure World* (Central European University Press 2006) p. 11.

only derive from a law which is of "universally binding" nature.[17] This means especially, that the government cannot adopt social rights through executive regulations.[18]

Discretion enjoyed by the legislature with respect to social rights implementation extends to the issue of whether social protection would be reduced or expanded. It is commonly accepted that Article 81 of the Constitution proclaims a much wider margin of discretion for the legislature to define the scope of social rights compared to that enjoyed when enacting civil and political rights.[19] Especially, the Constitution does not guarantee an increasing provision of welfare.[20] Retrenchment might be justified by other human rights and constitutional principles at stake and might also find substantive backing in the constitutional values of budgetary balance and financial stability.[21]

The lack of straightforward enforceability of constitutional social rights explains the predominantly sub-constitutional focus of the analysis in Chapters 3-7 by illuminating that illiberalism might be spotted within social rights only when looking at their legislative articulation. The questions of the constitutional core of rights or their justiciability are thus of little relevance and must be viewed as secondary versus social rights' recognition through ordinary legislation, their on-the-ground enforcement and adjudication.

### 1.1.2. Illiberal law-making

Illiberalism interferes with the scope of the law-making power and, thereby, with the core mechanism for integrating social rights into the domestic legal system. To begin with, the quality

[17] This requirement follows from Article 87(1) of the Constitution enumerating the statute among the sources of universally binding law (*prawo powszechnie obowiązujące*), as well as from the general human rights limitation clause of Article 31(3) of the Constitution, stating that the restrictions on individual rights and freedoms might only follow from the statute; *see* L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu* (Wolters Kluwer 2019) p. 140-141.
[18] Specification, albeit not determination, of some aspects of individual rights and freedoms that were previously regulated in the statute can be made through executive regulations, according to Article 87(1) of the Constitution, if the statute includes a specific clause demanding such intervention.
[19] J. Trzciński and M. Wiącek, Commentary to Article 81 in L. Garlicki and M. Zubik (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II* (Wydawnictwo Sejmowe 2016) p. 930; Judgment of the Constitutional Tribunal of 5 December 2007, K 36/06; A. Krzywoń, *Konstytucyjna ochrona pracy i praw pracowniczych* (Wolters Kluwer 2017) p. 368
[20] Krzywoń, *supra* n. 19, p. 367; Judgment of the Constitutional Tribunal of 8 May 2005, SK 22/99.
[21] L. Garlicki and S. Jarosz-Żukowska, Commentary to Article 67 in Garlicki and Zubik, supra n. 19, p. 694-695; L. Garlicki, Commentary to Article 67 in Garlicki, *supra* n. 12, p. 5-6.

of the law-making declined considerably under illiberalism.[22] Bills have been rushed through Parliament and fundamental legal amendments have been enacted within days or even overnight. For instance, the radical reforms of the Constitutional Tribunal and the Supreme Court followed such speedy procedures.[23] Crucially, this legislative fast-tracking happens *de facto,* without any formal basis. Enabling this is an illiberal practice of submitting legislative proposals as private members' bills, bypassing thus the governmental law-making trajectory to which higher legislative standards apply. Circumventing this path lowers the complexity of the law-making process and the level of formal scrutiny to which the bills are subjected.[24] Especially, it allows for adoption of procedurally dubious legislation with no *vacatio legis* or effective retroactively.[25] To name an example of such legislative tactic, no *vacatio legis* was provided in the laws introducing major reforms of the Constitutional Tribunal.[26]

The law-making process has also been devoid of plurality. It has been following a strictly majoritarian approach, marked by an open disregard for any opinions coming from outside the ruling majority.[27] It is also a classic trait of the illiberal law-making that no proper deliberations are held in the Parliament prior to the passage of laws.[28] Members of political opposition are not given time to familiarize themselves with the content of proceeded bills or to formulate critique. Amendments are voted in blocks according to the political faction which introduced them, no comments are allowed from the representatives of the political opposition, the opinions of the expert legislators are ignored.[29] It goes without saying that there is no room left for public participation in such law-making processes.

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[22] T. Drinóczi and R. Cormacain, 'Introduction: illiberal tendencies in law-making', 3 *The Theory and Practice of Legislation* (2021) p. 270; T. Drinóczi and A. Bień-Kacała, *Illiberal Constitutionalism in Poland and Hungary. The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law* (Routledge 2022) p. 115.
[23] Drinóczi and Bień-Kacała, *supra* n. 22, p. 118.
[24] According to Wojciech Sadurski, in 2016, 40 percent of the adopted bills were proceeded as private members' bills while during the two previous parliamentary terms it was 15 and 13 percent accordingly; *see* W. Sadurski, *Poland's Constitutional Breakdown* (Oxford University Press 2019) p. 133.
[25] Judgment of the Constitutional Tribunal of 19 November 2008, Kp 2/08; Judgment of the Constitutional Tribunal of 12 May 2009, P 66/07.
[26] Sadurski, *supra* n. 24, p. 73.
[27] A. Bień-Kacała, 'Legislation in Illiberal Poland', 3 *The Theory and Practice of Legislation* (2021) p. 278.
[28] T. Drinóczi and A. Bień-Kacała, 'Democracy and Human Rights in Illiberal Constitutionalism' in M. Belov (ed.), *Populist Constitutionalism and Illiberal Democracies. Between Constitutional Imagination, Normative Entrenchment and Political Reality* (Cambridge University Press 2021), p. 235.
[29] Bień-Kacała, *supra* n. 27, p. 285; I Wróblewska,'The Rule of Law: Polish Perspective' in T. Drinóczi and A. Bień-Kacała (eds.), *Rule of Law, Common Values, and Illiberal Constitutionalism. Poland and Hungary within the European Union* (Routledge 2021) p. 143.

Next to the procedure, it is the content of laws that changed and began to reflect an illiberal logic. The ruling majority has been enacting personalized laws targeting specific groups or individuals.[30] For instance, attempts were made to force compulsory retirement of the Supreme Court justices by lowering the pensionable age.[31] Another recent example of legal measures conceived to harm concrete individual was the creation of a parliamentary commission to investigate Russian influence on the Polish politics. According to the law, the finding of such a connection equaled a ban on performing public functions for ten years, excluding the person involved from running in the elections. Whereas the law was supposedly universal, in reality it was adopted to bring charges against the opposition leader, Donald Tusk, to prevent him from running in the back then upcoming parliamentary elections. For this reason, the statute was commonly referred to as "lex Tusk".[32] Such legislation violates the principle of general applicability of statutory law, although personal targeting is extremely hard to prove in legal terms, given legislation's seeming universality.

Another example of a law passed to achieve specific political goals was the amendment to the right to assembly, heavily restricting admissibility of counterdemonstrations.[33] The law was adopted with a specific aim of prioritizing the monthly public assemblies of the governing party members mourning the victims of the Smolensk air disaster[34] and banning any counterdemonstrations that could disturb these events.

The above shows the lack of any procedural or substantive boundaries to illiberal legislation. The Parliament has been passing the laws by following erroneous procedures, an aspect which will be analyzed in-depth when exploring the illiberal rejection of the formal rule of law requirements.[35] Legislature has also been implementing laws pursuing blatantly unconstitutional objectives. However, the constitutionality of, neither the formal quality, nor the substance of

[30] For an analogical pattern in the Hungarian context, *see* P. Bárd and V.Z. Kazai, 'Enforcement of a Formal Conception of the Rule of Law as a Potential Way Forward to Address Backsliding: Hungary as a Case Study', 2-3 *Hague Journal on the Rule of Law* (2022) p. 168.
[31] M. Stambulski, 'Constitutional populism and the rule of law in Poland' in M. Krygier, A. Czarnota and W. Sadurski (eds.), *Anti-Constitutional Populism* (Cambridge University Press 2022) p. 342.
[32] Reuters, 29 May 2023, https://www.reuters.com/world/europe/polish-president-sign-russian-influence-bill-despite-opposition-protests-2023-05-29/, visited 17 June 2024.
[33] M. Wyrzykowski and M. Ziółkowski, 'Illiberal Constitutionalism and the Judiciary' in A. Sajó, R. Uitz and S. Holmes (eds.), *Routledge Handbook on Illiberalism* (Routledge 2022), p. 526.
[34] A plane crash of 10 April 2010 in which the President of Poland as well as 95 other people died, including members of the highest state authorities and senior military officers.
[35] *See* 2.1.1.

illiberal legislation, can be scrutinized as the constitutional court has been captured and remains uncapable of performing its role.

### 1.1.3. Illiberal social policy objectives

Before concluding on the illiberal interference with the law-making powers, it must be addressed how the above illiberal legislative tendencies of procedural or substantive nature might be spotted in the adoption of social law. Whereas to scrutinize the law-making procedure against the backdrop of formal requirements is a straightforward endeavor, looking for an illiberal content of social laws is far more difficult. It is hard to discern illiberalism in the state's positive action consisting in providing the population with goods or services. On the other hand, given that, as indicated above, retrenchment remains within the realms of legislative discretion, limiting social rights by itself does not point to illiberalism either. Therefore, it is the objectives and value commitments attached to social laws that may link them to illiberalism.

Central to the considerations regarding the motivation of social law is the sphere of social policy, a domain of the state's activity aiming toward implementation of legal measures advancing the quality of life of the population.[36] This specifically social focus distinguishes social policy from other fields of public activity.[37] In the domestic political system, wherein the government is appointed from among parliamentary majority, social policy making constitutes a joint effort of the Parliament and the government. Considered in the context of the law-making process, social policy precedes the adoption of law.[38] It captures the transition from policy ideas to enforceable rights.

The above means that when looking for an illiberal substance within the social law reforms we must explore the altered social policy objectives and look for the specifically illiberal value commitments, the content of which will be tackled in-depth below, under the normative framework.[39] Moreover, observing the shifts in social policy requires being particularly attentive

[36] U. Becker, 'Das Sozialrecht: Systematisierung, Verortung und Institutionalisierung' in F. Ruland, U. Becker and P. Axer (eds.), *Sozialrechtshandbuch* (Nomos 2017) p. 63
[37] Regarding the nature of the 'specifically social objectives' (*spezifisch soziale Zwecke*), *see* Becker, *supra* n. 36, p. 53.
[38] A.B. von Maydell, 'Sozialpolitik und Rechtsvergleich' in F. Ruland, B. von Maydell and H.-J. Papier (eds.), *Verfassung, Theorie und Praxis des Sozialstaats. Festschrift für Hans F. Zacher zum 70. Geburtstag* (C.F. Müller 1998) p. 591.
[39] *See* 2.1, 2.2., 2.3.

to social rights' continuity over time. Hasty reforms or policy reversals as well as profound re-regulations of entire policy agendas within the fields typically marked by stability (e.g. housing construction, pensions) might point to pernicious political aims. Changes can also be traced by engaging with the reform's articulated purpose following from justifications eclosed to the draft laws or addressed explicitly in the political debate.

### 1.2. Executive

In this section, we will explore the expansion of the executive power under illiberalism and assess the importance of this phenomenon for social rights. Central to the succeeding considerations is the concept of "executive aggrandizement" denominating an illiberal attempt to subordinate increasingly more fields of statehood to the executive, resulting in the erosion of legal constraints which conventionally limit this branch of government.[40] In jurisdictions with aggrandizing governments, the liberal democratic institutions and structures which ought to, either hold the executive accountable or remain fully independent of it, are wakened, taken over, or packed with government allies.[41]

In essence, the phenomenon of executive aggrandizement affects protection of social rights by leading to significant power imbalance of both horizontal and vertical nature, with the former meaning the power asymmetry between the executive and the remaining two branches of government, and the latter referring to the shifting central-local power dynamics. Horizontally, with respect to the legislature, by maximizing its responsibilities in the law-making, the executive paved the way to unfettered legislative transformation. On the other hand, assumption of power at the expense of the judiciary hampered the proper discharge of judicial functions in the field of human rights protection. Finally, distorted vertical power relations are likely to encroach upon the local authorities' capacity to deliver social rights. Prior to engaging with these three aspects, to give a broader picture of the discussed phenomenon, some general examples of the domestic maximization of executive powers will be provided.

[40] R. Uitz, 'Constitutional Practices in Times "After Liberty"' in Sajó, Uitz, and Holmes, *supra* n. 33, p. 451.
[41] N. Bermeo, 'On Democratic Backsliding', 1 *Journal of Democracy* (2016) p. 10-11; T. Khaitan, 'Executive aggrandizement in established democracies: A crisis of liberal democratic constitutionalism', 1 *International Journal of Constitutional Law* (2019) p. 343.

An ample illustration of the executive aggrandizement can be discerned within the biased use of discretionary powers by the government, more precisely by the Minister of Education who in 2022 infamously allocated public funds to exclusively pro-government NGOs allegedly "actively supporting the education system".[42] The reality was that majority of institutions which benefited from the initiative had no experience in the field of education and some of them were set up within months, weeks or even days prior to the deadline for submitting the applications to the competitive grant procedure. Such biased allocation of funds is a canonical example of illiberal arbitrary decision-making tailored to benefit active supporters of the government.

An arbitrary use of executive power was also a strategy resorted to by the President, with whom the Council of Ministers shares executive competences. Back in 2015, relying on the constitutionally grounded institution of presidential prerogative, Andrzej Duda pardoned two politicians of the Law and Justice party, former heads of the Central Anticorruption Bureau, accused of abuse of power and illegal operational activities during their time in office.[43] The unconstitutionality of this act of the President consisted in him having pardoned these two MPs even before the pertinent ordinary court issued a final ruling in the case. Hence, the decision was premature and amounted to the abuse of the power of presidential prerogative.

Next, the propensity of an illiberal executive to assume increasingly more competences can also be discerned in the way Poland's government proceeded during the coronavirus pandemic. Instead of declaring the constitutional emergency regime foreseen for cases of "state of natural disaster"[44], the government continued to operate within the standard legal framework and severely restricted individual rights and economic freedoms through ordinary legislation.[45] Especially, while the constitutional regulations of the state of natural disaster enumerate individual rights which can be restricted under the given state of emergency, as well as obligate the state to regulate compensation scheme for pecuniary damages resulting from such restrictions, by sticking to the standard legal framework, the government freed itself from all the constitutional limitations. Moreover, contrary to the Constitution, the executive regulations enacted during the pandemic

[42] For a series of articles on this matter, *see* TVN24, https://tvn24.pl/willa-plus, visited 17 June 2024.
[43] Mariusz Kamiński and Maciej Wąsik were eventually convicted based on these allegations in December 2023 and sentenced to two years in prison; see Reuters, 8 January 2024, https://www.reuters.com/world/europe/chaos-row-over-polish-lawmakers-conviction-reveals-judicial-muddle-2024-01-08/, visited 17 June 2024.
[44] Article 228(1) of the Constitution.
[45] T. Drinóczi and A. Bień-Kacała, 'COVID-19 in Hungary and Poland: extraordinary situation and illiberal constitutionalism', 1-2 *The Theory and Practice of Legislation* (2020) p. 180.

within a variety of public policy fields allowed the respective ministers to suspend the effectiveness of statutory provisions.[46] However, the most blatantly abusive political development from that time was the attempt of the governing majority to organize presidential elections in the midst of the epidemic. Minding the rising infection numbers and aware that the elections cannot be held as normal, just one month before the planned elections date, the governing majority pushed a bill amending the law on elections, allowing for an all-postal ballot. And it did so by violating the constitutional prohibition to pass changes to the electoral law within six months prior to the scheduled elections.[47] Due to the mounting organizational hindrances, the voting was eventually called off.

Finally, a standard illustration of an abusive discretionary decision-making which unfolded domestically, is the planting of loyal candidates in democratic institutions which, by design, ought to be merely hierarchically subordinate or entirely independent of the central state apparatus. Those are, for instance, the Children's Rights Commissioner, Central Anti-Corruption Bureau[48], the National Bank of Poland, National Electoral Commission, Supreme Audit Office, or the police.

The above power-maximizing practices of the executive affect the realization of the principal task of the central administration which is to implement the law. Additionally, through a network of loyalists installed in administrative bodies hierarchically subordinate or supervised by the central state, arbitrary governmental decision-making extends to the lower administration levels.[49]

#### 1.2.1. Executive aggrandizement at the expense of the legislature

The phenomenon of executive aggrandizement is also called a "crisis of executive accountability".[50] In the following two sections, the investigation will inquire how the domestic

[46] Drinóczi and Bień-Kacała, *supra* n. 45, p. 189.
[47] This principle was derived from the rule of law by the Constitutional Tribunal; see A. Rytel-Warzocha, 'Postal Voting as an Ultimate Rescue Measure for Presidential Election During the COVID-19 Pandemic in Poland', 5 *Przegląd Prawa Konstytucyjnego* (2020) p. 108.
[48] The European Commission raised concerns about the Anti-Corruption Bureau being dependent on the government as a dangerous precedent by which top executives involved in corruption-related cases can stay immune; see European Commission, *2022 Rule of Law Report. Country chapter on the rule of law situation in Poland*, 13 July 2022, https://commission.europa.eu/publications/2022-rule-law-report-communication-and-country-chapters_en, visited 17 June 2024.
[49] Uitz, *supra* n. 40, p. 452.
[50] Khaitan, *supra* n. 41, p. 346.

executive power-grab nullifies the horizontal accountability mechanisms, towards the legislature and the judiciary. [51]

It bears noting that in jurisdictions where the government does not dispose of the parliamentary majority, executive power abuses set out increased reliance on administrative law and executive regulations.[52] In Poland, however, where the system itself sets out that the central government and the parliamentary majority are formed by the members of the same political faction, an opposite trajectory took place. The government has been using the law-making as a platform to deepen and manifest its supremacy.

The executive's "appropriation and misuse of law-making powers"[53] must be considered in the context of its role within the legislative process. It bears indicating that the Council of Ministers was attached a privileged position within the law-making. In the social realm, the government designs comprehensive policy agendas, regulating entire areas of welfare provision, commonly adopted for instance in the spheres of housing and healthcare. It disposes of a comprehensive structure of expert legislative bodies drawing up, opining, and submitting legislative proposals on the government's behalf. Equally, the government is entitled to formulate amendments to any proceeded bill, wielding considerable influence on the content of the laws being passed. It bears recalling as well that the government submits the majority of bills, and it does so *via* the private members' initiative, allowing to realize its political aggrandizing agenda while circumventing the thorough formal and substantive scrutiny of legislation, applicable to the legislation submitted through official governmental channels.

The above position of the government has enabled the illiberal majority to adopt laws consolidating power in the hands of the executive. Such statutory reforms were mainly passed with regard to the judiciary and the local government, as well as in the field of economy, and will be tackled in more detail in the respective succeeding sections.[54] Considering that the issues of state economy, independent judiciary, and central-local allocation of funds, constitute cornerstones of social rights provision, their weakening through executive inroads threatens effective provision of welfare.

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[51] M.G. Laebens, 'Beyond Democratic Backsliding: Executive Aggrandizement and its Outcomes', *V-Dem Working Paper* (2023) p. 7.
[52] Uitz, *supra* n. 40, p. 451.
[53] Uitz, *supra* n. 40, p. 452.
[54] *See* 1.2.2, 1.2.3 and 2.3 below.

### 1.2.2. Subordination of the judiciary to the executive

Outside the law-making, executive aggrandizement can be spotted by tracing the gradual increase of the executive powers with adverse impact on judicial independence.

To begin with, it must be noted that the government has been successful in subordinating strategic institutions of the system of justice by packing them with loyal appointees. In this context, the processes of dismantling and packing of the Constitutional Tribunal, as well as the ordinary and administrative courts, must be named, which will be explained in-depth when discussing the reforms of the judiciary.[55]

Equally illustrative of an executive power-grab at the expense of the courts, was the maximization of competences vested in the Minister of Justice.[56] Primarily, in 2016, the government merged the offices of the Prosecutor General and the Minister of Justice which led to centralization of major prosecutorial and justice-related powers in the hands of one person.[57] International institutions, including the Venice Commission[58] and the European Commission, indicated that these two functions should be separated as to "ensure the independence of the prosecution's actions from the government"[59], but Poland has routinely refused to comply with these indications. The Minister of Justice assumed discretionary powers regarding the appointment and dismissal of the ordinary courts' presidents[60], initiation of the disciplinary proceedings against judges[61] and appointment of judges-investigators to instigate disciplinary action[62]. Likewise, on many occasions, he has actively undermined public trust in the judiciary.

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[55] *See* 1.3.
[56] These fields of state policy are referred to as the government departments; see The Act of 4 September 1997 on the Departments of Government Administration (Journal of Laws of 2023, item 2029).
[57] The Act of 28 January 2016 on the Prosecutor's Office (Journal of Laws of 2017, item 177).
[58] Venice Commission, The 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 Courts and Some Other Laws, 18 June 2020, https://www.venice.coe.int/webforms/documents/?opinion=977&year=all, visited 17 June 2024.
[59] European Commission, *supra* n. 48, p. 2.
[60] Act of 12 July 2017 amending the Act on the system of ordinary courts and some other acts (Journal of Laws of 2017, item 1452).
[61] D. Adamski, 'The social contract of democratic backsliding in the "new EU" countries', 3 *Common Market Law Review* (2019) p. 639; European Commission, *supra* n. 48, p. 4; *see* also ECtHR 15 March 2022, No. 43572/18, *Grzęda* v *Poland*, at 348.
[62] Article 112(b) of the Act of 27 July 2001 on Courts of General Jurisdiction (Journal of Laws of 2019, item 52).

Similarly, attempts were made to weaken the judiciary by accumulating powers in the hands of the President. When the government was reforming the Supreme Court, aiming to force the justices out of office by lowering their retirement age, one of the solutions put forth was to make the continuity of the judicial tenure contingent upon the President's approval. By vesting the decision on the length of judicial service with the representative of the executive power, these provisions were in direct breach of the constitutional principles of judicial irremovability as well as the EU guarantees of judicial independence.[63]

Finally, a major shift has been visible in the executive's approach towards the Constitutional Tribunal. The government has the responsibility to publish and implement constitutional judgments. Under illiberalism, it ceased to execute these duties. First, it began the discretionary cherry-picking of the rulings which deserve to be published in the Journal of Laws, and thereby, claimed the authority to decide which rulings are "worthy" of coming into effect.[64] This is in clear breach of Article 190(2) of the Constitution stipulating that judgments are published immediately.[65] Second, the government would only implement chosen rulings, disrespecting thus the legal gravity of constitutional judgments and oftentimes prolonging the state of unconstitutionality caused by the ensuing lack of pertinent legislative intervention.

### 1.2.3. Executive-aggrandizing practices against the local government

Finally, the power-aggrandizing practices occurring under illiberalism must be tackled in the context of the central-local power dynamics. This overview aims to indicate the points of tension between central and subcentral government, to highlight such executive power abuses which lead to restrictions in the local delivery of social rights.

[63] The law violated Article 19(1) of the Treaty on the European Union as stated in CJEU 24 June 2019, Case C-619/18, *Commission* v. *Poland*, at 126.
[64] L. Pech and J. Jaraczewski, 'Systemic Threat to the Rule of Law in Poland: Updated and New Article 7(1) TEU Recommendations', 13 *UCD Working Papers in Law, Criminology & Socio-Legal Studies Research Paper* (2023) p. 18.
[65] The first sentence of Article 190(2) stipulates that "Judgments of the Constitutional Tribunal regarding matters specified in Article 188, shall be required to be immediately published in the official publication in which the original normative act was promulgated"; *see* also W. Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', 1 *Hague Journal on the Rule of Law* (2019) p. 74 et seq.; Sadurski, *supra* n. 24, p. 77.

We must begin by noting that the demand for decentralized state powers was enshrined in Article 15(1) of the Constitution.[66] Overall, the central-local arrangement sets out that public tasks are allocated between the central and sub-central authorities, with the latter divided according to a three-tier structure including municipalities, counties, and voivodships.

Decentralization is vital in the context of social rights provision. Local authorities are responsible for the implementation of the bulk of state's social obligations.[67] Next to providing social benefits and services, local government runs critical social infrastructure, supporting adequate discharge of specific social duties. The scope of local social responsibility spans almost[68] all fields of domestic welfare provision: social assistance, housing, healthcare, rights of persons with disabilities, education, and unemployment. Within these areas, different levels of subcentral government allocate social rights through specialized administrative apparatus. Oftentimes, these responsibilities are shared between the central and local bodies. However, the majority of duties are delivered on the municipal level, closest to the individual.

For reasons of space, only the main social responsibilities of the municipalities can be enumerated here. The latter are the first-hand providers of social benefits and services, administered mainly through the Social Assistance Centers (currently under transition into Social Services Centers[69]). The centers' responsibility extends to the realms of social assistance, including short- or long-term financial support for individuals in economic hardship and low-income households, as well as to the field of disability-related benefits and services, including provision of the nursing benefit as well as institutionalized and deinstitutionalized care. In the area of housing, Social Assistance Centers provide the homeless with transitional shelter. They offer in-kind assistance such as food and clothes. Finally, in the field of family support, Social Assistance Centers manage the payment of a one-time childbirth allowance and a monthly child

[66] Article 15(1) of the Constitutes provides that "The territorial system of the Republic of Poland ensures decentralization of public power."

[67] J.T. Hryniewicz, 'Administracja samorządowa – misje, własność i kontekst organizacyjny', 10 *Samorząd Terytorialny* (2004) p. 32; M. Stec, 'Ustrój terytorialny Rzeczypospolitej Polskiej i miejsce w nim samorządu terytorialnego' in I. Lipowicz (ed.), *System Prawa Samorządu Terytorialnego. Tom 2. Ustrój Samorządu Terytorialnego* (Wolters Kluwer 2022) p. 51.

[68] A major social area excluded from the local authorities' purview is the social insurance system including old-age and disability pensions as well as sickness and accident schemes. The latter are managed by the Social Insurance Institution operating locally through departments, which institutionally remain outside the local government administration.

[69] For more information of the transition, *see* the official website of the President of Poland, https://www.prezydent.pl/aktualnosci/inicjatywy/centrum-uslug-spolecznych, visited 17 June 2024.

benefit (until 2022). Beyond that, municipalities offer social housing for the low- and middle-income households and are engaged in housing construction, including through private-public partnership. They also manage payments of housing allowances supporting households in covering rent and utility costs. Moreover, municipalities provide healthcare services through local health centers. Finally, in the field of education, they manage nurseries, kindergartens, and schools.

That said, the local government is not self-sufficient in delivering social rights. At the same time, illiberal power has been marked by hostility towards subcentral state powers. Crucial to understanding this dynamic is the fact that the illiberal executive perceives the local government as a considerable impediment to centralized state power. In this context, subcentral authorities' functional and financial dependence on central government marks a potential avenue for executive inroads into the local autonomy which, in turn, is likely to affect the local governments' capacity to provide quality welfare to their communities.

The entire spectrum of central government's systematic attempts to curb the local autonomy will be tackled in Chapter 7, but as an introduction to this subject matter, the twofold nature of these practices must be outlined here. First, the interferences concern funding. The local government's own income is insufficient to cover all subcentral expenses, including those related to the provision of welfare. Therefore, local authorities remain dependent on the allocation of funds from the central state. In this context, the ever-present problem of inadequate financing has further exacerbated under illiberalism. The local finances follow a complex structure but the two main pillars coming from the central state comprise the general subsidies and the earmarked grants. A notably growing importance of the latter at the expense of the former has been negatively impacting upon the local government's discretionary spending decisions. Second, the government has been interfering with the scope of the local government duties, including those in the sphere of welfare provision. An ample example of these practices was the taking of the management of the 500+ monthly allowance away from the local authorities and its transfer to the Social Security Institution supervised by the Ministry of Family and Social Policy.

Consequently, when investigating the transformation of social rights delivered by the local government, with a goal to discern illiberal influence, the analysis must consider the functional and financial executive-aggrandizing activity.

The conclusion from the above is that an illiberal executive equals enlarged executive powers. Domestically, the executive managed to use the law-making powers to its political benefit,

sideline the judiciary to limit any checks on power, and exert top-down pressures on the subcentral authorities. Accordingly, the unfettered law-making power, weakened judicial protection of human rights[70], and unprecedented challenges to local provision of welfare, are the core implications of the aggrandizement for social rights. Looked at from a larger perspective, the horizontal and vertical power asymmetry ensuing from the institutional reforms consequential of executive aggrandizement equals *de facto* constitutional change.

### 1.3. Judiciary

Sweeping reforms adopted from 2015 onwards, transformed the domestic judiciary.[71] At the same time, changes in the realm of justice constitute the most paradigmatic illustrations of illiberal governance. The aim of the present section is to elucidate those rearrangements, which had a subversive impact on judicial independence, and thereby, on effective judicial protection of social rights.

The following overview is selective and only considers the most profound illiberal reforms. It zooms in on the changes targeting three specific institutions: the Constitutional Tribunal, the Supreme Court, and the National Council of the Judiciary. Discussed will be the capture of the Constitutional Tribunal, instrumental for the assumption of control over the constitutional review, the reforms of the NCJ, giving the government political influence over nationwide judicial appointments, and the reforms of the Supreme Court, establishing a disciplinary regime allowing to control adjudication and enforce judicial compliance. The analysis will demonstrate that a significant decline in judicial independence, ensuing from the reforms, translates into a visibly weaker legal protection of individuals when confronted with the domestic system of justice.

#### 1.3.1. Court system and judicial responsibility in the social realm

[70] Laebens, *supra* n. 51.
[71] The scale of the adopted reforms prompted the EU to trigger in December 2017 the procedure of Article 7 TEU against Poland due to the existence of a clear risk of a serious breach of the rule of law. Poland was the first member of the EU against which the procedure was activated; DW, 'EU triggers Article 7 against Poland', 20 December 2017, https://www.dw.com/en/european-commission-triggers-article-7-against-poland/a-41873962, visited 17 June 2024.

Understanding the scale of illiberal interference and its implications for social rights, requires having at least a general idea of the arrangement of the domestic judicial framework as well as of the allocation of the social rights-related adjudicative functions among the respective courts. We shall thus begin by outlining the structure of the domestic court system.

Poland's judicial system consists of ordinary courts (district/regional, appellate and the Supreme Court) and administrative courts (following a two-level structure of voivodeship courts and the Supreme Administrative Court), both of which strands are engaged in social rights adjudication.[72] Also, the Constitutional Tribunal was vested in constitutional scrutiny of legislation, with several formal avenues for questioning the constitutionality of laws available to the individual. Two of them, by which the unconstitutionality of social legislation would be claimed most often, are the individual constitutional complaint and the review upon the court's referral made during an ongoing judicial proceeding.

Despite it being a subject of doctrinal controversies, and although the following inquiry eschews the discussions on enforceability and justiciability of constitutional social rights, we must raise the point of the constitutional courts' review powers with respect to social laws. This issue is vital to grasping the social rights-related consequences of the constitutional court's capture which will be explained next.

The initial doctrinal narrative regarding the breadth of the constitutional review of social rights was that the constitutional court's purview was very modest due to the constitutional limitation clauses of twofold nature. These constraints were included in the constitutional by-law clauses, enshrined along the specific social rights provisions, obliging the legislature to regulate different areas of welfare, and from the above-mentioned Article 81 of the Constitution. The argument was that, by declaring some constitutional social rights claimable only within the confines of statutory law, Article 81 essentially denies their status as enforceable constitutional rights and excludes the way for mounting a constitutional complaint.

Contrary to this assumption, rich constitutional jurisprudence, which developed over the years, confirmed that social rights mentioned in Article 81 can constitute formal bases for

[72] In a nutshell, ordinary courts decide all things social insurance, including cases regarding old-age and disability pensions, as well as health insurance-related entitlements. Depending on the size of the courts, some of them have specialized labor and social security divisions. Likewise, a Labor and Social Security Chamber was separated within the organizational structure of the Supreme Court. The remaining social rights cases falling within the scope of social assistance, unemployment benefits, housing assistance, and tax allowances, are tackled by administrative courts.

mounting the constitutional complaint, albeit only to assert that the level of protection guaranteed by the statute in question is below the bare minimum deriving from the Constitution. In such cases, the Constitutional Tribunal scrutinizes legislation against the constitutionally protected minimum standard. Such assessment is thus limited to the delineation of the core, the essence, of constitutional social rights.[73]

Starkly different is the position of the social rights provisions not mentioned in Article 81, including the right to social security and healthcare, which in light of their intentional exclusion from the scope of Article 81, were deemed directly enforceable.[74] They are regarded as social rights with a settled normative constitutional content.[75] This renders the Tribunal's authority for reviewing the laws implementing these constitutional provisions, more robust.

In any case, however, it is agreed upon that in the constitutional review process involving social rights, the Constitutional Tribunal can strike down statutory regulation only where there is a visible contrast between the state's economic capability and the level of afforded protection, as well as when the existing regulation encroaches upon other constitutional values, such as social justice, equality, or human dignity.[76]

Although the scope of the constitutional review and the extent of the Tribunal's deference to the legislature vary considerably depending on social provisions invoked, during the years of practice, the constitutional court proved to afford a crucial counter-majoritarian institution advancing the domestic level of welfare provision and protecting social rights from unduly legislative inroads.[77]

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[73] This applies to the provisions on the right to minimum wage, state policy of full employment, right to safe working conditions, the right to vacation, the rights of persons with disabilities, as well as to family support.
[74] Sadurski, *supra* n. 3, p. 265.
[75] Krzywoń, *supra* n. 19, p. 369 et seq.
[76] Krzywoń, *supra* n. 19, p. 367; W. Osiatyński, *Human Rights and their Limits* (Cambridge University Press 2009) p. 140; W. Sokolewicz and M. Zubik, Commentary to Article 2 in L. Garlicki and M. Zubik (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom I* (Wydawnictwo Sejmowe 2016) p. 162-163.
[77] In the context of the Tribunal's early adjudication see H. Schwartz, *The Struggle for Constitutional Justice in Post-Communist Europe* (University of Chicago Press 2000) p. 64-65; *See* for instance Judgment of the Constitutional Tribunal of 17 July 1996, K 8/96 where the Tribunal invalidated the law prohibiting indexation of pensions, as cited by Sadurski, *supra* n. 13, p. 237; Judgment of the Constitutional Tribunal of 6 April 1993, K 7/92 (unemployment benefit); judgment of the Constitutional Tribunal of 6 April 1993, K 7/92 (unemployment benefit); Judgment of the Constitutional Tribunal of 1 June 1993, P 2/93 (minimum subsistence); Judgment of the Constitutional Tribunal of 4 February 1997, P 4/96 (housing allowance); *see* also Sadurski, *supra* n. 3, p. 284-286.

### 1.3.2. Constitutional court's capture

The succeeding examination of the illiberal transformation of the preexisting judicial system encompasses reforms of three judicial bodies. To trace how the changes unfolded over time, leading to incremental erosion of judicial independence, the analysis follows a chronological order.

The Polish case of regime change can be said to have followed a classic illiberal trajectory, because the governing majority decided to target the constitutional court first. This choice followed two objectives: to eliminate the most powerful counter-majoritarian institution providing check on the legislative and the executive power, as well as to wield control over the content of the constitutional jurisprudence.[78]

Reforms began soon after the 2015 ballot, when the Parliament controlled by the newly elected majority formed by the Law and Justice party retroactively cancelled the appointments of five Constitutional Tribunal justices made by the prior majority, claiming that these nominations were premature and should have been left for the incoming majority.[79] Having annulled the nominations, the Parliament chose five new judges for the same seats. These candidates were immediately sworn by the President. The not-yet-reformed Constitutional Tribunal ruled on the matter and found that, indeed, two of the initial nominations were premature and unconstitutional, whereas the remaining three were lawful, creating an obligation on the side of the President to swear in the elected constitutional justices.[80] This, however, did not take place as the President refused to take the oath from the justices, explaining that all 15 seats in the Constitutional Tribunal were already filled. These events jumpstarted the crisis within the constitutional court which is ongoing at the time of writing.

Having installed five constitutional justices, the government followed with a spate of further reforms, including the change of the law on the functioning of the Constitutional Tribunal, replacement of the specialized staff and clerks, and procedural amendments allowing to block the "old" judges, appointed before the Law and Justice came to power, from ruling. Over time, as the

[78] J. Fomina and J. Kucharczyk, 'The Specter Haunting Europe: Populism and Protest in Poland', 4 *Journal of Democracy* (2016) p. 62.
[79] L. Garlicki, 'Constitutional Court and Politics. The Polish Crisis' in C. Landfried (ed.), *Judicial Power* (Cambridge University Press 2019) p. 146; M. Wiącek, 'Constitutional Crisis in Poland 2015–2016 in the Light of the Rule of Law Principle' in A. von Bogdandy et.al. (eds.), *Defending Checks and Balances in EU Member States* (Springer 2021) p. 16.
[80] Judgment of the Constitutional Tribunal of 3 December 2015, K 34/15.

terms of office of the "old" judges had been elapsing, new justices were appointed for the vacant seats. Judges nominated by the Law and Justice were either active politicians, or persons with clear connections to the ruling majority.[81] At the time of writing, all 15 justices of the Constitutional Tribunal were nominated by the governing majority. Several of these appointments followed unconstitutional procedure.[82] Likewise, the appointment of the President of the Constitutional Tribunal followed an irregular procedure.[83]

It is crucial that the erroneous composition of the Tribunal has implications for Poland's compliance with international law. For instance, the ECtHR in case *Xero Flor v. Poland* held that an unlawful composition of the Tribunal in a constitutional complaint procedure violates the guarantees of Article 6 of the ECHR.[84] Domestically, Supreme Administrative Court found that the presence of incorrectly appointed judges in the composition of the Constitutional Tribunal means that the entire court has been "infected" with illegality, and has therefore lost its ability to adjudicate in accordance with the law due to an imminent risk that it will decide with at least one "doubler-judge".[85]

Most importantly, however, the Tribunal's continued unlawful composition has far-reaching consequences for the legal weight of its decisions issued from 2015 onwards, particularly those taken in compositions including at least one unlawfully appointed "doubler-judge". Many domestic judges, legal practitioners and members of academia, refuse to consider effective the constitutional judgments issued after 2015. There is an ongoing discussion regarding whether these rulings should be derogated as part of the Constitutional Tribunal's future restoration.

Assuming control over the Constitutional Tribunal, being the only domestic authority vested in constitutional review powers, allowed the governing majority to legitimize further steps of the ongoing political-constitutional transformation.[86] Poland's illiberal Constitutional Tribunal,

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[81] Stambulski, *supra* n. 31, p. 340.
[82] Two of the three unlawfully appointed judges passed away which means that the governing majority made repeated unlawful appointments for these seats.
[83] L. Pech, P. Wachowiec and D. Mazur, 'Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action', 1 *Hague Journal of the Rule of Law* (2021) p. 7; Garlicki, *supra* n. 79, p. 154.
[84] ECtHR, 7 May 2021, No. 4907/18, *Xero Flor* v. *Poland*.
[85] Judgment of the Supreme Administrative Court of 16 November 2022, III OSK 2528/21 cited by Pech and Jaraczewski, *supra* n. 64, p. 16; the expression "doubler-judges" is commonly used to address the three justices initially appointed for the taken seats as well as all justices appointed for either one of those three seats since 2015.
[86] D. Landau, 'Myth of the Illiberal Democratic Constitution' in Sajó, Uitz, and Holmes, *supra* n. 33, p. 431; Sadurski, supra n. 65, p. 77; P. Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe', 1 *European Constitutional Law Review* (2019) p. 67; Sadurski, *supra* n. 249, p. 85.

as it is commonly addressed in the literature[87], was used to validate the flagrantly unconstitutional reforms targeting the Tribunal itself and other constitutional bodies, such as the Supreme Court or the NCJ.[88]

Moreover, the constitutional court was deployed to implement the government's political agenda when deciding on highly controversial and politically relevant cases. For instance, the Tribunal decided on the scope of the right to abortion and invalidated one of the legal grounds for pregnancy termination.[89] It has likewise ruled on the limitation of the right to assembly, allowing the governing majority to ban counterdemonstrations during its monthly marches commemorating the victims of the Smolensk air disaster.[90]

The above examples indicate that, following the capture, the Tribunal has become the government's enabler and its most fierce supporter.[91] These practices afford a blatant violation of the constitutional principle of separated state powers. In the literature, the ability to control the decisions of the other branches of state power is considered an aggravated form of executive aggrandizement and denoted in terms of an "executive hegemony".[92]

Equally illustrative of the level of the Tribunal's politicization are the judgments disregarding Poland's obligations under the European law. The Tribunal has on many occasions disrespected the principle of primacy of the EU law[93] and has found Article 6 ECHR incompatible with the Constitution.[94] Next, it held that Poland does not have to implement the CJEU's interim measures orders in cases regarding the domestic system of justice as they are contrary to the Constitution.[95] In one of the most recent judgments, of 11 December 2023, the Constitutional Tribunal declared that the EU has no competence to impose financial penalties on Poland.[96]

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[87] *See* T. Drinóczi, 'Illiberal Constitutional Courts of Hungary and Poland (Some Features and the Danger They Pose)', 8 *Państwo i Prawo* (2022) p. 3.

[88] *See* Judgment of the Constitutional Tribunal of 14 July 2021, P 7/20 in which the Tribunal confirmed the compatibility with the Constitution of the creation of the Supreme Court's Disciplinary Chamber and stated that the ruling of the CJEU claiming otherwise should be declared void; *see* also Judgment of the Constitutional Tribunal of 20 June 2017, K 5/17 validating the reform of the National Council of the Judiciary.

[89] Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20; see also A. Bień-Kacała, 'Nieliberalny sąd konstytucyjny w Polsce na przykładzie wyroku Trybunału Konstytucyjnego w sprawie aborcyjnej, sygn. akt K 1/2020', 5 *Przegląd Prawa Konstytucyjnego* (2022).

[90] Judgment of the Constitutional Tribunal of 16 March 2017, Kp 1/ 17.

[91] Stambulski, *supra* n. 31, p. 342; Sadurski, *supra* n. 249, p. 82.

[92] Uitz, *supra* n. 40, p. 453.

[93] Judgment of the Constitutional Tribunal of 7 October 2021, K 3/21.

[94] Judgment of the Constitutional Tribunal of 24 November 2021, K 6/21.

[95] Judgment of the Constitutional Tribunal of 14 July 2021, P 7/20.

[96] Judgment of the Constitutional Tribunal of 11 December 2023, K 8/21.

The conclusions following from the above for social rights protection are twofold. First, in negative terms, the Tribunal's function of reviewing the constitutionality of legislation was nullified.[97] The Tribunal was deprived of its role to effectively strike down unconstitutional social laws. In positive terms, the politicization of the constitutional court has already been used to achieve political goals at the expense of social rights protection. The abortion case is an example of such instrumentalized constitutional review.

The fact that the above conclusions might seem mutually exclusive by itself aptly depicts the intricacy of the illiberal institutional capture. The Tribunal was sidelined in the sense that its independence and impartiality in scrutinizing legislation were dismantled but, at the same time, in cases where it could validate the practices of the executive, the Tribunal was turned into government's enabler.

### 1.3.3. Politicization of the National Council of the Judiciary

The next step in exploring illiberal influences on the individual right to effective judicial protection would be to address the reform of the domestic system of judicial appointments. In late 2017, following the capture of the Constitutional Tribunal, the National Council of the Judiciary, being a constitutional body nominating candidates for all domestic judicial positions, became the target of rearrangements.[98]

As provided by the Constitution, the NCJ consists of, among others, 15 members "chosen from among judges."[99] The Constitution, however, does not stipulate who should appoint those judge-members. Over the years, prior to the discussed reforms, the understanding was that since the NCJ's remaining members include the MPs, senators, and a representative of the President, the members of the judiciary should be chosen by judges themselves as to avoid politicization. Such reading of the Constitution afforded a constitutional norm binding since the democratic transition.[100] It ceased to be effective when the Parliament amended the law and provided that the

[97] Pech and Jaraczewski, *supra* n. 64, p. 13.
[98] Article 179 of the Constitution; Following the nomination by the National Council of the Judiciary, the only requirement for entering the profession is to be sworn in by the President.
[99] Article 187 of the Constitution.
[100] W. Sadurski, *A Pandemic of Populists* (Cambridge University Press 2022), p. 101.

15 judge-members of the NCJ are going to be elected by the Parliament. This made the NCJ's composition subject to exclusively political decision-making.[101]

Following the entry into force of the new law, the terms of office of all former members of the NCJ were annulled, in breach of the constitutional guarantees protecting the length of their tenure.[102] The majority of the newly elected judge-members had personal connections to the Minister of Justice. They were either beneficiaries of the speedy judicial promotions, or have been previously demonstrating their public support for the government's activity in the realm of justice.[103]

As the reforms were in direct breach of the Constitution, the legality of any judicial appointments made since then by the NCJ, has been questioned. Especially perplexed became the situation within the Supreme Court, with "old" judges refusing to recognize new judicial appointments to the Supreme Court and questioning the validity of any decisions or rulings issued by the "neo-judges", that is the judges appointed by the reformed NCJ. Several preliminary rulings of the CJEU dealt with these questions. Crucial in this regard was the *A.K. and Others* case in which the CJEU elaborated a test for the Supreme Court to assess the independence of the NCJ as well as the judges it appointed.[104] By closely following these indications, the Labor and Social Security Chamber of the Supreme Court held that, in its current composition, the NCJ ceased to be independent of the executive and the legislature.[105] In a later judgment in the case *W.Ż*, the CJEU held that a decision of a judge whose appointment was in "clear breach of fundamental rules" governing judicial nominations, must be considered null and void.[106]

Beyond the Supreme Court justices, lower courts' judges across the country started to question the legality of judicial nominations of the "neo-NCJ" by relying on the jurisprudence of the CJEU and the EU provisions regarding judicial independence. By invoking these regulations, they were able to overrule the judgments produced by the "neo-judges" or deny adjudicating with them. In response to this strategy, the ruling majority elaborated a tool aimed at inhibiting referrals to the EU law and sanctioning the validity of all deficient judicial appointments. The so-called

[101] Wróblewska, *supra* n. 29, p. 142.
[102] Article 187(3) states that the term of office of the chosen members of the NCJ is four years.
[103] Judgment of the Supreme Court of 5 December 2019, III PO 7/18, at 49.
[104] CJEU 19 November 2019, Cases C-585/18, C-624/18 and C-625/18, *A.K. and Others* v *Poland.*
[105] Judgment of the Supreme Court of 5 December 2019, III PO 7/18, at 60.
[106] CJEU 6 October 2021, Case C-487/19, *W.Ż.* v *Poland*, at 161; this case concerned a decision by an irregularly appointed judge moving another judge from one court to another, without his consent.

"muzzle law" was adopted, prohibiting all domestic judges from relying on the EU law to challenge judicial appointment procedures.[107] Invoking the EU law despite the new regulations prohibiting to do so, was considered a disciplinary offence of a gravity sufficient to launch disciplinary proceedings. Since its implementation, the "muzzle law" has been successfully used to prosecute judges for applying the EU law. The scheme was not derogated even after the CJEU has found it incompatible with the EU guarantees of judicial independence, and consequently, as infringing upon the fundamental right to effective judicial protection.[108]

The outcomes of the NCJ's remodeling are pervasive and deeply affect the domestic legal order. Since the reform, the system of justice has been marked by legal dualism, wherein both lawfully and deficiently appointed judges adjudicate within the structure of the Supreme Court as well as lower, ordinary and administrative courts.

At the time of writing, more than two thousand judicial appointments nationwide were made by the "neo-NCJ". Legal scholars claim that all of these appointments will eventually have to be subject to verification.[109] It bears noting as well that any case decided by an ordinary or administrative court composed of a judge appointed by the "neo-NCJ" can be questioned against its legality.[110] This *status quo* impinges upon the legal standing of thousands of individuals which have had their case heard by the "neo-judges", contradicting thus the rule of law-derived demands for legal certainty. Adding complexity to this is the fact that beyond examples of flagrant violations, "the impartiality and moral integrity of specific judges"[111] coming from the post-2017 appointments cannot be assessed upfront, rendering it impossible to draw a clear line between the binding and non-binding rulings.

Ensuing is the lack of effective judicial protection in Poland, a conclusion reached directly by the ECtHR which, in one of its rulings against Poland, stated that "continued operation of the NCJ, as constituted by the 2017 Amending Act, and its involvement in the judicial appointments procedure perpetuates the systemic dysfunction as established above by the Court and may in the

[107] Act of 20 December 2019 amending the Act on System of Courts of General Jurisdiction, the Act on the Supreme Court, as well as Other Acts (Journal of Laws of 2020, item 190).
[108] CJEU 5 June 2023, Case C-204/21, *Commission* v *Poland*; CJEU has also held that the law is contrary to the fundamental right to respect for private life, the fundamental right to the protection of personal data, the principle of primacy of the EU law, the functioning of the preliminary ruling mechanism and the EU General Data Protection Regulation.
[109] Sadurski, *supra* n. 24, p. 102 citing a joint statement of Professors Adam Strzembosz and Andrzej Zoll.
[110] M. Krajewski and M. Ziółkowski, 'EU judicial independence decentralized: A.K.', 4 *Common Market Law Review* (2020) p. 1109.
[111] Opinion of Advocate General Bobek 8 July 2021, Case C-132/20, *BN, DM, EN* v *Getin Noble Bank S.A*., at 69.

future result in potentially multiple violations of the right to an independent and impartial tribunal established by law".[112]

### 1.3.4. Structural rearrangement of the Supreme Court

When reforming the NCJ, the governing majority has simultaneously proposed a new bill on the Supreme Court, setting out to change its composition and structure.[113] The initial idea advanced by the government was to annul the terms of office of all Supreme Court justices with a possibility of their subsequent reinstatement to be decided by the Minister of Justice. This bill was vetoed by the President who submitted his own legislative proposal.[114]

Ultimately, the governing majority reached a consensus with the President and attempted to remove the Supreme Court justices by changing the old-age regulations and applying them retroactively to the judges already in service. Retirement age was first unconditionally lowered from 70 to 65, but following vigorous public protests the provisions allowed judges who passed the age of 65 to submit a request to the President, asking him to permit their continued service.[115] Given the age structure of the Supreme Court justices, the law was relevant for over one third of the court's composition.

After six months since the entry into force of the new law, during which several attempts were made to force the Supreme Court justices including the First President out of office, on 2 October 2018, the European Commission launched proceedings against Poland before the CJEU. It alleged that Poland's new old-age regulations were incompatible with the EU standard on judicial independence, in particular, with the principle of irremovability of judges.[116] Equally, the fact that the President was allocated discretionary powers to decide on the Supreme Court judges' continued service, was claimed contradictory to the EU laws. On 17 December 2018, pending the judgment, the CJEU ordered interim measures prohibiting domestic application of the law.[117]

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[112] ECtHR 3 February 2022, No. 1469/20, *Advance Pharma* v *Poland*, at 365 cited by B. Grabowska-Moroz, 'Judicial dialogue about judicial independence in times of rule of law backsliding: Getin Noble Bank', 3 *Common Market Law Review* (2023) p. 804.
[113] The new law on the Supreme Court was adopted by the Parliament on 20 July 2017 but vetoed by the President.
[114] Law of 8 December 2017 on the Supreme Court (Journal of Laws of 2018, item 5) which entered into force on 3 April 2018. Between April and July 2018, the law was amended three times.
[115] Sadurski, *supra* n. 24, p. 106.
[116] CJEU 24 June 2019, Case C-619/18, *Commission* v *Poland*.
[117] CJEU 17 December 2018, Case C-619/18R, *Commission* v *Poland*.

Following the injunction, on 1 January 2019, the governing majority withdrew from the Supreme Court's reform.[118] This was the only time when the government implemented a ruling of the CJEU concerning judicial reforms. The reform's withdrawal notwithstanding, the European Commission proceeded with legal action against Poland. Eventually, the CJEU found the domestic attempts to lower the retirement age of the Supreme Court justices contrary to the EU law.[119]

Next to meddling with the Supreme Court's composition, legislative amendments provided for major changes to the court's structure. Two additional chambers were created: the Chamber on Extraordinary Review and Public Affairs and the Disciplinary Chamber. The former one was vested in adjudicating on the new type of claim, an extraordinary appeal, and was made responsible for deciding on legality of all types of domestic elections. Disciplinary Chamber, on the other hand, became responsible for administering the new disciplinary regime for judges, the operation of which was mainly cantered on prosecuting judges who questioned the status of the newly made appointments of the reformed NCJ. Hence, the Disciplinary Chamber was vested in the implementation of the "muzzle law" to seal the prior reforms of the NCJ and confirm the validity of any judgments issued by the "neo-judges".

With a significant percentage of its 120 justices coming from recent nominations by the "neo-NCJ", and the remaining "old" justices questioning the status the latter, the Supreme Court has been marked by strong polarization frustrating its daily performance.

Considered against the backdrop of the CJEU's indications of *A.K. and Others v Poland*, on how to scrutinize a given body's judicial independence, the Labor and Social Security Chamber of the Supreme Court found that the Disciplinary Chamber cannot be considered a court within the meaning of the EU law and Poland's Constitution.[120] Likewise, the ECtHR decided on that matter and held that the Disciplinary Chamber was composed of judges failing to meet the requirements of Article 6 ECHR, and therefore its overall composition was incompatible with the "very essence of the right to a "tribunal established by law.""[121] Finally, the CJEU ruled that the entire disciplinary regime for judges was incompatible with Article 19(1) TEU.[122] Despite these rulings – and the fact that the flagrantly unconstitutional character of the disciplinary regime

[118] Act of 21 November 2018 amending the Act on the Supreme Court (Journal of Laws 2018, item 2507) was signed by the President on 17 December 2019 and entered into force on 1 January 2019.
[119] CJEU 24 June 2019, Case C-619/18, *Commission* v *Poland*, at 126.
[120] Judgment of the Supreme Court of 5 December 2019, III PO 7/18, at 79.
[121] ECtHR 22 July 2021, No. 43447/19, *Reczkowicz* v *Poland*, at 277.
[122] CJEU 15 July 2021, Case C-791/19, *Commission* v *Poland*.

caused the EU to suspend the payment of the EU funds allocated to Poland[123] – the framework for prosecuting judges remained in place.

The above overview of the institutional reforms targeting three bodies central within the domestic justice system, made clear that the right to effective judicial protection has been considerably weakened.[124] Marija Pejčinović Burić, the Secretary General of the Council of Europe went as far as to claim that "obligation of Poland to ensure the enjoyment of the right to a fair trial by an independent and impartial tribunal established by law to everyone under its jurisdiction is not, at this stage, fulfilled".[125] Hence, even if a significant percentage of the "old" judges nationwide do fulfill the obligations regarding judicial independence, considered at large, domestic judicial system has ceased to provide, at all times and in all cases, the necessary guarantees enabling individuals to effectively seek their rights in front of the courts.

## 2. Normative framework

Having outlined illiberalism's destructive effect on the institutional structures, we can turn to exploring its substantive agenda. The goal of the following investigation is to assess whether the moral values espoused by illiberalism affect social rights. To analyze this issue in the specific Polish social context, we will consider how illiberalism understands open-ended constitutional concepts routinely employed in the lawmaking or adjudication to either advance or retrench domestic protection of social rights. The triad of the rule of law, equality, and social market economy was chosen as offering a diverse representation of the moral objectives enshrined in the Constitution, often invoked in social rights cases.

Given that illiberalism is morally and ideologically hostile to the values of liberal constitutionalism but must refer to them as intrinsic to the underlying constitutional framework, it distorts the meaning of liberal values. When applied in the law-making or employed by the courts, illiberal views on the standard liberal principles alter the content of law. Hence, illiberalism

[123] T. Bielecki, 'EU Suspends Poland's Covid Recovery Funds Over Rule of Law Violations', *Gazeta Wyborcza*, 3 September 2021, https://wyborcza.pl/7,173236,27529335,eu-suspends-poland-s-covid-recovery-funds-over-rule-of-law-violations.html, visited 17 June 2024.
[124] Bień-Kacała, *supra* n. 27, p. 280.
[125] Council of Europe, Report by the Secretary General under Article 52 of the ECHR on the consequences of decisions K 6/21 and K 7/21 of the Constitutional Court of the Republic of Poland, No. SG/Inf(2022)39, 9 November 2022, https://archiwumosiatynskiego.pl/images/2023/06/SG_Inf202239E-2.pdf, visited 17 June 2024, at 29, 31.

advances its political agenda through reinterpretation of the fundamental constitutional values, in which understandings it then anchors the newly adopted laws. The following examination will consist in discerning such practices with respect to the three constitutional principles under scrutiny.

The analysis first lays out the domestic notion of the rule of law and explains the challenges coming from an illiberal redefinition of its basic premises, depicted under the label of "illiberal legality". Next, it tackles the constitutional demands for equality and demonstrates how illiberalism reformulates them to impose a concrete societal arrangement. Considering the gendered inclinations of illiberalism, the most far-reaching reinterpretations are claimed to have targeted the gender equality provisions. Finally, the analysis delves into the domestic economic framework of social market economy, explaining the extent to which illiberal economic policies interfere with its emphasis on safeguarding market freedoms.

### 2.1. The rule of law

The rule of law is a cornerstone of the European liberal constitutionalism[126] and as such, figures prominently in the debates on illiberalism in Poland. For a lack of a better expression, or simply because such assessments are considered self-explanatory, illiberal modifications of the preexisting constitutional structures are commonly deemed in breach of the rule of law. This is, however, not the relationship between illiberalism and the rule of law that we will conceptualize here. Explaining illiberal alternatives to the rule of law and their impact on social rights requires more sophisticated elaboration.

The focus of this outline is on the formal elements of the rule of law. That is not because the domestic rule of law concept is a purely formal one, a premise which must be strongly rejected given the profound significance of the notion in Poland's transitional constitutionalism. It is rather because the rule of law's formal components are intimately linked to the adoption and implementation of social rights while, at the same time, being subject to illiberal assaults. The core

[126] F.K. Upham, 'The Illusory Promise of the Rule of Law' in A. Sajó (ed.), *Human Rights with modesty. The problem of Universalism* (Springer 2004) p. 282; M.F. Brzezinski and L. Garlicki, 'Judicial Review in Post-Communist Poland: The Emergence of a *Rechtsstaat*?', 31 *Stanford Journal of International Law* (1995) p. 35.

of the illiberal critique of the rule of law, including its formal components, will be explained by invoking the phenomenon of "illiberal legality".[127]

The argument presented below is structured as follows. First, the domestic rule of law account is outlined, and the gravity of its formal components is emphasized. Next, the phenomenon of "illiberal legality" is explained, together with the challenges it poses to the rule of law-derived qualities of formal nature.

### 2.1.1. Formal rule of law requirements

Article 2 of the Constitution stipulates that Poland is a "democratic state governed by law, implementing the principles of social justice." This provision was adopted in 1989, introducing the rule of law into the Polish constitutional design.[128] Drawing on the Western European experiences, the Constitutional Tribunal instantly recognized substantive potential captured in the notion. Accordingly, constitutional jurisprudence makes up the primary source to consult the substance of the domestic rule of law concept.

While the specific domestic articulation of the rule of law together with social justice, referring to the German conception of "social state"[129], encourages to reinterpret a duty of positive action in the social realm, this is not an aspect of the rule of law with which illiberalism interacts. It is likewise outside the scope of the domestic illiberal assaults that the value-driven and robust rule of law definitions encourage the states to actively protect social rights.[130]

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[127] T. Drinóczi and A. Bień-Kacała, 'Illiberal Legality' in Drinóczi and Bień-Kacała, *supra* n. 29, p. 219 et seq.

[128] L. Garlicki, 'Materialna interpretacja klauzuli demokratycznego państwa prawnego w orzecznictwie Trybunału Konstytucyjnego' in S. Wronkowska (ed.), *Zasada demokratycznego państwa prawnego w Konstytucji RP* (Wydawnictwo Sejmowe 2006) p. 123.

[129] Garlicki, *supra* n. 128, p. 123; P. Tuleja, 'Zastane pojęcie państwa prawnego' in Wronkowska, *supra* n. 128, p. 55; S. Wronkowska, 'Charakter prawny klauzuli demokratycznego państwa prawnego (Art. 2 Konstytucji Rzeczypospolitej Polskiej)' in Wronkowska, *supra* n. 128, p. 110; Similar formulations adhering to the German *sozialer Rechtsstaat* as a model solution, were entrenched in Spain and Romania. Article 1(1) of the Constitution of Spain of 1978 states that Spain is "a social and democratic State, subject to the rule of law". Article 1(3) of the Constitution of Romania of 1991 stipulates that "Romania is a democratic and social state governed by the rule of law."

[130] *See* for instance, International Commission of Jurists, *The Rule of Law in A Free Society: A Report of the International Congress of Jurists,* 5-10 January 1959, https://www.icj.org/wp-content/uploads/1959/01/Rule-of-law-in-a-free-society-conference-report-1959-eng.pdf, visited 4 July 2024, p. 93-94; B. Tamanaha, *On the Rule of Law. History, Politics, Theory* (Cambridge University Press 2004) p. 112-113; N.W. Barber, *The principles of constitutionalism* (Oxford University Press 2018) p. 116-117.

The point of intersection between the rule of law, illiberalism and social rights must be looked for in the rule of law's formal demands[131] reinterpreted by the constitutional court during transition times. At that juncture, by means of the so-called formal interpretation, Article 2 became a source of a variety of legislative requirements.[132] Central among them are the "principles of the orderly law-making"[133] stipulating protection of vested rights as well as protection of citizens' trust in the state and law, finding its roots in the German conception of *Vertrauensschutz*. The Constitutional Tribunal added that to uphold individual trust, the laws must be adequate, precise, and clear.[134] Beyond that, the principles of orderly law-making ought to secure a coherent and noncontradictory legal system.

Moreover, with a view to maintain legal certainty – an overarching principle of the "orderly lawmaking" – the rule of law requires that when passed, the laws provide an appropriate *vacatio legis*[135] and cannot be applied retroactively, unless to the benefit of individuals.[136] What also demands protection is the citizens' confidence in the binding force of established legal interpretations elaborated by courts.[137] Finally, under the "public trust" heading, the rule of law necessitates as well that the state protects vested rights and legitimate expectations[138], both of which cannot be withdrawn or otherwise modified at the expense of individual rights.[139]

The formal side of the rule of law implies as well that the laws do not accommodate arbitrary decision-making as that would be contrary to the principle of legality. Decisions taken by public authorities should be justified and rational.[140] Especially, an arbitrary nullification or extreme limitation of individual rights is excluded under the rule of law.[141] In a similar vein, the principles preclude the legislature from abusing its power by making promises without coverage,

[131] See Bárd and Kazai, *supra* n. 30, where the authors discern in a formal rule of law conception a framework to tackle the lack of compliance with the EU rule of law standard.
[132] As opposed to the substantive one which has been understood as making normative claims regarding the scope of protection of individual rights and freedoms; *see* Garlicki, *supra* n. 128, p. 126.
[133] Garlicki, *supra* n. 17 , p. 76; *see* also the cited Resolution of the Supreme Administrative Court of 12 March 2001, OPS 14/00 which contains an overview of all the principles.
[134] Judgment of the Constitutional Tribunal of 11 January 2000, K 7/99.
[135] Garlicki, *supra* n. 128, p. 124 et seq.
[136] Judgment of the Constitutional Tribunal of 22 August 1990, K 7/90
[137] Judgment of the Constitutional Tribunal of 13 April 1999, K 36/98.
[138] Judgment of the Constitutional Tribunal of 25 June 2002, K 45/01.
[139] Garlicki, *supra* n. 17, p. 7; M. Kordela, 'Formalna interpretacja klauzuli demokratycznego państwa prawnego w orzecznictwie Trybunału Konstytucyjnego' in Wronkowska, *supra* n. 128, p. 148.
[140] Kordela, *supra* n. 139, p. 148.
[141] Judgment of the Constitutional Tribunal of 22 June 1999, K 5/99 cited by Kordela, *supra* n. 139, p. 152.

withdrawing from the lawmaking, or enacting laws the effectiveness of which is illusory and merely symbolic.[142]

These principles inform the processes of legal norms' production. Compliance therewith, or its lack, come to light in the subsequent processes of the laws' implementation and adjudication and shape the legal standing of individuals versus public authorities. In an institutional landscape equipped with a functional constitutional court, legislation may be nullified if the process of its adoption did not observe the formal requirements.

In line with one of the leading rule of law typologies[143] dividing the phenomenon's features between those of formal and substantive nature, the above stipulations match the formal accounts.[144] That is because they focus on the technicalities regarding the form that the law takes, rather than on the law's content.[145] The formal rule of law conceptions do not specify any objectives that the law should pursue.[146] Domestically, the formal interpretation of the rule of law dominates over the substantive one.[147]

However, according to the abundant rule of law literature, alone the formal notions contain far more aspects than outlined above. This is also true regarding the domestic concept which, next to all the mentioned features, refers as well to the separation of powers and the right to fair trial.[148] Such a broad understanding of the rule of law, extending to the aspects of institutional nature, was

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[142] E. Łętowska and J. Łętowski, *Towards to [sic] the rule of law* (SCHOLAR 1996) p. 119-120; Judgment of the Constitutional Tribunal of 18 January 2013, K 18/10; Judgment of the Constitutional Tribunal of 9 June 2003, SK 5/03.

[143] G. Napolitano, 'The Rule of Law' in P. Cane et. al. (eds.), *The Oxford Handbook of Comparative Administrative Law* (Oxford University Press 2020) p. 422.

[144] The elaboration of this distinction dates back to the 19th century and is used interchangeably with the 'thin' and 'thick' classification; K.-P. Sommermann, *Staatsziele und Staatszielbestimmungen* (Mohr Siebeck 1997) p. 223; Tamanaha, *supra* n. 130, p. 91; Napolitano, *supra* n. 143, p. 422.

[145] Barber, *supra* n. 130*,* p. 116; Napolitano, *supra* n. 143, p. 422; Among the most fierce advocates of the formal conceptions the scholarship enumerates Friedrich Hayek, Lon Fuller and Joseph Raz; *see* J. Raz, *The Authority of Law. Essays on Law and Morality* (Oxford University Press 1979) p. 220-21.

[146] Overall, however, the mere fact that the domestic notion explicitly refers to social justice speaks on behalf of its classification among substantive accounts. Indeed, the domestic rule of law notion is substantive and robust and was employed to scrutinize the laws in terms of their fairness; the Judgment of the Constitutional Tribunal of 8 May 1990, K 1/90 instigated substantive interpretation of the rule of law as suggested by Garlicki, *supra* n. 128, p. 124 et seq.

[147] S. Wronkowska, 'Zarys koncepcji państwa prawnego w Polskiej literaturze politycznej i prawnej' in S. Wronkowska (ed.), *Polskie dyskusje o państwie prawa* (Wydawnictwo Sejmowe 1995) p. 75-76 cited by Wróblewska, *supra* n. 29, p. 137.

[148] Wróblewska, *supra* n. 29, p. 135; Kordela, *supra* n. 139, p. 155-157; for a similar conclusion regarding the German *Rechtsstaat*, *see* K.-P. Sommermann, Commentary to Article 20 in H. von Mangoldt et.al. (eds.), *Kommentar zum Grundgesetz. Band 2* (C.H.Beck 2018) p. 106; for the right to fair trial as part of the formal conceptions, *see* also Napolitano, *supra* n. 143, p. 422.

necessitated by the lack of an explicit constitutional anchor for these varied institutional elements under the democratic transition.[149]

### 2.1.2. "Illiberal legality"

Research on illiberalism in Poland and beyond uses the term "illiberal legality" to describe illiberal violations of the rule of law.[150] Just as illiberals in power elaborated multiple strategies to undermine the substantive and formal rule of law aspects, "illiberal legality" encompasses a plethora of different illiberal practices.

"Illiberal legality" encapsulates the process of hollowing out the rule of law demands against arbitrary power. Additionally, "illiberal legality" sets out relativization[151] of the rule of law and its opportunistic use, depending on whether invoking the phenomenon in a concrete case can contribute to achieving a given political goal.[152] The gist of "illiberal legality" was aptly put by Martin Krygier who held that "the underlying motivation of illiberals is to exploit existing rule of law provisions for anti-rule of law purposes".[153]

It must be concluded, however, that although illiberal governments adhere to formal conceptions of legality in that they transform the preexisting constitutional-political systems by employing the legal apparatus, this does not mean that they respect even the thinnest of the formal rule of law accounts. What they rely on is merely some illiberal version of legality which fails to meet the requirements of the rule of law.

For the purposes of the present analysis, it suffices that the scope of "illiberal legality" is narrowed down to cover the specific case of domestic disregard for the above formal requirements derived from the rule of law. Indeed, illiberal actions aimed at suppressing the legislative dimension of the rule of law are visible.

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[149] Between 1989 marking the beginning of the democratization process and 1997 when the liberal-democratic constitution was adopted, Poland's system of government was first based on an amended communist Constitution of People's Republic of Poland of 1952 and next, on the so-called Small Constitution of 1992.
[150] Most fully elaborated in the previously cited Drinóczi and Bień-Kacała, *supra* n. 29 and Drinóczi and Bień-Kacała, *supra* n. 22; For the meaning of "illiberal legality" in an international context, *see* M. Krygier, 'Illiberalism and the Rule of Law' in Sajó, Uitz and Holmes, *supra* n. 33, p. 543 et seq.
[151] Drinóczi and Cormacain, *supra* n. 22, p. 271; Bień-Kacała, *supra* n. 27, p. 279.
[152] Drinóczi and Bień-Kacała, *supra* n. 22, p. 38, 96 et seq.
[153] Krygier, *supra* n. 150, p. 544.

First, ambiguity regarding the legal nature and consequences of decisions taken by the "neo-judges" is blatantly against the principle of citizens trust in law and state, protected under the rule of law. Individuals subject to any decisions taken by the "neo-judges" cannot rely on stability and irrevocability of their legal situation as it was shaped by irregularly appointed judges.

Next, the rule of law demands as well that the judgments are respected and implemented.[154] Opposite practices have been discernible under illiberalism. Especially, during the process of the constitutional court's dismantling, the government repeatedly refused to publish those judgments of the Constitutional Tribunal which could have precluded the ongoing reforms.[155] Moreover, an intentional suspension of the constitutional rulings' publication has also taken place in a social rights case regarding abortion.[156] Such practices negatively affect individual's ability to adjust their behavior to the legal changes happening on-the-ground. That is to say, especially where the law decides on such intimate aspects of citizens' lives, the lack of any timely prospects on the law's continued effectiveness deprives citizens of the possibility to adjust their conduct accordingly.

The issue of the lack of implementation has further rule of law-related ramifications. It follows from the principle of public trust in the law that individual reliance on established judicial interpretations deserves protection. Hence, where the lack of implementation culminates in legal uncertainty and divergent interpretations across courts, this must also be considered in breach of the rule of law.

One could risk a statement that, given the leading role of the formal rule of law demands among all requirements reinterpreted from Article 2 of the Constitution and noting that all other formal rule of law aspects are explicitly protected by the respective constitutional provisions, by disregarding the formal elements, illiberals attack the very core of the domestic rule of law concept.

The above made clear that when adopting the law, illiberals repudiate the legislative fundamentals constituting the formal side of the rule of law. These practices are indicative of "illiberal legality" as a phenomenon depicting the process of distortion of the established rule of law understanding. It is finally crucial to reiterate that while the illiberal assault on the formal rule of law requirements continues to unfold, there is no counter-majoritarian institution able to strike

[154] Judgment of the Constitutional Tribunal of 8 May 2000, SK 22/99.
[155] R. Mańko, '*Exceptio popularis*: Resisting Illiberal Legality' in R. Mańko et al. (eds.), *Law, Populism, and the Political in Central and Eastern Europe* (Routledge 2023) p. 118 et seq.
[156] Judgment the Constitutional Tribunal of 22 October 2020, K 1/20.

down legislation for failing to observe the procedure or in any other way enforce compliance with the rule of law standard.

## 2.2. Equality

To weaken the principle of equality and antidiscrimination mechanisms has been a vital point on the domestic illiberal agenda.[157] This section traces how, driven by the ultimate goal of bolstering an alternative social arrangement, illiberalism managed to repurpose the domestic guarantees of equality. The main assumption is that illiberal egalitarian views enter into the mainstream of domestic social law through the notion of gender equality.

### 2.2.1. Equality clauses

The guarantees of equality are enshrined in several constitutional provisions. Article 32(1) is a general equality clause stipulating that "All persons are equal before the law. All persons have the right to be treated equally by public authorities."[158] Beyond that, Article 32(2) sets out a general antidiscrimination clause proclaiming that "No one can be discriminated against in political, social or economic life for any reason." Finally, by demanding that "Men and women have equal rights in family, political, social and economic life", Article 33 proclaims gender equality.

These different formulations match the common classification of egalitarian clauses as rights and principles.[159] According to this divide, a principle of equality is included in preambles or substantive provisions stipulating that the respective rights pertain to "all" or "everybody".[160] Alternatively, it can be provided as a stand-alone provision next to other constitutional rights and

[157] Some refer to this phenomenon as "equality backsliding"; *see* B. Gaweda, 'Europeanization, Democratization, and Backsliding: Trajectories and Framings of Gender Equality Institutions in Poland', 3 *Social Politics* (2021) p. 629.
[158] A general equality clause, as opposed to a diffuse formulation, counts as a standard European solution. For instance, Article 3 of the German Basic Law stipulates a general notion of justice and is considered *lex generalis* versus the other constitutional provisions relating to equality, such as the Articles 3(2), 3(3), 6(5), 12(1), 33(1); B. Banaszak, 'Zasada równości w orzecznictwie Związkowego Trybunału Konstytucyjnego w Republice Federalnej Niemiec' in L. Garlicki and J. Trzciński (eds.), *Zasada równości w orzecznictwie trybunałów konstytucyjnych* (Wydawnictwo Uniwersytetu Wrocławskiego 1990) p. 113.
[159] W. Borysiak and L. Bosek, Commentary to Article 32 in M. Safjan and L. Bosek (eds.), *Konstytucja RP. Tom I* (C.H.Beck 2016) p. 834; M. Masternak-Kubiak, 'Prawo do równego traktowania' in B. Banaszak and A. Preisner (eds.), *Prawa i wolności obywatelskie w Konstytucji RP* (C.H.Beck 2002) p. 137.
[160] J. Clifford, 'Equality' in S. Farrior (ed.), *Equality and Non-Discrimination under International Law* (Routledge 2015) p. 430 et seq.

freedoms to guide or moderate their application. As a right, equality amounts to a positive claim not to be discriminated against, or in other terms, a right against discrimination.

Attaching this distinction to domestic provisions, Article 32(1) stipulates a right to be treated equally by public authorities. Looked at as a principle, equality is a fundamental component of the constitutional text and it is rare to consider any constitutional rights or freedoms in separation from it.[161] It translates into three fundamental demands – to treat equal equally, unequal unequally, and those who are different, differently[162] – and when invoked together with other substantive provisions, it tailors their application.[163]

Phrased out as a right, equality stands for equal treatment in the lawmaking (equality in law) and equality in the application of law (equality before the law).[164] The former demand refers to the legislative process and constrains the legislature to adopt laws which satisfy the obligation of equal treatment. The content of law must be neither privileging, nor discriminating against any individuals or communities.[165] Equality before the law, on the other hand, demands equal treatment of individuals when the law is applied.[166]

In case of an alleged unjustified differentiation, a constitutional test applies. It begins with a "similarity assessment", that is a determination whether the subjects are similar enough to be compared against one another. The test resorts to equality in the descriptive sense to scrutinize whether two or more subjects belong to the same category identified with reference to the relevant characteristic.[167] Once similarity is confirmed, the next step is to consider whether individuals were treated alike.[168] It is only the conclusion that they were treated differently that leads to the

[161] L. Garlicki and M. Zubik, Commentary to Article 32 in L. Garlicki and M. Zubik (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II* (Wydawnictwo Sejmowe 2016) p. 119.
[162] M. Granat and K. Granat, *The Constitution of Poland. A contextual analysis* (Bloomsbury 2019) p. 206; Borysiak and Bosek, *supra* n. 159, p. 831.
[163] Garlicki and Zubik, *supra* n. 161, p. 119.
[164] W. Sadurski, *Giving Desert Its Due. Social Justice and Legal Theory* (Springer 1985) p. 78; Garlicki and Zubik, *supra* n. 161, p. 110.
[165] Masternak-Kubiak, *supra* n. 159, p. 121; Judgment of the Constitutional Tribunal of 24 October 1989, K 6/89.
[166] W. Sadurski, *Equality and Legitimacy* (Oxford University Press 2008) p. 96; Clifford, *supra* n. 160, p. 427; G. Marshall, 'Notes on the Rule of Equal Law' in J.R. Pennock and J.W. Chapman (eds.), *Equality* (New York: Atherton 1967) p. 263.
[167] Garlicki and Zubik, *supra* n. 161, p. 108; W. Sadurski, 'Równość wobec prawa', 8-9 *Państwo i Prawo* (1978) p. 53; S.I. Benn, 'Egalitarianism and the Equal Consideration of Interests' in Pennock and Chapman, *supra* n. 166, p. 63.
[168] B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (C.H.Beck 2012) p. 226; Sadurski, *supra* n. 167, p. 54.

"discrimination test", that is a final assessment whether the difference in treatment was justified or arbitrary.[169]

Differentiated treatment challenges the very idea of equality in law and equality before the law, but can be admissible, even necessary, in some contexts. A dissimilar treatment of similar subjects appears on the level of the lawmaking and application of law when justified by other concurring rights or freedoms at stake. Likewise, it can be applied to bridge the disparities which occurred due to the prior systemic discrimination (e.g. affirmative measures to foster inclusion of underrepresented communities) or gender-based factual disparities in the economic or social sphere (e.g. gender-based differentiation in the old-age regulations). Hence, a differentiating treatment is never unconstitutional *per se* but only if it fails to meet the demands for proper justification or implies discrimination.[170]

An overview of the constitutional formulations of equality would not be complete without addressing the gender equality clause, indicative of the domestic constitutional commitment to pursuing substantive equality between men and women.

It bears mentioning for context, that while formal equality presupposes "that things which are the same or similar should be treated in the same or similar ways"[171] and consequently, does not go beyond the requirement of an equivalent treatment of all, substantive equality recognizes the additional extra-legal factors culminating in a worse position of some members of society.[172] It stands for correction of these initial disadvantages.[173] Given that *de facto* equality cannot be a reasonable goal pursued by the state in all dimensions of public life, and it is the equality of opportunity that constitutes such commitment, the goal of gender equality must be viewed as a rare exception when substantive demands – meaning an intention to equip women and men with equal conditions in social, economic, and cultural settings – constitute a rational objective.

Finally, while illustrating the varieties of the domestic constitutional application of equality goes beyond the scope of this overview, it is worthwhile to at least invoke its boundaries by

[169] Garlicki and Zubik, *supra* n. 161, p. 109.
[170] Marshall, *supra* n. 166, p. 261-269.
[171] Clifford, *supra* n. 160, p. 421.
[172] There even exists a concept of the so-called "luck egalitarianism" which explicitly labels the inequalities over which an individual has no control in terms of "brute luck"; S. White, 'Equality' in D. Béland et.al. (eds.), *The Oxford Handbook of the Welfare State* (Oxford University Press 2021) p. 29; R.J. Arneson, 'Luck Egalitarianism and Prioritarianism', 2 *Ethics* (2000) p. 340.
[173] B. Zawadzka, *Prawa ekonomiczne, socjalne i kulturalne* (Wydawnictwo Sejmowe 1996) p. 27-29; Clifford, *supra* n. 160, p. 421.

mentioning such equalizing treatment that cannot be justified with reference to the constitutional guarantees. For beyond the commitment to gender equality, constitutional provisions cannot be understood as subscribing to the ideal of equality of results as one involving a too simplistic equalization. Especially, Poland's socialist past delivers telling examples of an overbroad pursuit of substantive equality through primitive equalization of citizens, implemented at the expense of the individual rights and freedoms. The inadequacy of such goals was also explicitly confirmed by the Constitutional Tribunal already prior to the adoption of the Constitution. Back in 1989, the constitutional court committed to being against "primitive egalitarianism".[174] This statement was formulated in the context of the universal and compulsory system of social insurance which, according to the Tribunal, implied an inadmissible "equalization" of citizens. When justifying the nullification of the law, the Constitutional Tribunal resorted to social justice and claimed that the reform violated its substantive demands. This case was not an exception. The early constitutional jurisprudence, although generally supportive of regulations implementing broad social policies, opposed to interpreting equality as granting "equally to everyone".[175]

The above overturns a seemingly uncontroversial premise that the greater the social commitment, the more egalitarian the formula of equality.[176] Domestic constitutional "call for equal rights"[177] does not imply equalization.

### 2.2.2. Equality: an illiberal perspective

Domestically, the governing majority has been advancing alternative views on equality. They are consequential of illiberalism's substantive political agenda and the moral objectives it espouses.

In essence, illiberal governance in Poland is marked by conservatism and traditionalism, attaching special significance to Christianity and protection of religious freedom. Conservative leanings are accompanied by the disregard for individual autonomy as well as an anti-pluralist rejection of different, non-heteronormative lifestyle choices. On the other hand, illiberalism's strong links to traditional values are discernible in the reemerging policy of family mainstreaming.

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[174] Judgment of the Constitutional Tribunal of 9 May 1989, Kw. 1/89.
[175] T. Dybowski, 'Zasada sprawiedliwości społecznej jako problem konstytucyjny w orzecznictwie polskiego Trybunału Konstytucyjnego' in 1 *Sądownictwo Konstytucyjne* (1996) p. 82.
[176] *See* P. Saunders, 'Inequality and Poverty' in Béland et.al., *supra* n. 172, p. 717.
[177] S. Baer, 'Dignity, Freedom, Equality: A Fundamental Triangle of Constitutionalism', 4 *University of Toronto Law Journals* (2009) p. 452.

As part of the expanding familialist discourse, illiberalism positions the "traditional family" - adhering to the male breadwinner model and a gendered division of labor - in the center of society.[178] Hence, illiberal hierarchy of moral values is part of the struggle for a concrete social arrangement.[179]

The above premises induced the illiberal reframing of the domestic egalitarian demands. An altered conception of equality has been either sanctioned directly through laws or enforced *de facto* in the practice of the state's institutional apparatus as well as in political discourse. Most heavily targeted have been two areas of the domestic equality protection: the anti-discrimination laws and the mechanisms promoting gender equality.

First, driven by the strong conservative inclinations, illiberalism discriminates against sexual minorities, in breach of the constitutional anti-discrimination clause. *De facto* discriminatory practices include police violence against the LGBTQ+ persons and multiple arrests of the LGBTQ+ activists.[180] However, verbal assaults have also been coming from the highest public officials.[181] During his presidential campaign in 2020, Andrzej Duda referred to the LGBTQ+ community as "an ideology" that promotes viewpoints more harmful than communism.[182] Finally, back in 2019, a nationwide anti-LGBTQ+ campaign launched aiming for the creation of the so-called "LGBT-free zones" across Poland. Stickers would be used to mark spaces where the members of the sexual minorities were not welcome. Even some local government authorities were engaged in this endeavor, having issued official resolutions declaring the respective regions "free of LGBT".[183]

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[178] A. Bień-Kacała, J. Kapelańska-Pręgowska and A. Tarnowska, 'Rise and Fall of Gender Equality in Poland' in I. Spigno et al. (eds.), *The Rights of Women in Comparative Constitutional Law* (Routledge 2023) p. 97.

[179] I. Jędrzejowska-Schiffauer, 'Nein zur „Ideologie"? Das rechtspopulistische Ziel einer homogenen und queer-feindlichen Gesellschaft in Polen', 1 *Zeitschrift des Deutschen Juristinnenbundes* (2023) p. 19.

[180] E. Douglas, 'Poland: Police arrest dozens of pro-LGBTQ+ protesters', *DW*, 8 August 2020, https://www.dw.com/en/poland-police-arrest-48-pro-LGBTQ+-protesters/a-54494623, visited 17 June 2024.

[181] For an overview of statements made by the politicians of the governing majority regarding the LGBTQ+ community, *see* P. Pacewicz and J. Szymczak, 'PiS' Homophobia. How the president, chairman, ministers and deputies aroused hatred of LGBTQ+ in Poland', *Oko Press*, 9 August 2019, https://oko.press/pis-homophobia-how-the-president-chairman-ministers-and-deputies-aroused-hatred-of-LGBTQ+-in-poland, visited 17 June 2024; see also Jędrzejowska-Schiffauer, *supra* n. 179, p. 19.

[182] *See* BBC, 'Polish election: Andrzej Duda says LGBT 'ideology' worse than communism', 14 June 2020, https://www.bbc.com/news/world-europe-53039864, visited 17 June 2024; LA Times, ' Polish president calls LGBT 'ideology' worse than communism', 15 June 2020, https://www.latimes.com/world-nation/story/2020-06-15/polish-president-calls-LGBTQ+-ideology-worse-than-communism, visited 17 June 2024.

[183] M. Bucholc, 'The anti-LGBTQ+IQ campaign in Poland: The established, the outsiders, and the legal performance of exclusion', 1 *Law & Policy* (2022); E. Korolczuk, 'The fight against 'gender' and 'LGBTQ+ ideology': new developments in Poland', 1 *European Journal of Politics and Gender* (2020) p. 167; Jędrzejowska-Schiffauer, *supra* n. 179, p. 20.

Next to these activities, constitutional jurisprudence delivers ample evidence that the protection of persons identifying with the LGBTQ+ community has been significantly limited under illiberalism and dropped below the constitutional standard set by the antidiscrimination clause. One case is particularly illustrative in this context. It concerned an entrepreneur who refused to provide printing services for an entity engaged in advancing the protection of the rights of LGBTQ+ persons. He claimed he did not wish to support such activity. The LGBTQ+ foundation sued the printer alleging a breach of a Misdemeanor Code provision prohibiting refusal of service without valid reason.[184] The case went through the whole ordinary courts structure and ended in the Supreme Court which, by upholding the rulings of the lower instances, convicted the printer for having intentionally and without sufficient reason refused to provide service.[185]

Of quite an opposite view regarding the printer's conduct was the Constitutional Tribunal which also dealt with the issue upon the referral by the Minister of Justice.[186] The Tribunal found the provision of the Misdemeanor Code which served to prosecute the printer, incompatible with the Constitution. According the to the Tribunal, Article 138 did not realize its anti-discriminatory purpose and, therefore, had to be overturned as ill-equipped to perform its main function.[187] The constitutional court further noted that because there are other legal ways of seeking justice in cases of discrimination, legal protection of Article 138 was not indispensable. The reality is that the Constitutional Tribunal nullified a piece of legislation which afforded an important legal avenue to seek redress in discrimination cases.[188] According to the Human Rights Commissioner, the provision was "the only effective means of protection against unlawful discrimination in access to services"[189]

The ruling has not only far-reaching negative implications for the level of anti-discriminatory protection in the realm of services provision but indicates the overall declining

[184] Article 138 of the Misdemeanor Code (Journal of Laws 2023, item 2119).
[185] Judgment of the Supreme Court of 14 June 2018, II KK 333/17.
[186] Judgment of the Constitutional Tribunal of 26 June 2019, K 16/17.
[187] Judgment of the Constitutional Tribunal of 26 June 2019, K 16/17, at 3.3.3.
[188] I. Wróblewska and W. Włoch, 'Denial of service in the light of the constitutional principle of equal treatment and prohibition of discrimination. Some remarks against the background of legal doctrine and constitutional jurisprudence in Poland and the Federal Republic of Germany', *Toruńskie Studia Polsko-Włoskie XVIII* (2022) p. 91.
[189] Statement of the Commissioner for Human Rights of 29 March 2018 submitted in the case K 6/17, No. XI.815.6.2018.AM, at 17, cited by Wróblewska and Włoch, *supra* n. 188, p. 91.

trajectory of nondiscrimination mechanisms and gives indirect political approval for engaging in the discriminatory practices on grounds of sexual orientation or gender identity.[190]

Second, moving on to gender equality, it must be noted that the domestic account of illiberalism is marked by backlash against gender egalitarian mechanisms.[191] It impedes the way towards equal rights for men and women through legal means, as well as by engaging in a hostile political narrative, both of which activities are grounded in traditional religious and family values. As will be demonstrated, the ruling majority's activity in the field of gender equality has been centered on dismantling the previous incremental progress.[192] For this reason, in the realm of human rights, it is gender equality that is the main target of the ongoing process of illiberalization.[193]

Hostile political discourse involves lack of respect for gender-neutral language, reduction of women's role to reproduction and care[194], open support for the traditional male-breadwinner family model, disrespect for the actual hindrances faced by women in the social, economic, and cultural settings[195], and cutting funding for the NGOs engaged in women's rights advocacy.[196] Embedded in the illiberal opposition to individualism are the constant attempts to curb female autonomy which have been particularly visible in the domestic backlash against reproductive rights.

This gender-hostile attitude stands behind the parliamentary majority not fulfilling its obligations to implement the Istanbul Convention.[197] Although Poland joined the Istanbul Convention in 2015, the government has since then purposefully and routinely failed to give effect to the legal obligations ensuing therefrom, calling the convention a document based on a "radical

[190] The ruling offers yet another illustration of the instrumental use of the captured constitutional court to deal with politically sensitive cases.
[191] Jędrzejowska-Schiffauer, *supra* n. 179, p. 20; W. Grzebalska and A. Pető, 'The gendered modus operandi of the illiberal transformation in Hungary and Poland', *Women's Studies International Forum* (2018) p. 164.
[192] W. Grzebalska, 'Gender Politics of "Illiberal Pragmatics" in the Polish Defense Sector', 4 *Politics and Governance* (2022) p. 62.
[193] M. Szczygielska, '"Good Change" and better activism: Feminist responses to backsliding gender policies in Poland' in A. Krizsán and C. Roggeband (eds.), *Gendering Democratic Backsliding in Central and Eastern Europe. A Comparative Agenda* (Central European University Press 2019) p. 124.
[194] K. Suwada, 'Genderizing Consequences of Family Policies in Poland in 2010s: A Sociological Perspective, 5 *Society Register* (2021) p. 46.
[195] Bień-Kacała, Kapelańska-Pręgowska and Tarnowska, *supra* n. 178, p. 96.
[196] In 2017, the ruling majority withdrew funding for an NGO helping female victims of domestic violence; see T. Cylka, 'Politycy PiS tłumaczą się z obcięcia dotacji dla ofiar przemocy', Gazeta Wyborcza, 21 January 2017, https://poznan.wyborcza.pl/poznan/7,36001,21301861,politycy-pis-tlumacza-sie-z-obciecia-dotacji-dla-ofiar-przemocy.html, visited 17 June 2024.
[197] The Council of Europe Convention on preventing and combating violence against women and domestic violence.

gender ideology" and opposing the value of "traditional marriage".[198] The political majority refused to provide specific legal instruments foreseen by the Istanbul Convention, hindering violence against women.[199] Moreover, the Polish Prime Minister has lodged a case with the Constitutional Tribunal, asking it to assess the document's compatibility with the Constitution.[200] The government's opposition to Istanbul Convention reached its peak in 2020, when a law was adopted limiting the domestic effectiveness of the latter.[201]

Most importantly, however, the illiberal majority adopted several laws directly contradicting the previous approach to gender equality and hindering its achievement. For instance, a piece of legislation which was criticized for having a negative impact on women's labor market participation, and thereby, negatively affecting the struggles for *de facto* economic equality between men and women, is the monthly child allowance of PLN 500, the so-called 500+.[202]

### 2.2.3. Illiberal assaults on gender equality in the social rights context

Having outlined the overarching consequences of illiberalism for the anti-discrimination mechanisms and for gender equality, we must focus specifically on whether illiberal egalitarian views permeate social law. Indeed, the intensifying hindrances to gender equality have been palpably affecting major fields of social rights provision.

Furst, the undeniable link between gender equality and social rights must be briefly addressed. The provision of social rights has been gendered, leading to different outcomes for men

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[198] See a press release of the most influential ultra-conservative organization Ordo Iuris, 'Skrajna ideologia zamiast walki z przemocą – analiza Konwencji stambulskiej i dokumentów GREVIO', 15 September 2020, https://ordoiuris.pl/rodzina-i-malzenstwo/skrajna-ideologia-zamiast-walki-z-przemoca-analiza-konwencji-stambulskiej-i, visited 17 June 2024; for an overview of the *status quo* regarding the Istanbul Convention see Bień-Kacała, Kapelańska-Pręgowska and Tarnowska, *supra* n. 178.

[199] Timea Drinóczi and Agnieszka Bień-Kacała enumerate the spheres of housing assistance, economic violence, and social support as those in which the under-implementation occurred; *see* Drinóczi and Bień-Kacała, *supra* n. 22, p. 38, 96 et seq.

[200] Case K 11/20 was pending for almost three years and was withdrawn in January 2024 by the new government.

[201] The Act of 20 January 2021 on changing the scope of The Council of Europe's Convention on preventing and combating violence against women and domestic violence of 2011 (Journal of Laws of 2021, item 149).

[202] This has been the flagship program of the Law and Justice government. With the average annual cost of approximately EUR 5,54 billion, it has also been the most expensive social policy ever introduced in Poland; *see* D. Szelewa, 'From Implicit to Explicit Familialism: Post-1989 Family Policy Reforms in Poland' in D. Auth, J. Hergenhan, B. Holland-Cunz (eds.), *Gender and Family in European Economic Policy* (Springer 2017) p. 145; P. Radzik, 'Wpływ rządowego programu "Rodzina 500+" na współczynnik aktywności zawodowej kobiet', *Studia Ekonomiczne Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach* (2018) p. 69; M. Gajewicz, 'Aktywność zawodowa kobiet a świadczenie wychowawcze', 1 *Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu* (2019) p. 40.

and women despite the neutral framing of law, a phenomenon most notable in the fields of labor market participation, family policy, and old-age pensions.[203] Therefore, one of the main avenues to pursue *de facto* equality between genders is through specific social policy solutions. In the above realms, measures accelerating gender equality aim at *de facto* equal rights, meaning equal pay, equal pension, equal access to labor market. The struggle for gender equality must take account of the discrepancies occurring despite the gender-neutral regulations, resulting from the deeply ingrained factual disparities. For the most part, the latter ensue from the strong entrenchment of the traditional models of labor division which perceive the role of women as limited to childbearing and care, rendering them economically dependent on men.

A legal instrument deployed to eradicate the preexisting economic and social cleavages between genders are the temporary positive measures, such as gender-based pensionable age differentiation, economic advantages in pensions calculation, legal measures to bridge the gender pay gap or incentivize female reengagement with labor market after having children. These solutions create more favorable conditions for women, whether in the social or economic setting, to accelerate the achievement of *de facto* equality. In practice, however, owing to diverging views on whether a given provision advances or hinders the way towards factual equality, positive measures are strongly contested and difficult to justify in legal terms. It may occur that a seemingly positive and thus, equality-enhancing measure ceases to produce positive change because of the circumstances of extra-legal nature. In such case, it must be eradicated as perpetuating the differences. Consequently, scrutinizing whether a concrete regulation leads to favorable outcomes is always context specific.

Moreover, the content of the measures undertaken to advance gender equality will always hinge upon the understanding of the gender equality ideal. For instance, a liberal attitude implies an egalitarian model of family policy, based on equal support for labor participation of both parents through high quality childcare and other family supportive schemes.[204] It protects female reproductive autonomy and provides liberal rights to abortion. On the other hand, a contrasting view that gender egalitarian demands must take account of the biological differences and distinguish between the female caring role and the male breadwinning functions, is reflected in

[203] For the role of reproductive rights for women's equality in family and society, *see* S. Mancini and N. Palazzo, 'The Body of the Nation: Illiberalism and Gender' in Sajó, Uitz and Holmes, *supra* n. 33, p. 415.
[204] M. Daly, 'Families, States, and Markets' in Béland et al., *supra* n. 172, p. 211.

more conservative approaches to family policy. It presupposes adoption of specific family policy schemes addressed exclusively or primarily to women, or although gender-neutral at first glance, in fact encouraging women to take on the bulk of childcare obligations and disengage with the labor market. In the sphere of reproductive healthcare, conservative views imply restrictive regulation of abortion laws.

Driven by the traditional values and a family-mainstreaming agenda, illiberalism taps right into the above liberal-conservative divide. It exploits the constructive ambiguity inherent to the notion of gender equality to put forth its own understanding of the concept.

Reformulation of the prior predominantly liberal reading of gender equality so that it matches conservative approach, has taken place incrementally. The groundwork for this change was laid by the domestic discourse on pensionable age, reproductive rights, and female labor market participation. These debates culminated in the lowering of the universal pensionable age and the implementation of a differentiation based on gender. They have likewise led to restrictions on the access to *in vitro* fertilization and emergency contraception, as well as to the development of family policies discouraging women from work. All these laws constitute solutions directly hindering the achievement of *de facto* gender equality.[205]

Concrete narratives surrounding the adoption of the new laws as well as their implications will be commented on in the respective chapters[206] but alone the enumeration of the reforms substantiates the conclusion that illiberalism radically transformed the domestic gender equality landscape.

### 2.3. Social Market Economy

We will conclude the outline of the normative constitutional framework by exploring illiberalism's approach to the economy. The analysis first introduces the domestic constitutional economic model and explains its emphasis on social rights provision and the specific rationales for production and allocation of social goods. Next, it explains the functioning of social market economy under illiberalism, highlighting illiberal economic goals and the spheres of the economy

[205] For such an argument in the context of pensionable age reform, *see* Bień-Kacała, *supra* n. 27, p. 281.
[206] Chapters 4, 5, and 8.

in which the presence of the illiberal state is most profound. Finally, the focus goes to discerning the fields of welfare provision upon which the illiberal economic practices could likely impinge.

Article 20 of the Constitution proclaims that "social market economy based on the freedom of economic activity, private ownership, and solidarity, dialogue and cooperation between social partners, constitutes the basis of economic system of the Republic of Poland." The adoption of this economic framework followed the German constitutional experience.[207] During the constitution-making process, social market economy was presented as a model standing behind the German "economic miracle" (*Wirtschafswunder*) consisting in a combination of efficiency and social rights protection.[208]

However, it was not the constitutionalization but legal interpretation of the social market economy model that turned out to pose a major difficulty following the adoption of the new constitution. This resulted from the fact that, first, the notion was not legal but economic in nature.[209] Second, there was no prior domestic legal practice to rely on.[210] Hence, the process of the constitutional reinterpretation of the principle's substantive content referred directly to the German legal doctrine. That said, the domestic understanding of the social market economy closely reflects the legal and economic ideas of German neoliberalism[211] and ordoliberalism of the Freiburg School (*Freiburger Schule*), affording two main intellectual strands that influenced the elaboration of the social market economy notion.[212] A quick reference to this theoretical

[207] The model of the social market economy thus conceived was implemented in Germany in 1948 following the monetary reform introduced by Ludwig Erhard. It finds no direct constitutional anchor in German Basic Law; H.J. Rösner, 'The Institutional Framework of a Social Market Economy' in H. Sautter and R. Schinke (eds.), *Social Justice in a Market Economy* (Peter Lang 2001) p. 62; *see* also H.F. Zacher, 'Social Market Economy, Social Policy, and the Law', 3 *Zeitschrift für die gesamte Staatswissenschaft* (1982) p. 372; C. Watrin, 'Zur sozialer Dimension marktwirtschaftlicher Ordnungen' in E. Streissler and C. Watrin (eds.), *Zur Theorie marktwirtschaftlicher Ordnungen* (Mohr Siebeck 1980) p. 476; C. Seiler, 'Gestaltungsfragen der Wirtschaftsordnung' in V.J. Vanberg (eds.), *Marktwirtschaft und soziale Gerechtigkeit* (Mohr Siebeck 2012) p. 82; Beyond Germany, social market economy was opted for in a number of jurisdictions, such as Austria, Czechia, and the Slovak Republic.

[208] P. Hampe, 'Wir die „Soziale Marktwirtschaft" ihrem Namen gerecht?' in M. Grömling and M. Taube (eds.), *Reflexionen zur sozialen Marktwirtschaft. Eine Festschrift für Wolfgang Quaisser* (Metropolis 2020) p. 142; E. Dworak and W. Kasperkiewicz, *Społeczna gospodarka rynkowa w RFN* (Omega-Praksis 1995) p. 4.

[209] A. Domańska, *Konstytucyjne podstawy ustroju gospodarczego Polski* (Wydawnictwo Sejmowe 2001) p. 107; this largely contributed to the social market economy becoming a point of interest in the economic, philosophical, or social contexts, rather than in the legal ones.

[210] S. Ehrlich, *Dynamika norm* (Państwowe Wydawnictwo Naukowe 1988) p. 213.

[211] German neoliberalism differs substantially from what American economic thought understands under the name. It was first synonymous with ordoliberalism. Over time, the term 'neoliberalism' was gradually pushed out by the notion of the 'social market economy' and the latter became the preferred denomination for the German economic model.

[212] Rösner, *supra* n. 207, p. 59; H. Lampert, *Porządek gospodarczy i społeczny w RFN* (Kontrast 1993) p. 62; G.W. Kołodko, 'O społecznej gospodarce rynkowej' in Biuro Trybunału Konstytucyjnego (ed.), *Podstawowe założenia*

background is instrumental to capturing the scope of the social commitment binding domestically under the social market economy.

In a nutshell, underlying *soziale Marktwirtschaft*, as conceived by Alfred Müller-Armack[213] and Walter Eucken[214], were two reflections. First, an ordoliberal critique of laissez-faire capitalism, and second, the opposition to widespread state intervention as a flawed means of pursuing social equality. At the same time, however, the founding fathers of the social market economy recognized that free market most fully facilitates individual activity and economic growth. They were also supportive of the claims for basic social security for vulnerable members of the society.[215] Consequently, the new model of market economy was conceived as a middle ground between capitalism and socialism, capable of mitigating the extremes of these two and of correcting their fundamental deficiencies.

### 2.3.1. The "social" under the market economy

As an introduction to welfare provision under the social market economy, we must first unpack the fundamental premise of reconciliation of the "social" and "economic" objectives. For social market economy aims to combine a liberal free market economy with elements of social state doctrine[216] while avoiding full-fledged laissez-faire and the widespread redistributive frameworks

*Konstytucji Rzeczypospolitej Polskiej* (Wydawnictwo Trybunału Konstytucyjnego 2010) p. 32; J. Ciapała, *Konstytucyjna wolność działalności gospodarczej w Rzeczypospolitej Polskiej* (C.H.Beck 2009) p. 71.

[213] Alfred Müller-Armack has coined the German term of *soziale Marktwirtschaft*; A. Müller-Armack, *Wirtschaftslenkung und Marktwirtschaft* (Verlag für Wirtschaft und Sozialpolitik 1948) p. 95; V.J. Vanberg, 'Einführung: Marktwirtschaft und „soziale Gerechtigkeit"' in Vanberg, *supra* n. 207, p. 6; C.L. Glossner, 'The making of the German post-war economy' in C.L. Glossner and D. Gregosz (eds.), *60 Years of Social Market Economy* (Konrad-Adenauer-Stiftung e.V. 2010) p. 11; R. Skarżyński, *Państwo i społeczna gospodarka rynkowa. Główne idee polityczne ordoliberalizmu* (Instytut Studiów Politycznych Polskiej Akademii Nauk 1994) p. 143.

[214] Founder of the Freiburg School, who drew up the "constitutive and regulative principles" of the economy (*die konstituierenden und regulierenden Prinzipien*) on the price mechanism and competition, but also the mechanisms to foster monetary stability, the promotion of private ownership, the freedom of contract, and those facilitating the stability of the economic policy; see Rösner, *supra* n. 207, p. 61 et seq; R. Janik, *Szanse realizacji „państwa opiekuńczego" w procesie integracji europejskiej* (Wydawnictwo Politechniki Częstochowskiej 2003) p. 71.

[215] H.F. Zacher, 'Social Policy in a Free Market Economy', 3 *Zeitschrift für die gesamte Staatswissenschaft* (1982) p. 346.

[216] P. Winczorek, *Komentarz do Konstytucji Rzeczypospolitej Polskiej z dnia 2 kwietnia 1997 r*. (Liber 2000) p. 33; R. Illinicz, 'Normatywny sens pojęcia „społeczna gospodarka rynkowa" w Konstytucji RP', 4 *Kwartalnik Prawa Publicznego* (2007) p. 171; Janik, *supra* n. 214, p. 71; S. Zawadzki, *Państwo o orientacji społecznej. Geneza-doświadczenia-perspektywy* (Scholar 1996) p. 50.

of welfare states[217] and centrally planned economies. It is precisely because of its position between capitalism and collectivism that social market economy was found to offer "the third way" (*dritter Weg*).[218]

Moving on to the strictly social assumptions, intervention is considered indispensable.[219] Social market economy not only allows but assumes the state's interference to correct the deficiencies produced by the free market.[220] This explains the state's commitment to provide social rights in many fields of statehood including housing, taxation, social security, social assistance, healthcare, and protection of work. Domestically, social market economy is associated with work-protective measures, such as those facilitating the achievement of full employment, minimum wage, and dignified working conditions.[221] The minimum of social welfare, including a positive claim to the existential minimum, is likewise argued to have roots in the social market economy.[222] The latter is also a legal source of the state's activity aimed at providing individuals with decent housing. Finally, the fact that the state lays down a framework for income redistribution from the rich to the poor, for instance through tax exemptions or progressive taxation, is also a social facet of the domestic model of market economy.[223]

Social market economy not only constraints the state to take up an active role in the social realm but stipulates specifically how welfare ought to be delivered. It sets boundaries for production and allocation of goods as well as for the regulation of the welfare-relevant markets such as labor or housing.

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[217] In the scholarly discussions on the social market economy, the Anglo-American notion of welfare state is juxtaposed with the German concept of the social state (*Sozialstaat*). Hence, when referring to the welfare state in this subsection, a conception is meant whereby the state takes full responsibility for the citizens' standing and engages in widespread production of goods. The social aspirations of the German social state notion were more modest, aiming to secure individuals against unexpected social risks. Elsewhere in the analysis, references to the welfare state in the domestic context simply mean a state which provides its citizens with basic social security.

[218] P. Häberle, 'Soziale Marktwirtschaft als „Dritter Weg": Ein Vorschlag für die Einbringung der sozialen Marktwirtschaft in das Grundgesetz – Sieben Thesen zu einer Verfassungstheorie des Marktes', 10 *Zeitschrift für Rechtspolitik* (1993) p. 388 et seq; E. Kundera, 'Koncepcje społecznej gospodarki rynkowej', *Acta Universitatis Wratislaviensis* (2015) p. 83.

[219] Illinicz, supra n. 216, p. 178; Skarżyński, *supra* n. 213, p. 146.

[220] A. Krzywoń, 'Ustrój gospodarczy RP' in M. Zubik (ed.), *XV lat obowiązywania Konstytucji z 1997 r.* (Wydawnictwo Sejmowe 2012) p. 24; Ciapała, *supra* n. 212, p. 77-78.

[221] K. Strzyczkowski, 'Konstytucyjna zasada społecznej gospodarki rynkowej jako podstawa tworzenia i stosowania prawa' in C. Kosikowski (ed.), *Zasady ustroju społecznego i gospodarczego w procesie stosowania Konstytucji* (Wydawnictwo Sejmowe 2005) p. 13.

[222] Skarżyński, *supra* n. 213, p. 150; Krzywoń, *supra* n. 220, p. 22.

[223] Zacher, *supra* n. 207, p. 373-374; Skarżyński, *supra* n. 213, p. 147.

The constitutional model of economy assumes that, as far as possible, production and provision of goods must be discharged by the private market and follow the rules of competition.[224] Given that social market economy recognizes that the free market is not self-sufficient, the state was allowed to take responsibility for direct provision of goods, albeit only those which either cannot be produced on the market (at least not as reliably), or cannot be allocated in a desired manner.[225] When these conditions occur, allowing the state to engage in the provision of goods or regulation of markets, it must observe the principle of market conformity.[226] The latter assumes that the interference must neither distort the competition nor the price mechanisms.[227] Subsidies are especially undesired as leading to direct price distortions.[228] The notion of market conformity, constituting a fundamental rationale for delineating the scope of public interference, allows for an intervention with the market *results* and not with the market *processes*.[229]

Social market economy draws up two fundamental value-laden rationales for redistribution of social goods and services. First, they must be allocated in an equality-enhancing manner.[230] In this context, the notion informing the distribution is that of equality of opportunity. It implies that "more equality" can be achieved within society through allocation that primarily targets poverty and secures the minimum of dignified existence, that is by improving the opportunities of the most disadvantaged and providing them with a fair start into the future.[231] Only when this minimum standard applies equally within society, the state can pursue higher levels of prosperity.[232]

The second notion guiding the allocation of social goods is the principle of subsidiarity[233] which assumes that redistribution cannot hinder private initiative or discourage individuals from developing their capabilities. Precisely because social market economy grew out of the criticism

[224] Zacher, *supra* n. 207, p. 373.
[225] H.F. Zacher, 'Das soziale Staatsziel' in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*. *Volume I. Grundlagen von Staat und Verfassung* (C.F. Müller 1987) p. 1080.
[226] C. Watrin, 'The Principles of the Social Market Economy - its Origins and Early History', 3 *Zeitschrift für die gesamte Staatswissenschaft* (1979) p. 421.
[227] Zacher, *supra* n. 225, p. 1081.
[228] European People's Party, *The Social Market Economy in a Globalised World*, 9-10 December 2009, https://www.epp.eu/files/uploads/2015/11/The_Social_Market_Economy_in_a_Globalised_World.pdf, visited 17 June 2024, p. 4.
[229] Rösner, *supra* n. 207, p. 63; M. Wörsdörfer, 'On the Economic Ethics of Walter Eucken' in Glossner and Gregosz, *supra* n. 213, p. 28.
[230] Rösner, *supra* n. 207, p. 62.
[231] An overarching objective of the social policy under the social market economy is to provide 'more equality' *("mehr Gleichheit")*; *see* Zacher, *supra* n. 225, p. 1082; 1084; 1091; D. Nientiedt, 'Success factors of the social market economy', *Friedrich Neumann Stiftung* (2020), p. 9.
[232] Zacher, *supra* n. 207, p. 384.
[233] Subsidiarity is a foundational notion intrinsic to the social market economy; *see* Janik, *supra* n. 209, p. 72.

of the welfare state, the founding fathers attached great weight to the promotion of self-responsibility (self-reliance) and individual satisfaction of basic existential needs.[234] Only when one's social needs cannot be satisfied despite their personal efforts, or these efforts constitute an excessive burden, the state intervenes.[235] That said, for the state to completely substitute personal initiative is prohibited under the social market economy.[236]

### 2.3.2. Illiberal economic policies and their implications for social rights

Aware of the fundamental premises intrinsic to the domestic economic model, we can move on to tackle the functioning of the social market economy under illiberal governance. It goes without saying that illiberalism interferes with the economy just as with any other field of statehood. Illiberalism's activity in the economic realm is typically so far-reaching that the outcomes of this transformation are claimed to amount to a new economic model of the so-called "illiberal state capitalism".[237]

The main indication of illiberalism's presence in the economy is the increased state interventionism[238], depicting conditions whereby "officials make – politically motivated – economic decisions over strategic investments, state ownership and regulation".[239] In line with this overarching premise, the domestic tendencies have been to expand state ownership[240] as well as increase regulation and centralization of specific areas of economy.[241]

Especially, the state has strengthened its grip on the banking and energy sectors and followed with largescale nationalization of major entities under the common label of "repolonization".[242] It further wielded straightforward control over state-owned companies by

[234] In German, *Selbstverantowrtung*; see Zacher, *supra* n. 225, p. 1062.
[235] Wörsdörfer, *supra* n. 229, p. 27; H. Sautter, '"Social Justice" in a Market Economy. Some Results of the Discussion' in Sautter and Schinke *supra* n. 207, p. 192; Nientiedt, *supra* n. 231, p. 9.
[236] A. Przymeński, 'Mieszkalnictwo socjalne w Polsce w procesie zmian', 3 *Ruch Prawniczy Ekonomiczny i Socjologiczny* (2021), p. 357.
[237] J. Ricz, 'The Anatomy of the Newly Emerging Illiberal Model of State Capitalism: A Developmental Dead End?', 14 *International Journal of Public Administration* (2021).
[238] L. Csaba, 'Illiberal Economic Policies' in Sajó, Uitz and Holmes, *supra* n. 33, p. 674 et seq.
[239] Ricz, *supra* n. 237, p. 1254.
[240] P. Kozarzewski and M. Bałtowski, 'State Capitalism in Poland', 1 *Annales Universitatis Mariae Curie-Skłodowska, sectio H – Oeconomia* (2022) p. 62; P. Ganga, 'Economic Consequences of Illiberalism in Eastern Europe' in Sajó, Uitz and Holmes, *supra* n. 33, p. 694.
[241] As suggested by Ricz, *supra* n. 237, p. 1258; *see* also Ganga, *supra* n. 240, p. 694.
[242] A. Toplišek, 'The Political Economy of Populist Rule in Post-Crisis Europe: Hungary and Poland', 3 *New Political Economy* (2020) p. 393; K. Bluhm and M. Varga, 'Conservative Developmental Statism in East Central Europe and

appointing loyal party supporters as managers and members of the supervisory boards. In return, the managers of state-owned companies have become the leading donors for political campaign purposes.[243] Finally, the National Bank of Poland running the state's monetary policy has been subordinated to the executive, despite its constitutionally guaranteed independence.

It has been aptly summarized elsewhere that "illiberal states are using diverse forms of state interventions in the economy for purely political aims, thus, to maintain political power as long as possible."[244] Therefore, the objective of the illiberal economic practices is not to bolster efficiency or growth but to consolidate power and realize the previously set political goals.[245] Understood as such, the domestic illiberal economic policies are simply an extension of the previously highlighted executive power-grab.[246]

Finally, knowing how the illiberal economy operates on the ground, we must consider the spheres of welfare provision subject to state intervention though regulation, production or allocation of goods, in which the described illiberal patterns could emerge.

Under illiberalism, significant changes have been implemented in the realms of labor, housing, and tax policy. For instance, the government provided personal income tax exemptions for young adults of up to 26 years of age. It further engaged in nationwide housing construction and offered significant subsidies to private mortgage loans. In the field of labor protection, the governing majority adopted a law on the minimum wage for civil contractors. Indirectly, through market regulation forbidding trade on Sundays, the government has also improved labor conditions for those working in commerce.[247]

To discern illiberalism within the above reforms, their scrutiny against the backdrop of the core assumptions regarding welfare provision under the social market economy, could be

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Russia', 4 *New Political Economy* (2020), p. 652; L. Balcerowicz and A. Laszek, 'Poland's Economic Miracle won't Last', *Politico*, 10 October 2019, https://www.politico.eu/article/polands-economic-miracle-wont-last/, visited 17 June 2024; A. Sajó, 'The Constitution of Illiberal Democracy as a Theory About Society', 4 *Polish Sociological Review* (2019) p. 403.

[243] See, Notes From Poland, 'Polish ruling party raises campaign funds from state firm managers while private business supports opposition', 21 August 2023, https://notesfrompoland.com/2023/08/21/polish-ruling-party-raises-campaign-funds-from-state-firm-managers-while-private-business-supports-opposition/, visited 17 June 2024.

[244] Ricz, *supra* n. 237, p. 1258.

[245] Ricz, *supra* n. 237, p. 1259.

[246] D. Piątek, 'The illiberal model of state capitalism in Poland', 1 *Ekonomia i Prawo* (2023) p. 160.

[247] Importantly, the articulated purpose was to devote Sundays to religious activities. The justification attached to the draft law reads: "fundamental for declaring Sunday as a trade-free day is the doctrine of the catholic church"; *See* justification to the Act on the Limitations to Sunday Trading, 22 September 2016, https://orka.sejm.gov.pl/Druki8ka.nsf/0/65031EB21E0B978CC1258036005797DE/%24File/870.pdf, visited 17 June 2024, p. 6.

undertaken. For instance, housing is a field of economy in which people usually satisfy their needs privately, via the market. In this context, exploring the patterns of social housing allocation and homeownership support could provide new insights. Especially, such policies can lead to price distortions, and consequently, violate the principle of market conformity. Next, the negotiation of labor conditions is, at least in principle, subject to contractual freedom and yet the state chooses to regulate the standing of those particularly vulnerable to precarious work. Consequently, scrutinizing the regulation of the minimum wage by inquiring into its subjective coverage and the scope of the market interference it required, could be undertaken to draw the reform's similarity to illiberal economic patterns.

That said, all economic policies adopted in the social field under illiberalism can be examined against the backdrop of their compliance with the social market economy-derived stipulations. These requirements set out that the production of social goods cannot interfere with the market processes whereas the allocation must abstain from pursuing extreme visions of equality and avoids welfare-dependency. Similarly, the analysis can inquire whether the reforms lead to an overbroad regulation of the free market. Overall, the social policies in the primarily market-driven fields of welfare provision must conform the individual-state relationship endorsed by the social market economy in which the state's activity is geared towards assisting and supporting individuals, rather than substituting for them.[248]

## 3. Conclusion

This chapter has sought to explain the domestic illiberal transformation in the context of social rights. The constitutional foundations for welfare provision afforded a background against which this connection between social rights and illiberalism was conceptualized in detail. The analysis demonstrated that through its multi-faceted interferences with the institutional and normative constitutional assumptions underlying domestic welfare provision, illiberalism has been affecting social rights.

The first part of the investigation was devoted to the institutions. More precisely, it aimed to illustrate that illiberalism impinges upon social rights by altering the institutional structures of

[248] Przymeński, *supra* n. 236, p. 357.

liberal constitutionalism. The investigation has shown that illiberalism has managed to distort the functions of all state powers.

Especially palpable are the social rights implications of illiberalism occuring in the lawmaking and policy-setting activity of the legislature. More precisely, illiberalism must be looked for in the content of social laws and the procedural deficiencies accompanying their adoption. Next, illiberalism can be traced within the maximization of executive power which has led to the sidelining of the two remaining branches of government by interfering with the social responsibilities of the law-making and the judicial powers. Crucial are as well the attempts of the executive to curb the autonomy of the local government so as to hinder its capacity to deliver social rights on the local level. Finally, within the justice system, illiberalism has a twofold influence. Through a set of sweeping reforms of the domestic court system which created a situation of legal uncertainty regarding the effectiveness of the national courts' rulings, illiberalism has been impeding the provision of effective judicial review. Likewise, illiberal in nature is the process of production of politicized constitutional rulings by the captured Constitutional Tribunal.

Moreover, it bears indicating that all the discussed institutional reforms had a cumulative effect of an informal constitutional change. An institutional shift affected the principle of the separation of powers, mainly at the expense of the judiciary.[249] Hence, the following analysis of social rights must be attentive to the significant power imbalance, visible primarily in the nullification of the Constitutional Tribunal's functions. Since a constitutional check on the social legislation remains impossible[250], the analysis must take into account the possibility of an intrinsic unconstitutionality of the adopted social laws. Another feature to be considered in this respect builds on the above-indicated lack of the constitutional judgments' implementation and might occur in a triangular relationship between the Constitutional Tribunal, the legislature, and the lower courts. The absence of pertinent legislative reaction following the finding of unconstitutionality by the Constitutional Tribunal might push lower courts to decide without an explicit legal basis and thus, in an increasingly activist manner, questioning the constitutional division of powers.

The second chunk of the analysis analyzed the normative constitutional commitment and illustrated that the value-laden objectives pursued by the social law under illiberalism differ

[249] Drinóczi and Bień-Kacała, *supra* n. 22, p. 161 et seq; A Bień-Kacała, 'Informal Constitutional Change: The case of Poland', 6 *Przegląd Prawa Konstytucyjnego* (2017), p. 199 et seq.; A Bień-Kacała, 'Verfassungsdurchbrechung or Informal Constitutional Change. The Polish Experience', 5 *Przegląd Prawa Konstytucyjnego* (2020).
[250] Bień-Kacała, *supra* n. 27, p. 282.

contentwise compared to those that underlie liberal constitutionalism. Illiberalism rejects the established liberal understandings of the moral values underpinning social law and advances alternative views regarding their content.

The analysis of the three open-ended constitutional principles provided a cross-cutting summary of the illiberal moral commitments relevant in the social context. First, illiberalism substituted the rule of law with its antithesis called "illiberal legality". The latter term denotes a widespread domestic assault on the rule of law-derived formal requirements relevant to the law-making process.

Next, with respect to the principle of equality, illiberalism has placed a strong emphasis on the transformation of the domestic gender equality landscape with adverse impact on the protection of rights in the social policy fields, in which the struggle for equal rights constitutes the central issue. The latter include family policy, reproductive healthcare, and old-age pensions. The illiberal interference with the constitutional commitment to gender equality must be considered in the context of the attempts to entrench a new societal arrangement adhering to the notion of traditional family and religious values.

Finally, illiberal government has palpably increased the state's presence in the economy in ways that are contradictory to the constitutional basics of the free market economy. The succeeding analysis of social rights reforms must observe whether these tendencies extend to the social field. The social market economy-derived model of production and allocation of goods provides an adequate framework for scrutinizing the content of the social rights reforms adopted in the fields traditionally governed by the free-market forces, such as housing or labor.

In light of the above, it must be concluded that Chapter 2 made clear that illiberalism interacts with social rights, leaving it up for the reaming analysis to determine the nature of this interaction. To recognize illiberalism within the social rights reforms, based on the connections discerned by far, is the objective of the subsequent analysis.

# PART 2

## Chapter 3
## State-funded assistance to informal care for persons with disabilities

This chapter explores the problematic areas in the domestic regulation of cash benefits for informal caregivers, focusing on the inconsistencies in the adjudication of the nursing benefit.[1]

The argument developed in the present chapter was divided into three parts. First, an overview of the domestic care framework including professional care services and care-related cash benefits is provided. Next, the analysis zooms in on the eligibility criteria for the relevant cash-for-care benefits, explaining how the outdated (familialism-perpetuating), fragmentary (refusing to recognize the risk of dependency), and punitive (excluding work-care reconciliation) eligibility regulations laid the groundwork for inconsistent judicial enforcement with adverse impact on the individual rights of caregivers. Finally, in the third section, the jurisprudence on the main care-related cash benefit – the nursing benefit – is explored in-depth. The analysis demonstrates judicial efforts to solve the ambiguities of the eligibility criteria relating to the entitlement of further relatives, the moment of disability occurrence and the collision of entitlements. It shows that the continuous refusal of the legislature to adopt pertinent changes hinders judicial struggles for a stable and consistent adjudication.

### 1. Introduction to the domestic system of care for persons with disabilities

According to recent statistical data, there are around three million persons with disabilities currently living in Poland who have a formal disability assessment or its equivalent.[2] On top of that, it is estimated that, inclusive of all the individuals whose impairment was not legally

[1] Due to the limited scope of the present dissertation, covering the timespan between October 2015 and October 2023, this investigation does not tackle the legislative changes introduced to the care system as of 1 January 2024. The latter were adopted by the government formed in December 2023. It is notable that this new legislation resolved several issues tackled in the present analysis. For instance, it unified the system of cash benefits for informal caregivers by leaving only one cash-for-care scheme and phasing out the remaining two. It further allowed informal caregivers collecting the nursing benefit to engage in gainful activity.

[2] The Act of 27 August 1997 on the Occupational and Social Rehabilitation and Employment of Persons with Disabilities (Journal of Laws of 2024, item 44).

confirmed, the population might be around twice as big.[3] These numbers are an important indicator of the scale of disability as a policy issue and point out the gravity of the state's duty to secure effective protection of this group. Given the current demographic trends and the fact that the elderly constitute a significant percentage of the population of persons with disabilities, this responsibility will continue to grow in the coming years.

### 1.1. Legal framework for disability protection

The Constitution has recognized the vulnerability of persons with disabilities and made them subject to increased constitutional protection. Article 68 of the Constitution guarantees special healthcare protection to disabled, while Article 69 provides a more general stipulation that "public authorities shall provide, in accordance with statute, aid to disabled persons to ensure their subsistence, adaptation to work and social communication." Crucially, however, like most other constitutional social rights provisions, both articles afford mere directives of state policy, meaning that they cannot be invoked to claim any subjective rights. The constitution-maker, thus, did not take full responsibility for meeting the existential needs of disabled persons.[4] On the level of statutory law, the framework for protecting individuals with disabilities is complex. Disability-related schemes appear across the realms of social insurance, social assistance, and healthcare, offering either cash benefits or social services.[5] In personal terms, public support is addressed to both the disabled, and members of their families acting as informal caregivers.

Despite the constitutional status of disability protection and the robust statutory framework addressing the special demands for increased protection and care, there are several disability-related fields in which the state fails to deliver effective protection. The fact that the population of persons with disabilities remains most vulnerable to the risks of deprivation and social exclusion provides a general illustration of this negative pattern. It was proven that disability correlates with

[3] Supreme Audit Office, *Information on the results of the audit. Professional activation of persons with disabilities by the District Labor Offices*, No. P/21/043, 14 February 2021, https://www.nik.gov.pl/kontrole/P/21/043/, visited 19 June 2024, p. 6.

[4] D. Lis-Staranowicz, 'Prawo moralności publicznej, czyli o obowiązkach pozytywnych państwa po wyroku TK w sprawie K 1/20', 8 *Państwo i Prawo* (2021) p. 105; Judgment of the Constitutional Tribunal of 21 October 2014, K 38/13; Judgment of the Constitutional Tribunal of 6 October 2015, SK 19/14, at 2.3.

[5] Lis-Staranowicz, *supra* n. 4, p. 113-114.

poverty.[6] This link was confirmed by domestic statistical data according to which, in 2021, the rate of extreme poverty of households with at least one disabled person was 7%, whereas for the remaining families the average rate was 4%.[7]

Another major example of structural deficiencies is the domestic system of disability assessment. It consists of six different sub-systems, all of which provide assessments for different purposes.[8] This means that a person with disability must go through multiple disability examinations conducted by various commissions, scrutinizing different aspects of the person's medical, mental, and functional condition. Most of the time, assessments' validity is short-term, forcing individuals to seek reassessments even in cases where their health status is not subject to change. These administrative hindrances have a significant adverse impact on the capacity to exercise individual rights.[9] The new system of disability assessment has been long overdue. The beginnings of the law-making process date back to 2017, marking the creation of the first governmental expert committee. The law has been drafted since then, albeit without visible success. Implementation was postponed multiple times and according to the recent statements by the Ministry of Family and Social Policy, the new law should become effective in 2024.[10]

### 1.2. Availability of state-funded professional care services

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[6] European Commission, *European Semester 2020-2021 country fiche on disability equality*, February 2021, https://ec.europa.eu/social/BlobServlet?docId=23938&langId=en, visited 19 June 2024, p. 16.

[7] Statistics Poland, *The extent of economic poverty in Poland in 2021*, 30 June 2022, https://stat.gov.pl/files/gfx/portalinformacyjny/pl/defaultaktualnosci/5487/14/9/1/zasieg_ubostwa_ekonomicznego_w_polsce_w_2021_roku.pdf, visited 19 June 2024, p. 5.

[8] The systems of disability certification include: four systems of certification for the purposes of invalidity pensions (within: the Social Insurance Institution, The Agricultural Social Insurance Fund, Ministry of the Interior and Administration, and Ministry of National Defense), certification system concerning the levels of disability based on the Act on the Occupational and Social Rehabilitation and Employment of Persons with Disabilities, certification system for the purposes of entitlement to special education; Intervention of the Human Rights Commissioner, No. III.7060.1037.2015.D, 30 August 2021, https://bip.brpo.gov.pl/sites/default/files/Do_MRiPS_ws_wielotorowosci_%20orzecznictwa_30.08.2021.pdf, visited 19 June 2024; P. Kubicki and K. Roszewska, 'Ubezpieczenia społeczne i osoby z niepełnosprawnościami – wyzwania dla polityki publicznej i systemu prawnego', 2 *Ubezpieczenia Społeczne. Teoria i Praktyka* (2022) p. 3, 8.

[9] S. Nitecki, 'Przyznanie świadczenia pielęgnacyjnego w części stanowiącej różnicę pomiędzy uzyskiwaną emeryturą a kwotą tego świadczenia – glosa krytyczna do wyroku NSA z 8 stycznia 2021 (I OSK 2392/19)', 7-8 *Samorząd Terytorialny* (2020) p. 174.

[10] Intervention of the Human Rights Commissioner, No. BON-IV.070.72.2022.SJ, 28 September 2022, https://bip.brpo.gov.pl/sites/default/files/2022-10/Odpowiedz_MRiPS_stan_prac_reforma_systemu_orzecznictwa_28.09.2022.pdf, visited 19 June 2024.

One of the most problematic areas is the system of care for persons with disabilities, encompassing state-funded care services and care-related cash benefits addressed to informal caregivers.[11] Despite the growing demand for care[12], Poland has one of the lowest care expenditures among the EU countries.[13] There is a palpable scarcity of services and cash benefits. For instance, contrary to the statutory obligations, around 20% of municipalities in Poland do not provide residential care services for the dependent in their place of residence.[14]

Insufficient availability and low quality of care services is a result of an outdated model of institutionalized care. It is widely known that institutional care leads to poor outcomes in terms of the quality of life of the caretakers. Accordingly, a trend towards deinstitutionalization understood as "transition from institutional to community-based services"[15], preventing the isolation of persons with disabilities and fostering fuller realization of their individual rights to autonomy and participation, has been present across Europe for at least two decades.[16] Domestically, little emphasis has been placed on this transition.[17] This has a negative impact on the quality of care

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[11] European Commission, *supra* n. 6, p. 18 et seq.

[12] Dependency is projected to increase from 26.4 % in 2019 to 35.6 % in 2030 and 52.2 % in 2050; European Commission, *Long-term care report. Trends, challenges and opportunities in an ageing society* (2021) p. 321. For predictions on ageing, *see* D.E. Lach, 'Wspólnoty mieszkaniowe osób niesamodzielnych a rodzinne domy pomocy', 7 *Praca i Zabezpieczenie Społeczne* (2020) p. 17; D.E. Lach, *Niesamodzielność jako ryzyko socjalne* (Wydawnictwo Naukowe Uniwersytetu im. Adama Mickiewicza 2018) p. 49-50; According to Statistics Poland, until 2050, the number of elderly people of the age 65 and above will triple; Statisctics Poland, *Population forecast for 2014-2050*, 1 October 2014, https://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5469/1/5/1/prognoza_ludnosci_na_lata___2014_-_2050.pdf, visited 19 June 2024, p. 139-140; R. Bakalarczyk, 'Deficyt bezpieczeństwa emerytalnego opiekunów osób niesamodzielnych jako skutek dezaktywizującego zawodowo systemu opieki w Polsce', 4 *Ubezpieczenia społeczne. Teoria i Praktyka* (2017) p. 94.

[13] Supreme Audit Office, *Information on the results of the audit. Provision of respite care to caregivers of dependent persons,* No. P/21/062, 8 September 2022, https://www.nik.gov.pl/kontrole/wyniki-kontroli-nik/pobierz,lbi~p_21_062_20220314122249164725696 9~01,typ,kk.pdf, visited 19 June 2024, p. 6; European Commission and E. Pavolini, *Long-term care social protection models in the EU*, 2022, https://op.europa.eu/en/publication-detail/-/publication/670f407f-3572-11ed-9c68-01aa75ed71a1/language-en, visited 4 July 2024, p. 16 et seq.; R. Szarfenberg, R. Bakalarczyk and M. Kocejko, *Ekspertyza*. *Społeczne uzupełnienie tarczy antykryzysowej,* 30 April 2020, https://oees.pl/wp-content/uploads/2020/05/EKSPERTYZA-Spoleczne-uzupelnienie-tarczy-antykryzysowej-1.pdf , visited 19 June 2024, p. 34; European Commission, *supra* n. 12, p. 320.

[14] Supreme Audit Office, *Information on the results of the audit. At-home Care services provided to the elderly,* No. P/17/043, 22 May 2018, https://www.nik.gov.pl/plik/id,17440,vp,20012.pdf, visited 19 June 2024, p. 15.

[15] PACE, *Deinstitutionalization of persons with disabilities*, No. 15496, 8 April 2022, http://www.assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-EN.asp?fileid=29893&lang=en, visited 19 June 2024, at 3.

[16] M. Priestley, 'Disability' in Béland et.al., *supra* n. **Error! Bookmark not defined.**, p. 569.

[17] Such is the definition of deinstitutionalization used by the European Expert Group on the Transition from Institutional to Community-Based Care, https://deinstitutionalisation.com/cbc/, visited 19 June 2024; the term "deinstitutionalization" does not refer exclusively to the individuals with disabilities but also to the elderly, children in foster care, and homeless people.

services and the rights of disabled persons. The consequences of the lack of sufficient reform of institutionalized care came to public light during the COVID 19 pandemic when the pensioners of the nursing facilities were, despite their vulnerability, most exposed to the disease.[18]

Underdeveloped deinstitutionalization[19] means that the availability of solutions characteristic for such models of care, mainly including residential day-care and homecare services, is not sufficient.[20] On the other hand, access to the recently introduced new kinds of social services, is personally and geographically limited.

In personal terms, the domestic law provides that only a solitary, unmarried person without children and parents has a claim to state-funded professional nursing services.[21] Persons who have close relatives but live alone may be granted professional care services, but the decision is subject to administrative discretion.[22] Dependent persons living with a family member, are not entitled to any social services irrespective of the medical condition and occupational standing of their relatives impacting upon the factual capacity to perform care work. Hence, support may only be granted in cases of an absolute lack of self-care capacity and family assistance, an approach which is claimed to rely on a restrictive understanding of the subsidiarity principle.[23] Given that only a solitary person has a legal claim to be provided with professional assistance, the domestic arrangement indicates the family members as the primary agents responsible for providing care.[24]

What concerns the regional limitations in accessing professional care services established through the so-called Solidarity Fund (*Fundusz Solidarnościowy*)[25], the latter are only provided in chosen municipalities which had received earmarked financial support from the central

[18] Z. Głąb and M. Kocejko, 'Between safety and isolation: the governmental ministerial approach to care homes in Poland during the COVID-19 pandemic', 2 *Disability & Society* (2022) p. 2.

[19] *Ibidem*, p. 6-8; Kubicki and Roszewska, *supra* n. 8, p. 3; European Commission, *supra* n. 6, p. 18.

[20] European Commission, *supra* n. 6, p. 18; Bakalarczyk, *supra* n. 12, p. 106.

[21] Article 50(1) of the Act of 12 March 2004 on Social Assistance (Journal of Laws 2024, item 743); R. Babińska-Górecka, 'Prawo do świadczenia pielęgnacyjnego a kierunki rozwoju regulacji prawnej świadczeń pieniężnych związanych z potrzebą długoterminowej pomocy, opieki i pielęgnacji', *Praca i Zabezpieczenie Społeczne* 7(2021), p. 9.

[22] Article 50(2) of the Law on Social Assistance.

[23] On the role of subsidiarity in care policy, *see* I. Sierpowska, 'Pomocniczy wymiar opieki całodobowej a kierowanie do domów pomocy społecznej i ustalanie opłat za pobyt w placówkach', 2 *Państwo i Prawo* (2023) p. 77 et seq; S. Łakoma, 'Przyznawanie świadczeń niepieniężnych z pomocy społecznej w świetle orzecznictwa sądów administracyjnych – zagadnienia wybrane', 3 *Praca Socjalna* (2020) p. 172.

[24] Łakoma, *supra* n. 23, p. 160-170.

[25] The Act of 23 October 2018 on the Solidarity Fund (Journal of Laws 2018, item 2192); from 2020 onwards, four programs dedicated to persons with disabilities have been adopted: care services for disabled persons; respite care; care and residential centers; personal assistance.

government through competitive allocation of funds. Even in such cases, subsidies do not cover the entire cost, and additional funding must be secured by municipalities themselves. Considering that the professional care services are not provided country-wide and require taking part in competitive procedures, not every municipality is interested in offering them to their communities. Some do not run for funding at all.[26] This leads to significant differences across regions with respect to services' availability and accessibility.[27]

And yet the mainstream political debates rarely acknowledge the need for systemic re-regulation of public support granted to persons with disabilities and their caregivers. It has occurred in the past that the Constitutional Tribunal ruled to their disadvantage.[28] Consequently, to improve their standing, persons with disabilities are forced to resort to rent-seeking practices. During the last decade, there were three protest occupations of the Polish Parliament, during which persons with disabilities and their caregivers would enter the building of the Parliament and refuse to leave for as long as their demands remain unfulfilled.[29] And while this extreme strategy has proved successful in the past by having led to legislative changes, it illustrates the lack of political interest in comprehensive regulation of the issues at stake.

### 1.3. Long-term care: disability versus dependency

The quality and availability of care services for persons with disabilities is part of a larger debate. The state's responsibility to meet the care-related needs of persons with disabilities by offering a range of professional community-based, homecare and residential care services is considered under the heading of long-term care. In a nutshell, the latter refers to "support for those who are not able to independently perform activities of daily living".[30] Framed around the concept of dependency, long-term care is internationally recognized as a separate social risk, and

[26] Supreme Audit Office, *supra* n. 13, p. 8.

[27] European Commission, *supra* n. 6, p. 20; European Commission, *supra* n. 12, p. 332.

[28] *See* for instance, Judgment of the Constitutional Tribunal of 19 April 2011, P 41/09, in which the Tribunal did not find unconstitutional the provision defining the income threshold for social assistance as being equal for all families irrespective of how many disabled children they are raising. It likewise did not find unconstitutional the provisions granting a benefit of an equal amount irrespective of how many children the family raises; Judgment of the Constitutional Tribunal of 20 December 2012, K 28/11.

[29] J. Kubisia and K. Rakowska, 'What is a strike? Noted on the Polish women's strike and the strike of parents of persons with disabilities', 4 *Praktyka Teoretyczna* (2018) p. 22 et seq.

[30] U. Becker, 'Long Term Care in Europe: An Introduction' in U. Becker and H.-J. Reinhard (eds.), *Long-Term Care in Europe. A Juridical Approach* (Springer 2018) p. 1.

consequently, as an independent field of welfare provision.[31] The debates on long-term care held within the EU are focused on elaborating integrated solutions for providing affordable and high-quality care services to dependent persons. Crucially, however, long-term care is contentwise a broader term than disability-related care and refers as well to care for the elderly and children (pediatric long-term care).

Poland's social law does not provide care services within a separate framework of long-term care. The lack of a comprehensive and coherent approach to long-term care has been criticized by the European Commission.[32] Most importantly, domestic law does not recognize the social risk of long-term care dependency.[33] This further means that the system does not distinguish between dependency and disability.[34] And yet, as will be shown below, in addition to having a formal disability assessment, the right to some cash-for-care schemes is made contingent on demonstrating the "incapability of living independently" which, in fact, equals the basic prerequisite for long-term care.

Throughout the analysis we will refer to both dependency and long-term care as terms describing the factual state of persons with disabilities, and the factual care provided to them, accordingly, even though the risk of long-term care dependency was not regulated domestically.

## 2. Care-related cash benefits

Given the underdeveloped system of disability-related professional services, informal assistance and care play a major role in securing the needs of disabled people. The state offers several types of cash benefits to persons with disabilities and their caregivers which aim to cover at least part of care-related costs. Direct income transfers can be said to provide a substitution for what the state has failed to provide in kind.[35] A brief overview of the various benefits provided within the regime

[31] *Ibidem*, p. 4 et seq.; D.E. Lach, 'Few remarks on constructing a system to cover the risk of long-term care in Poland', 9 *Praca i Zabezpieczenie Społeczne* (2020) p. 44; the concept of long-term care refers to persons with disabilities, the elderly, and children. In the following the focus is on the first group.

[32] European Commission, *supra* n. 12, p. 331.

[33] Lach, *supra* n. 12, p. 61 et seq; Babińska-Górecka, *supra* n. 21; Lach, *supra* n. 31.

[34] On the role of this distinction, *see* Becker, *supra* n. 30, p. 4; B. Greve, 'Long-term care. What is it about?' in B. Greve (ed.), *Long-term Care for the Elderly in Europe* (Routledge 2017) p. 4.

[35] Cash benefits reach bigger sections of the population compared to homecare and residential services; *see* European Commission, *supra* n. 12, p. 320; Lach, *supra* n. 31, p. 48.

of social assistance[36] is necessary to explain the subsequent part's exclusive focus on the nursing benefit.

### 2.1. Cash benefits addressed to persons with disabilities

We can distinguish between the two fundamental schemes addressed directly to disabled persons.[37] Crucially, they cannot be collected jointly because the entitlement to one deprives of the eligibility for the other. First, the so-called nursing supplement (*dodatek pielęgnacyjny*)[38] constitutes an addition to the old-age or disability pension and, as of January 2023, equals PLN 294. It can only be granted to individuals who have an established right to either one of the above payments.[39] The second benefit is the nursing allowance (*zasiłek pielęgnacyjny*)[40] which is provided to persons with a formal disability assessment and equals PLN 215. The difference in the level of payments is controversial given that both benefits serve the same purpose, that is to cover part of the nursing- and care-related costs incurred by individuals incapable of self-care.[41]

Additionally, since 2019, a benefit of PLN 500 is allocated to those incapable of living independently (*świadczenie uzupełniające*).[42] Means-testing applies[43] and incapacity must be formally certified either through specific assessment of "inability to live independently" or by other forms of equivalent certification.[44] Ineligible are individuals entitled to other types of public payments such as old-age or disability pension. The specificity of this benefit consists in it not referring to disability. Rather, the requirement of "incapability to live independently" resembles the long-term care schemes relying on the risk of long-term care dependency, unforeseen by the domestic law. Hence, the main eligibility criterion for the benefit in question provides a telling example of the inconsistency within the disability-related legislation.

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[36] For an in-depth overview of the respective schemes, *see* A. Przybyłowicz, 'The Legal Positions of Persons Dependent on Long-Term Care in the Republic of Poland' in Becker and Reinhard, *supra* n. 30, p. 392 et seq.

[37] Babińska-Górecka, *supra* n. 21, p. 4.

[38] Article 75 of the Act of 17 December 1997 on Old-age and Disability Pensions from the Social Insurance Fund (Journal of Laws of 2023, item 1672).

[39] Kubicki and Roszewska, *supra* n. 8, p. 6.

[40] Article 16 of the Act of 28 November 2003 on Family Benefits (Journal of Laws of 2024, item 323).

[41] Judgment of Supreme Administrative Court of 9 July 2008, I OSK 1277/07.

[42] Law of 31 July 2019 on the Supplementary Benefit for Persons Incapable of Living Independently (Journal of Laws of 2019, item 1622).

[43] As of 2022, the income threshold is PLN 2157.80.

[44] Kubicki and Roszewska, *supra* n. 8, p. 8.

Overall, negligible amounts of payments additionally warranted by strict eligibility criteria render the cash benefits addressed directly to persons with disabilities incapable of pursuing the articulated objective of improving the existential conditions of the disabled.

### 2.2. Cash benefits addressed to informal caregivers: core eligibility criteria

Compared to the above benefits addressed to persons with disabilities, much more substantial assistance is offered to informal caregivers as compensation for their caring work.[45] Three different schemes are available domestically: nursing benefit (*świadczenie pielęgnacyjne*), special attendance allowance (*specjalny zasiłek opiekuńczy*)[46] and caregiver allowance (*zasiłek dla opiekuna*).[47] They are financed from the central state budget and allocated locally by municipalities.[48] The caregiver allowance was designed as a temporary solution applying to caregivers who lost their right to the nursing benefit due to legislative changes introduced in 2014. The amount of special attendance allowance and caregiver allowance is three times lower than of the nursing benefit. Consequently, the latter remains the leading and most substantial care-related scheme.

In their current shape, the above schemes have been strongly criticized both within the legal doctrine and by the advocates of disability rights. Alone the fact that there are three distinct provisions addressing the same issue of income support for informal caregivers, is subject to widespread critique.[49] But the core of this discussion concerns the benefits' eligibility.

Although the schemes vary in many respects including the amount, means-testing, and the peculiarities relating to the prohibition of occupational activity, they share three fundamental

[45] To be more precise, according to the domestic regulation, these benefits compensate for the income lost as a result of giving up work to engage in care.

[46] Article 2(2) of the Act on Family Benefits.

[47] Law of 4 April 2014 on Establishment and Payment of Caregivers Benefits (Journal of Laws of 2020, item 1297).

[48] R. Babińska-Górecka, 'Wybrane problemy związane z zapewnieniem opieki i pielęgnacji osobom niesamodzielnym przez polski system zabezpieczenia społecznego. Uwagi de lege lata i de lege ferenda' in R. Babińska-Górecka et al. (eds.), *Prawo pracy i prawo socjalne. Teraźniejszość i przyszłość* (E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa 2021) p. 304.

[49] The amounts of special attendance allowance and caregiver allowance are three times lower than the amount of the nursing benefit and both equal PLN 620; *see* §1(14) and (16) of the Regulation of the Council of Ministers of 13 August 2021 on the Amount of Family Income or Learner's Income Constituting the Basis for Applying for Family Allowance and Special Attendance Allowance, the Amount of Family Benefits and the Amount of Caregiver Allowance (Journal of Laws 2021, item 1481).

eligibility criteria, which at large, point to the model of informal care endorsed by the state. Below, discussed will be work incapacity as a social risk underlying care-related benefits. Second, addressed will be the requirement of formal disability assessment as well as its relation to the risk of long-term dependency. Finally, the analysis will turn to the personal aspect, limiting the circle of potential care providers to the closest family members.

### 2.2.1. Materialization of the social contingency of work incapacity

The first eligibility requirement relates to the occupational status of the caregiver.[50] Underlying all three schemes is the social risk of work incapacity which comes into being when the caregiver commits to cater for a person in need of long-term care.[51] Accordingly, the law demands that caregiver is professionally inactive, a requirement which depending on the benefit type, can be satisfied by giving up work or not taking up gainful activity.[52]

Hence, eligibility criteria are designed in a way that excludes reconciliation of professional and caring activities. It is hard to justify this solution in times of economic pressures for labor market participation and ubiquitous activating policies linked thereto.[53] The logic behind the domestic cash-for-care schemes is opposite: the state requires caregivers to stay out of the labor market to be granted financial support.[54] This solution can be regarded as a punitive measure considering that the lawmaker "punishes" professionally active caregivers by depriving them of eligibility. And it does so irrespective of the overall physical and mental condition of the caretaker, which does not necessarily have to exclude minor gainful activity of their carer.

Consequently, the current legal *status quo* works to the detriment of both the socio-economic standing of caregivers and persons under their care, as well as the economy. Also, given the immense psychological benefits linked to the opportunity of engaging in other meaningful

[50] Bakalarczyk, *supra* n. 12, p. 96.

[51] Babińska-Górecka, *supra* n. 21, p. 6.

[52] Article 17(1) of the Act on Family Benefits; D.E. Lach, 'Zabezpieczenie społeczne nieformalnych opiekunów osób niesamodzielnych. Rozwiązania polskie na tle wybranych systemów zagranicznych', 5 *Forum Prawnicze* (2018) p. 12.

[53] M. Filipovič Hrast and I. Dobrotić, 'Eastern European Welfare States' in B. Greve (ed.), *De Gruyter Handbook of Contemporary Welfare States* (De Gruyter 2022) p. 130; Bakalarczyk, *supra* n. 12, p. 98 et seq.; These tendencies have also been noticed by the Supreme Audit Office during a control of the domestic system of respite care; Supreme Audit Office, *supra* n. 13, p. 5

[54] Lach, *supra* n. 52, p. 15.

activity beyond nursing, the regulation is also indifferent to the mental well-being of the caregiver.[55] Positive implications of legal arrangements enabling caregivers to stay professionally active on the overall wellbeing of the person under care, have been scientifically confirmed.[56] Research indicates that it is mainly through higher disposable income that these solutions improve the standing of a long-term care dependent person.

It is notable that, contrary to domestic regulations, care arrangements providing for work-care reconciliation belong to the standard European solutions. While it is true that the cash-for-care entitlement usually restricts the caregivers' labor market participation to some extent, it rarely excludes work entirely, as it is in Poland.[57]

It is crucial that solutions supporting informal care can be tailored to the factual needs and capabilities of different households, more precisely, to the levels of factual dependency of the caretaker. The law can adjust to varied circumstances, for instance in that it differentiates between the amounts of received support, depending on the scale of professional activity of the caregiver. There is a whole spectrum of possible schemes to choose from. Most importantly, however, the ability to perform gainful activity should not be excluded by default.[58]

The prohibition of work as an eligibility requirement for the nursing benefit has long been considered controversial. It has been denounced by caregivers who argue in favoring of having additional sources of income, especially given the small amounts of care-related benefits.[59] Growing pushback against the current legislation resulted in a constitutional complaint.[60] Substantive claims invoked therein were backed up by the Human Rights Commissioner who joined the proceedings before the Constitutional Tribunal. The case is pending at the time of writing.

### 2.2.2. Formal disability assessment

[55] Lach, *supra* n. 31, p. 45.

[56] Lach, *supra* n. 31, p. 48; Bakalarczyk, *supra* n. 12, p. 95.

[57] R. Miyazaki, 'Long-Term Care and the State-Family Nexus in Italy and Japan - The Welfare State, Care Policy and Family Caregivers', 3 *International Journal of Environmental Research and Public Health* (2023) p. 8.

[58] Lach, *supra* n. 52, p. 15; Bakalarczyk, *supra* n. 12, p. 115.

[59] Babińska-Górecka, *supra* n. 21, p. 5.

[60] Case SK 18/22 pending before the Constitutional Tribunal.

The second eligibility requirement relates to the physical, mental, and functional condition of the caretaker. It demands that their disability is formally confirmed. To engage in-depth with this demand, the pertinent provisions of the nursing benefit must be invoked. Article 17(1) of the Law on Family Benefits stipulates that nursing benefit is allocated to provide care for a person with an assessment of severe disability, or disability that includes indications regarding the requirement of permanent or long-term care or assistance due to significantly limited ability to lead an independent life.

Two conclusions follow immediately. First, even though the principal objective of these benefits is to help meet the costs of long-term care, legislation links entitlement to disability, and not dependency.[61] The provisions address this gap in that severe disability is considered on equal terms with the inability to live independently.[62] With regard to the second mentioned type of disability, formal assessment must include additional indications regarding dependency. This, however, does not mean that the benefits are addressed to the persons in need of long-term care, because in such a case, the requirement of disability would not have been part of the regulation at all. It is crucial that disability and dependency are not coextensive phenomena. A conclusion follows that current legislation conflates disability and long-term care dependency. From the point of view of legal systematization and coherence, this conflation of two social contingencies affords a major regulatory flaw. It leads to the blending of two separate social law concepts, and therefore, to considerable inconsistencies in the legal regulation of care-related benefits.

Second, resulting from the lack of the domestic recognition of long-term care as a social contingency is the absence of a separate legal framework for performing a professional assessment of long-term care dependency, in line with the above nursing benefit regulations. Dependency is not subject to a systematic case-by-case evaluation which would be independent of the disability assessment.[63] Such mechanisms are in place in the systems recognizing the risk of long-term care and provide fundamental tools to test the presence of dependency.[64] What follows, it cannot be avoided that in practice, the allocated funds may be used to pursue objectives other than those

[61] For how disability overlaps with dependency, *see* Becker, *supra* n. 30, p. 4.

[62] Severe disability is defined through work incapacity and inability to live independently.

[63] From 2021, there is a formal basis for the pertinent administrative authorities to carry the so-called community interview which is performed in the local community of the beneficiary. It is, however, not mandatory and the interview is not devoted exclusively to assessing dependency. The law stipulates vaguely that it can be conducted when there are doubts regarding the provided care; see Article 23(4aa) of the Act on Family Benefits.

[64] Becker, *supra* n. 30, p. 1; Greve, *supra* n. 34, p. 3; Lach, *supra* n. 31, p. 45-46.

prescribed by law. That is because, especially regarding the second type of disability assessment which includes indications regarding dependency, whereby the existence of the latter is not thoroughly examined, the benefit can be allocated to persons without an actual need of care, solely on the basis of their disability. This would amount to a severe limitation of the effectiveness of these regulations.

Beyond that, a myriad of questions occurs regarding whether the provisions meet the constitutional demands for equality and social justice. It bears naming two major objections. First, current policies allocate equal financial support to persons who perform round-the-clock nursing activities, and those who cater for persons in need of minor assistance, such as help with meal preparations and housekeeping.[65] The lack of a more nuanced and gradual differentiation between the legal and factual standing of different households is hardly justifiable in light of the distributive account of social justice which prohibits granting equally to everyone without distinctions.[66] Second, there are persons who are not disabled but nevertheless require assistance in everyday life. There exists no separate policy solution within the regime of social assistance, albeit outside the disability framework, which addresses the needs of these individuals.

While the pressure coming from academia and persons with disabilities to recognize the risk of dependency is growing[67], implementation of long-term care on its own does not solve the above issues. What the lawmaker must do instead is to decide, once and for all, whether the cash benefits for informal caregivers are granted because of the disability of caretakers or due to their dependency on care. The pertinent regulations should be consistent in addressing either one of those risks.

### 2.2.3. Exclusive eligibility of family members

The third requirement concerns the benefits' personal coverage and defines who can become an informal caregiver. In a nutshell, only the closest family members are eligible for state-funded support addressed to caregivers. Eligibility for the nursing benefit, special attendance allowance, and the caregiver allowance is linked to the obligation of maintenance, regulated under the

[65] Babińska-Górecka, *supra* n. 48, p. 307; Babińska-Górecka, *supra* n. 21, p. 5.
[66] Babińska-Górecka, *supra* n. 21, p. 5.
[67] Filipovič Hrast and Dobrotić, *supra* n. 53, p. 122, 127; Lach, *supra* n. 31, p. 44.

respective provisions on alimony.[68] The law thus makes the right to the benefit contingent on whether a close family member would give up work to care for their dependent relative. The fundamental rule stipulates as follows: the further the kinship, the stricter the eligibility criteria.[69]

Such personal scope means that domestic care policies are familialistic in that they incentivize family members to take up care work.[70] Explanations for this approach may be found in the culturally driven domestic tradition of informal care arrangements.[71] Looking back at the conventional allocation of care responsibilities, it is true that the obligation has typically rested with the closest relatives.[72] Secondly, care work has always been gendered as most caregivers are female.[73] These two arrangements still do apply nowadays. Research demonstrates that around 5% of Polish adults are engaged in care provision. Out of these, approximately every third person provides intensive care for more than 20 hours per week.[74]

The fact of informal care dominating over professional one in the domestic system is not a matter of personal choice but results from the underdevelopment of disability-related public services. On the other hand, the regulation of cash-for-care benefits demanding that caregivers must be chosen from among the closest relatives only perpetuates this *status quo*, creating a vicious circle of familialistic care arrangements.

By entrenching familialistic patterns, legislation fails to acknowledge that our understanding of family and its role evolved significantly over the last decades.[75] Increased migration and the constantly improving socio-economic conditions have put enormous pressures on the traditional multigenerational family structures. Younger generations rarely stay at home to live together with their parents. What this means for the traditional care arrangements is that the closest family members, such as children or grandchildren, will be increasingly less capable and

[68] Article 17 of the Act on Family Benefits.

[69] Articles 17(1a) and 16a of the Act on Family Benefits.

[70] Filipovič Hrast and Dobrotić, *supra* n. 53, p. 121; Babińska-Górecka, *supra* n. 21, p. 5; Supreme Audit Office, *supra* n. 13, p. 5.

[71] L.M. Peña-Longobardo and J. Oliva-Moreno, 'The Economic Value of Non-professional Care: A Europe-Wide Analysis', 11 *International Journal of Health Policy and Management* (2022) p. 2282.

[72] European Commission, *supra* n. 12, p. 322.

[73] Negative consequences of such arrangements for the amounts of social security payments received by women are studied under the notion of gendered policy outcomes; *see* also Lach, *supra* n. 31, p. 48; A. Österle and H. Rothgang, 'Long-term Care' in Béland et.al., *supra* n. **Error! Bookmark not defined.**, p. 530; European Commission, *supra* n. 19, p. 19; Greve, *supra* n. 34, p. 4; Filipovič Hrast and Dobrotić, *supra* n. 53, p. 128.

[74] European Commission, *supra* n. 12, p. 322; Ł. Jurek, Łączenie pracy zawodowej z opieką nad osobą starszą w Polsce (Wydawnictwo Uniwersytetu Ekonomicznego we Wrocławiu 2016).

[75] Sierpowska, *supra* n. 23, p. 77; Babińska-Górecka, *supra* n. 21, p. 7.

willing to care for their relatives in need. This, on the other hand, is a factor that shall encourage the lawmaker to implement policy choices allowing persons from outside the family to fulfill the previously exclusively familial responsibilities.[76] Indeed, legal doctrine advocates that the group of individuals allowed by law to act as informal caregivers be broadened to encompass further relatives, as well as neighbors and friends.[77] This debate has been ongoing, albeit with no impact on the ground. Given the lack of political will to implement such changes, Poland's familialistic and path-dependent care model must be considered outdated. Conservative familialistic approaches continue to inform the domestic nursing policies.

It is crucial to add some comparative context and note that in other European states, the trends have been exactly opposite, and the transformation of societal structures prompted development of modern approaches to care.[78] Policies which vest the responsibility of care exclusively in the family members are considered inaccurate due to the risks they produce for caregivers. These include a worsening health, exclusion from the labor market, and deteriorating social and family relationships.[79] These risks are typically avoided by providing state-funded professional assistance to dependent persons.[80] And in jurisdictions which do provide cash-for-care benefits supporting informal care, such as those offered in Poland, these are addressed to caretakers and not caregivers. It allows dependent persons to make an informed decision regarding an individual who would care for them, allowing them to pick from among relatives or friends. Professional care services can also be bought directly on the market.

It goes without saying that family members cannot be entirely excluded from providing care and will continue to play a significant role in the domestic care framework.[81] What is, however, to be drawn from the comparative solutions is that, if the state is not able to provide professional care services to everyone in need, and instead provides the dependent with income support, it should withdraw from deciding who will take up this care work. Especially, this

[76] Babińska-Górecka, *supra* n. 21, p. 7.

[77] Bakalarczyk, *supra* n. 12, p. 115; Babińska-Górecka, *supra* n. 21, p. 7.

[78] Babińska-Górecka, *supra* n. 21, p. 6.

[79] Peña-Longobardo and Oliva-Moreno, *supra* n. 71, p. 2273.

[80] Z. Szweda-Lewandowska, 'The role of health and social care workers in long-term care for elders in Poland, Czechia, Hungary and Slovakia: The transition from institutional to community care', 3-4 *International Social Security Review* (2022) p. 159; C. Saraceno and W. Keck, 'Can we identify intergenerational policy regimes in Europe?', 5 *European Societies* (2010) p. 676.

[81] Lach, *supra* n. 31, p. 48; Peña-Longobardo and Oliva-Moreno, *supra* n. 71, p. 2273.

responsibility should not fall exclusively on the family.[82] When that is the case, the law ignores all other beyond-familial trajectories allowing to meet the law's articulated goal of supporting the dependent in their need to receive care.

Before concluding, the final question must be tackled, being why do the domestic care provisions address financial support to the caregiver and not caretaker. By contrast, as shown above, the amounts of benefits allocated directly to persons with disabilities are very low.[83] Considering that the goal of the care-related benefits is to secure the existential needs of the disabled persons, regulations should have been designed to allocate the funds directly to them. By ignoring such possibility, the current provisions contradict the recent global efforts to position persons with disabilities in the center of disability-related policies, a phenomenon referred to as "disability mainstreaming".[84] It is also an element of the human rights-based approach to disability.[85] Equipping persons with disabilities with the authority to freely decide on the organization of their own care would contribute to further these internationally recognized goals.

To conclude, the domestic regulation of cash benefits addressed to informal caregivers is deficient.[86] It ignores the varied, context-specific needs of caregivers and caretakers relating to professional activity as well as the external pressures for adjusting care framework to the shifting societal and familial roles. The root cause of systemic deficiency, however, consists in linking the entitlement to care-related benefits to disability.[87]

### 3. Jurisprudence on the right to the nursing benefit

Nursing benefit is the central allowance within the domestic system of care-related cash benefits for informal caregivers. Amounting to a monthly payment of PLN 2458, it is the most generous disability-related allowance[88] but is nevertheless lower than the minimum wage.[89] Considering

[82] Österle and Rothgang, *supra* n. 73, p. 527.

[83] Babińska-Górecka, *supra* n. 21, p. 5; Lach, *supra* n. 31, p. 48.

[84] Österle and Rothgang, *supra* n. 73, p. 531.

[85] Which appeared following the ratification of the UN Convention on the Rights of Persons with Disabilities and focused on recognition of subjectivity of persons with disabilities; *see* Głąb and Kocejko, *supra* n. 18, p. 6-7.

[86] Lach, *supra* n. 31, p. 49; Lach, *supra* n. 12, p. 174-176.

[87] Filipovič Hrast and Dobrotić, *supra* n. 53, p. 121.

[88] Announcement of the Minister of Family and Social Policy of 1 November 2022 concerning the amount of the nursing benefit in 2023.

[89] As of January 2023, the minimum wage was set at PLN 3490.

that the benefit is framed within the risk of work incapacity, and thus aims to provide a substitution for the lost income, the amount appears too low to achieve the prescribed aim.[90]

Individual attempts to substitute other allowances with the nursing benefit have become increasingly more common recently, due to the increasing inconsistencies emerging in the adjudication.[91] Alone in 2022, four motions concerning the nursing benefit withstood preliminary control and were admitted for further consideration by the Constitutional Tribunal.[92] Significant uncertainties regarding the legal circumstances in which the benefit is granted encourage caregivers to seek their rights in courts. Consequently, the number of administrative court proceedings concerning the nursing benefit increased dramatically over the last years.[93]

Ensuing from the massive inflow of cases are also negative adjudicative tendencies. Especially notable is the emergence of judicial activism and arbitrary administrative decision-making.[94] Beyond that, despite the unconstitutionality of select eligibility criteria confirmed by the constitutional court[95], further inconsistencies keep on accumulating due to the lack of appropriate legislative intervention.

The main strands of this perplexed adjudication are tackled below, along the lines of the eligibility criteria. The scrutiny zooms in on the eligibility of further relatives, the requirement regarding caretaker's age at the moment of disability occurrence, and the collision of the right to the nursing benefit with other social payments. These issues are strongly connected to the above-

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[90] K. Małysa-Sulińska (ed.), *Ustawa o świadczeniach rodzinnych. Komentarz* (Wolters Kluwer 2015) p. 270; Judgment of the Constitutional Tribunal of 21 October 2014, K 38/13; Judgment of the Constitutional Tribunal of 18 November 2014, SK 7/11.

[91] H. Pławucka, 'Świadczenie pielęgnacyjne' in Babińska-Górecka et al., *supra* n. 48, p. 341; Babińska-Górecka, *supra* n. 21, p. 5.

[92] The cases currently pending before the Constitutional Tribunal: SK 99/22 alleging unconstitutionality of the regulations providing for the right to only one nursing benefit, irrespective of how many disabled persons require care within the family; SK 18/22 concerning the prohibition of work as an eligibility criterion for the nursing benefit; SK 87/22 and 50/22 concerning denial of the right to the nursing benefit during the parental leave; SK 22/22 concerning denial of the right to the nursing benefit to individuals obliged to maintenance, if they hold an assessment of disability.

[93] K. Małysa-Sulińska and A. Kawecka, 'Mnogość świadczeń dla opiekunów osób z niepełnosprawnościami a praktyka orzecznicza w zakresie ustalania prawa do świadczenia pielęgnacyjnego' in K. Małysa-Sulińska and M. Stec (eds.), *Wspólnotowy wymiar samorządu terytorialnego. Rzeczywistość a oczekiwania* (Wolters Kluwer 2022) p. 141; S. Nitecki, 'Znaczenie orzecznictwa sądów administracyjnych z zakresu spraw socjalnych w demokratycznym państwie prawa' in A. Matan and A. Nita (eds.), *Sądownictwo administracyjne w umacnianiu państwa prawa* (Wolters Kluwer 2022) p. 297.

[94] P. Ruczkowski, 'Wykładnia prawa a bezpieczeństwo prawne jednostki i podmiotu administrującego' in Z. Duniewska, M. Karcz-Kaczmarek and P. Wilczyński (eds.), *Prawo administracyjne w służbie jednostki i wspólnoty* (Wolters Kluwer 2022) p. 52-53; Z. Duniewska, 'Wykładnia prawa administracyjnego' in M. Stahl (ed.), *Prawo administracyjne – pojęcia, instytucje, zasady w teorii i orzecznictwie* (Wolters Kluwer 2021) p. 304

[95] *See* for instance Judgment of the Constitutional Tribunal of 21 October 2014, K 38/13.

described eligibility criteria. Consequently, the first issue builds on the above-explained exclusively familial entitlement. The investigation further argues that the second one reflects the benefit's design attaching the eligibility for care-related benefits to disability, while the last criterion is a consequence of the nursing benefit's embeddedness in the risk of work incapacity.

### 3.1. Eligibility of further relatives

Article 17 of the Law on Family Benefits stipulates that nursing benefit can be granted to mother or father, the child's factual guardian, foster parents, or other persons obliged to maintenance by the respective provisions on alimony, unless they hold an assessment of severe disability. Concerning the latter group of persons obliged to maintenance, benefit can be allocated without further reservations to the first-degree relatives (parents and children).[96] Crucially, although the spouse is not explicitly enumerated as eligible, they bear the primary obligation of maintenance which means that their entitlement to the benefit is considered on equal terms with that of first-degree relatives.[97] In practice, any relatives enumerated in Article 17[98] can become eligible only if the person in need of care is unmarried or if the spouse holds an assessment of severe disability.[99] For any other persons obliged to maintenance, commonly referred to as "further relatives"[100] (siblings, grandchildren, grandparents) stricter eligibility criteria apply which must be satisfied jointly. First, parents of the caretaker are deceased, have been deprived of parental rights, are minors or have an assessment of severe disability. Second, there are no other first-degree relatives, they are minors or have an assessment of severe disability. Finally, there are no factual guardians or foster parents, they are minors or hold an assessment of severe disability.

Against this backdrop, a major issue occurred in the adjudication of administrative courts regarding the entitlement of further relatives. The law stipulates that if there are any relatives with higher eligibility status, further relatives can become eligible only if the latter have an assessment

[96] Article 17 (1a) of the Act on Family Benefits.

[97] A.K. Modrzejewski, 'Glosa do Wyroku Wojewódzkiego Sądu Administracyjnego w Białymstoku z dnia 23 listopada 2021 r., sygn. akt II SA/Bk 660/21', 5 *Przegląd Sejmowy* (2022) p. 239; Judgment of the Supreme Administrative Court of 14 December 2018, I OSK 3539/18; B. Chludziński, Commentary to Article 17 in P. Rączka (ed.), *Świadczenia rodzinne. Komentarz* (Wolters Kluwer 2021) p. 427.

[98] Article 17(1)4 of the Act on Family Benefits.

[99] Pławucka, *supra* n. 91, p. 340; Judgment of the Constitutional Tribunal of 10 December 2021, I OSK 817/21.

[100] For the sake of clarity, throughout the analysis, children are also referred to under the common heading of "further relatives" as far as their further eligibility status compared to that enjoyed by the spouse is concerned.

of severe disability. The most problematic turned out to be the cases in which the benefit could not be granted despite the close relatives' *de facto* incapability of providing care, due to the absence of a formal assessment of disability. Legalistic interpretation of these provisions produced an outcome whereby the actual caregiver could not claim the right to the benefit. The main question which resulted was whether the benefit can be granted to further relatives by omitting eligibility of closer family members.

The practice of administrative courts has been that judges began to abandon textual interpretation to instead rely on systemic or value-driven reasoning. When justifying such interpretations, they would argue that only this reading of the law permits to allocate the benefit to those relatives who *de facto* provide care. With some courts relying on the value-driven reasoning and others sticking to the textual interpretations, large inconsistencies appeared over time and the appropriate understanding of the legal provisions became disputable. Even within the Supreme Administrative Court, cases have been approached differently, depending on the composition of the bench. Below, explained are the two main opposite strands of adjudication.

On one hand, the Supreme Administrative Court has confirmed on numerous occasions that objective impediments to performing care activities by close relatives can justify granting the right to the individual with further degree of kinship or further eligibility status who factually discharges nursing obligations.[101] When justifying this reading of the law, which steps out beyond the literal interpretation, the Supreme Administrative Court has been invoking the constitutional principles such as the rule of law and equality. It stated numerous times that to implement these principles is primarily an obligation of the courts. Hence, they must deliver rulings that interpret the law in line with the Constitution, by resorting to the constitutionally conforming interpretation. The court has asserted that departing from the literal interpretation and substituting it with a broader value-laden understanding is a means to achieve this end.[102] The application of the nursing benefit provisions has to be rooted in the constitutional principles and values.[103] Courts cannot

[101] Judgment of the Supreme Administrative Court of 16 April 2020, I OSK 1115/19; Judgment of the Supreme Administrative Court of 25 January 2021, I OSK 2161/20.

[102] Judgment of the Supreme Administrative Court of 10 December 2021, I OSK 817/21; Judgment of the Supreme Administrative Court of 18 November 2018, I OSK 744/21.

[103] Judgment of the Supreme Administrative Court of 13 November 2015, I OSK 1286/14.

allow that a formalistic interpretation denies the benefit to the only person capable of providing care.[104]

Such were the factual circumstances in one of the cases in which the caregiving son was initially refused the right to the benefit because the mother he cared for was married and the spouse was obliged to maintenance, although struggling with addiction and without any contact to the family.[105] According to the Supreme Administrative Court, the decision declining the benefit violated the principle of social justice.[106] That is to say, in line with the Supreme Administrative Court's reasoning, not only severe disability of the spouse but also his factual incapacity to provide care, may be used as an argument in favor of granting the benefit to relatives with further eligibility status.[107]

Favoring value-based interpretation over reliance on the explicit legal provisions constitutes an example of judicial activism. Having considered the legalistic interpretation's negative consequences for the realization of the Constitution's moral standard, the court resorted to extralegal criteria. It thus substituted legal norms with its own views regarding the laws' proper articulation. It also balanced individual interest against the principle of legality and allocated more weight to the former, despite this approach being straightforwardly contrary to the clear and binding legal provisions. While in the above-cited case, an activist interpretation worked to the benefit of an individual seeking their right to the benefit, this may not always be the case.[108] When undertaking activist reasoning, a judge bends the interpretation of the value-laden norms to suit his personal moral views. These individual commitments are also subject to change which deprives the process, as well as the individuals involved, of legal certainty.[109] It must be concluded that arguments of moral nature cannot justify domestic employment of an activist judicial decision-making.

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[104] Judgment of the Supreme Administrative Court of 7 May 2020, I OSK 2831/19; Judgment of the Supreme Administrative Court of 14 December 2018, I OSK 1939/18; Judgment of the Supreme Administrative Court of 21 June 2017, I OSK 829/16.

[105] Judgment of the Supreme Administrative Court of 10 December 2021, I OSK 817/21.

[106] Judgment of the Supreme Administrative Court of 7 May 2020, I OSK 2831/19.

[107] Judgment of the Supreme Administrative Court of 10 December 2021, I OSK 817/21.

[108] A. Tschentscher, 'Constitutional Rights without the Notion of Optimization. Limiting Judicial Activism in the Realm of Social and Economic Rights' in A.L. Cantillo (ed.), *Constitutionalism: Old Dilemmas, New Insights* (Oxford University Press 2021) p. 192; S. Nitecki, *supra* n. 9, p. 178.

[109] P. Ruczkowski, *supra* n. 94, p. 52-53; Duniewska, *supra* n. 94, p. 304.

There is, however, a separate line of adjudication present within the Supreme Administrative Court which endorses an entirely opposite reading of the nursing benefit provisions. It asserts that further relatives can claim the right to the benefit only if the family members preceding them in terms of eligibility have a formal assessment of severe disability.[110] This reading relies directly on the text of respective provisions. The law stipulates in a clear manner that the court must rule to the detriment of further relatives if individuals considered before them do not hold a pertinent disability assessment. According to the Supreme Administrative Court, these provisions are unambiguous, and consequently, lend themselves to straightforward application. This means that they cannot be read in a way which is contrary to their wording only because the outcome is morally questionable.[111]

Beyond the principle of legality, another argument reinforcing such reading of the respective provisions is that disability amounts to a non-discriminatory and, in the case at hand, substantively relevant circumstance which excludes the ability to care for another person.[112] Since the benefit concerns personal care, the decision to make the right of further relatives dependent on whether closer family members have a severe disability assessment, was justified.

Finally, there is also a pragmatic argument speaking on behalf of a stringent interpretation. To agree upon an extra-legal reading of these provisions, and thus, to allow the exclusion of closer relatives, would also require a case by case, independent determination by the respective administrative authority of the relatives' factual capacity to care for a dependent person.[113] Administrative authorities and administrative courts lack sufficient apparatus enabling to decide on such matters in each case.[114]

These deepening inconsistencies with adverse impact on the legal standing of caregivers were subject to intervention of the Human Rights Commissioner who brought a claim to the Supreme Administrative Court demanding a binding resolution on whether the requirement of severe disability assessment applies in cases of factual inability to care. The position of the Human

[110] Judgment of the Supreme Administrative Court of 24 February 2021, I OSK 2392/20; Judgment of the Supreme Administrative Court of 17 June 2021, I OSK 371/21.

[111] Judgment of the Supreme Administrative Court of 23 January 2020, I OSK 2462/19; Judgment of the Supreme Administrative Court of 11 August 2020, I OSK 599/20.

[112] Judgment of the Supreme Administrative Court of 24 February 2021, I OSK 2392/20; Judgment of the Supreme Administrative Court of 17 June 2021, I OSK 371/21.

[113] Judgment of the Supreme Administrative Court of 14 October 2021, I OSK 575/21.

[114] Modrzejewski, *supra* n. 97, p. 243; Judgment of the Supreme Administrative Court of 24 February 2021, I OSK 2391/20.

Rights Commissioner was that the current provisions lead to decisions contrary to the principles of social justice and the rule of law. He further underscored the necessity to read the law against the backdrop of these constitutional values. According to the Human Rights Commissioner, further relatives should be eligible for the nursing benefit when closer family members are alive, albeit objectively uncapable of providing care.[115]

The Supreme Administrative Court followed with a resolution which, contrary to the views presented by the Human Rights Commissioner, decided in favor of restrictive interpretation.[116] The resolution simply reiterated arguments of different compositions of the Supreme Administrative Courts. It stated that the explicit and clear wording of the law does not qualify for extra-legal interpretation.[117] The provisions indeed limit the access to the nursing benefit of further relatives, but they do so by relying on an objective criterion. A requirement of a formal assessment of disability is consistent with the overall regulation implying that the caregiver is able to provide factual care for the dependent person.[118] Excluding eligibility based on disability evaluation, therefore, affords a non-arbitrary measure. Considered against the backdrop of the constitutional principles, the criterion was found not to be in breach of equality, social justice, or the rule of law.[119]

The Supreme Administrative Court's resolution binds upon further administrative judicial decision-making. As such, it shall increase adjudicative coherence. Notably, however, it does not eradicate the root cause of the problem. While it might have put an end to the diverging jurisprudence, it did not address the issue of the factual caregivers remaining without state support when a closer relative is uncapable or unwilling to provide care.

Finally, we must look at this issue from a larger perspective of familialism as an overarching pattern intrinsic to the domestic design of the nursing benefit, as discussed in the preceding sections. It is notable that extending the personal scope of the benefit to persons outside the family and allowing the disabled person to independently choose the caregiver, would alleviate the above inconsistencies within the judicial decision-making.

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[115] Motion of the Human Rights Commissioner of 6 April 2022 to the Supreme Administrative Court, No. III.7064.45.2022.JA, p. 12.

[116] Resolution of the Supreme Administrative Court of 14 November 2022, I OPS 2/22.

[117] *Ibidem*, para. VI.

[118] *Ibidem*, para. VII.

[119] *Ibidem*, para. VIII.

### 3.2. The moment of disability occurrence

The second controversy within the practice of the right to the nursing benefit concerns the demand that disability of the caretaker occurred before they were 18 years old.[120] If the person in need of care went to school or college, disability must have occurred before the person turned 25.[121] This requirement has been subject to critique in the context of equality. Caregivers allege that the law differentiates between their financial standing in an unjustified manner, based on the moment of the occurrence of disability of the person under their care. A case on this matter was brought to the Constitutional Tribunal and the latter has confirmed the unconstitutionality of the differentiation.[122] However, the ruling did not help to solve the inconsistencies. Quite to the contrary, contentwise, the reasoning in the case K 38/13 was more obscuring than illuminating. The analysis below traces how the judgment deepened the inconsistencies in judicial decision-making instead of eradicating them.

Regarding the main allegation at stake concerning unequal treatment, the Constitutional Tribunal confirmed that provisions indeed lead to such an outcome, for which reason they were declared unconstitutional. It ruled that, in principle, the law can distinguish between the situation of persons caring for adults versus those who care for children as the Constitution subjects children to special care and protection.[123] With respect to individuals who care for adult dependent persons, however, the law cannot differentiate between their status solely based on the moment of disability occurrence.[124] Consequently, the provisions which differentiated between the caregivers of disabled persons whose disability arose at different points in life was found as amounting to an unconstitutional differentiation with direct negative implications for the caregivers' financial standing.

Although the Tribunal's argumentation is clear, the same cannot be said about the judgement's effectiveness. Lower courts differ when interpreting the ruling's implications,

[120] Article 17(1b)1 of the Act on Family Benefits.
[121] Article 17(1b)2 of the Act on Family Benefits.
[122] Judgment of the Constitutional Tribunal of 21 October 2014, K 38/13.
[123] For example, under Articles 68(3) or 72; see Judgment of the Constitutional Tribunal of 21 October 2014, K 38/13, at 7.2.
[124] Judgment of the Constitutional Tribunal of 21 October 2014, K 38/13, at 7.3.

bringing about further disparities within the administrative and judicial decision-making. To grasp this issue, we must engage with the respective statements from the K 38/13 judgment.

The last section of the ruling was devoted to elucidating its consequences for the future practice of the nursing benefit. It first stated that the implementation of the ruling requires legislative intervention to restore equal treatment of caregivers. It noted that, when designing the new scheme, the lawmaker must consider both the state's financial capacity and the vested rights of the current beneficiaries. Next, the Constitutional Tribunal asserted that the ruling nullifies "neither Article 17(1b) of the Law on Family Benefits, nor the decisions granting benefits, nor does it create an entitlement for caregivers of persons whose disability did not arise during childhood."[125] Finally, the constitutional court declared that the legislation must be amended by the legislature which should do so without undue delay.

These statements deserve a closer inquiry. First, it is common for the constitutional court to declare that the ruling's implementation requires legislative intervention. This pressures the legislature to elaborate a new, constitutionally compliant, legal solution. However, in the present case, the court went a step further and stated that it is only up to the legislature to remedy the unconstitutional *status quo*. This suggests that the courts are not in a position to implement the ruling and decide by omitting the unconstitutional norm, as they would usually do awaiting the adoption of the new law. The Constitutional Tribunal's explicit intention was thus to limit the ruling's bearing on the future cases.[126] This, on the other hand, contradicts the fundamental premise that the impact of the constitutional judgments is never limited to the individual case under scrutiny. An opposite view would encroach upon the systemic role of the constitutional court.[127] Article 190(1) of the Constitution states that constitutional jurisprudence is universally binding. A declaration of unconstitutionality overturns the presumption of constitutional compliance and is binding upon all state authorities, including those which apply the law, such as administrative bodies and courts.[128]

Notable is also the second demand phrased out in the K 38/13 judgment, that when changing the law, the legislature takes account of the social consequences of the pertinent

[125] Judgment of the Constitutional Tribunal of 21 October 2014, K 38/13, at 8.
[126] Judgment of the Voivodship Administrative Court in Gdansk of 13 February 2020, III SA/Gd 796/19.
[127] B. Banaszak, 'Wyroki interpretacyjne Trybunału Konstytucyjnego a orzecznictwo sądów administracyjnych i Sądu Najwyższego', 6 *Zeszyty Naukowe Sądownictwa Administracyjnego* (2013) p. 12, 15.
[128] Banaszak, *supra* n. 127, p. 10.

intervention. It is not for the constitutional court to impose upon the legislature to consider the social outcomes of its legislative choices. The constitutional court's role ends with the declaration of unconstitutionality. In this respect, such stipulations impinge upon the exclusive obligations of the legislative branch of government.

Adding further complexity is the fact that K 38/13 is a specific type of constitutional ruling. In such judgments, the court decides on the unconstitutionality of a given provision (legal norm resulting therefrom) only within a specific scope relating to concrete factual or timely circumstances or referring to concrete persons.[129] This type of ruling is domestically called *wyrok zakresowy*. The limited extent of the unconstitutionality declaration translates into specific outcomes. The effectiveness of such rulings has long been subject to academic debates.[130] A leading interpretation is that such a ruling does not result in the nullification of the provision under scrutiny but only invalidates a specific legal norm decoded therefrom.[131] Thus, the courts deciding based on the legal provision containing such an unconstitutional norm, have the obligation to rule by omitting it so that the decision reached is constitutionally compliant.[132]

Ensuing from the above statements regarding the judgment's effectiveness and the limited scope of the declaration of unconstitutionality, was the growing adjudicative incoherence occuring between the courts and the administration. Additionally, contrary to the constitutional requirement of respect for the binding judgments of the constitutional court, legislature did not implement the ruling.

Immediately after the K 38/13 judgment, the Supreme Administrative Court began to decide that, due to its limited scope, the ruling does not preclude the application of the criterion relating to disability occurrence.[133] Some compositions of the same court did not share this view

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[129] A. Kustra, 'Wznowienie postępowania w następstwie stwierdzenia niekonstytucyjności pominięcia prawodawczego' in M. Bernatt, J. Królikowski and M. Ziółkowski (eds.), *Skutki wyroków Trybunału Konstutycyjnego w sferze stosowania prawa* (Wydawnictwo Trybunału Konstytucyjnego 2013) p. 209; L. Garlicki, 'Uwagi o charakterze prawnym orzeczeń Trybunału Konstytucyjnego' in J. Trzciński and B. Banaszak (eds.), *Studia nad prawem konstytucyjnym* (Wydawnictwo Uniwersytetu Wrocławskiego 1997) p. 90-91; Judgment of the Voivodship Administrative Court in Gdansk of 13 February 2020, III SA/Gd 796/19.

[130] Banaszak, *supra* n. 127, p. 10.

[131] Kustra, *supra* n. 129, p. 210.

[132] J. Roszkiewicz, 'Odpowiedzialność Skarbu Państwa za ograniczenie dostępu do świadczeń pielęgnacyjnych w świetle wyroków Trybunału Konstytucyjnego z 5.12.2013 r., K 27/13, oraz z 21.10.2014 r., K 38/13', 4 *Przegląd Sądowy* (2019) p. 55.

[133] Judgment of the Supreme Administrative Court of 1 October 2015, I OSK 519/14; Judgment of the Supreme Administrative Court of 10 February 2015, I OSK 2926/14.

and have been consistently deciding that the right to the benefit should be adjudicated by omitting the unconstitutional criterion.[134] The latter argued that only the operative part of the judgment which specifically confirms the unconstitutionality has a binding effect on the courts.[135] The rest is an interpretative guideline and therefore, not binding.[136] This strand of reasoning has become dominant within the recent adjudication. It has been commonly accepted, that given the lack of legislative intervention, legal norms must be decoded from provisions the constitutionality of which has not been questioned.[137] Consequently, the administrative courts interpret Article 17(1b) of the Law on Family Benefits in a way that does not contradict the position expressed in the operative part of the judgment.[138] This means that the practice turned out contrary to Constitutional Tribunal's stipulations because the lower courts apply the judgment in similar cases and adjudicate the benefit while recognizing the unconstitutionality of the age criterion.[139]

The growing judicial consensus is, however, not reflected in the practice of administrative authorities. The issue thus remains unsolved on the level closest to the individual. Especially in the first instance, administration takes on a legalistic approach and declines the right to the benefit if disability of the person under care occurred during adulthood.[140] Regional differences are pronounced. Self-government Boards of Appeal (*Samorządowe Kolegia Odwoławcze*), acting as the second instance in administrative cases, decide upfront on the binding interpretation of the provisions. According to the annual reports from the respective boards' decision-making activity, for instance, SKO in Poznan decides by omitting the unconstitutional norm, while SKO in Gliwice

[134] Babińska-Górecka, *supra* n. 21, p. 5; Judgment of the Supreme Administrative Court of 4 November 2016, I OSK 1578/16; Judgment of the Voivodeship Administrative Court in Wroclaw of 28 February 2023, IV SA/Wr 619/22.

[135] Judgment of the Supreme Administrative Court of 2 August 2016, I OSK 923/16.

[136] J. Mikołajewicz, *Zasady orzecznicze Trybunału Konstytucyjnego. Zagadnienia teoretyczne* (Wydawnictwo Uniwersytetu im. Adama Mickiewicza 2008) p. 84; Banaszak, *supra* n. 127, p. 10; Judgment of the Supreme Administrative Court of 26 April 2019, I OSK 8/19; Judgment of the Voivodship Administrative Court in Gdansk of 13 February 2020, III SA/Gd 796/19.

[137] Judgment of the Supreme Administrative Court of 4 November 2016, I OSK 1578/16; Judgment of the Supreme Administrative Court of 26 April 2019, I OSK 8/19.

[138] Judgment of the Supreme Administrative Court of 17 November 2022, I OSK 2170/21; Judgment of the Voivodeship Administrative Court in Cracow of 18 November 2018, III SA/Kr 884/18.

[139] Judgment of the Supreme Administrative Court of 17 November 2022, I OSK 2170/21; Judgment of the Supreme Administrative Court of 26 February 2021, I OSK 1530/20.

[140] A.K. Modrzejewski, 'Ograniczenia w dostępie do świadczenia pielęgnacyjnego w polskim systemie prawnym' in A. Drabarz (ed.), *Aksjologiczne i prawne aspekty niepełnosprawności* (Temida 2 2020) p. 139 et seq; A. Kawecka, 'Świadczenia z pomocy społecznej realizowane przez jednostki samorządu terytorialnego jako antyprzykład dobrego prawa' in Małysa-Sulińska and Stec, *supra* n. 93, p. 200.

takes on the opposite approach and continuously applies the age criterion.[141] The argument for the latter position is claimed to be rooted in the principle of legality and asserts that since the law was not changed, the administration is constrained to apply the criterion.[142] To strengthen this view, administration invokes the statements of the Constitutional Tribunal regarding the ruling's effectiveness.[143]

Individuals challenge the administrative decisions before the courts which allows them to effectively claim their rights.[144] However, the issue at stake is not solved by the availability of judicial review. The nullification of the erroneous administrative decisions by courts does not substitute for justice being served in pre-court instances. A rational goal is rather to bring the constitutionally compliant decision-making to the administrative level. It is notable that especially such vulnerable groups as persons with disabilities and their caregivers may feel ill-equipped to seek their rights before the courts. They might be especially discouraged by consecutive negative decisions of the administration. To assume that every individual will challenge a wrongful administrative decision before the court simply because such a legal trajectory exists, is unfounded. An immediate legislative intervention consisting in the implementation of the judgment is therefore required to align the administrative decision-making with courts' adjudication.

Finally, this issue must also be considered as linked to the above-indicated conflation of disability and dependency, taking place in the domestic care-related legislation. Looked at from a larger perspective, a complete re-regulation of the nursing benefit in a way which would divorce it from disability, and instead, rely exclusively on the indications regarding the caretaker's dependency on long-term care, would put an end to the unequal treatment of the dependent persons.

### 3.3. Collision of entitlements

[141] Information on the activity of the Local Government Board of Appeal in Poznań between 1 January 2021 and 31 December 2021 (2022), https://bip3.wokiss.pl/skopoznan/zasoby/informacja-roczna-sko-poznan-2021.pdf, visited 19 June 2024, p. 16; Information on the activity of the Local Government Borad of Appeal in Katowice between 1 January 2021 and 31 December 2021 (2022), https://bip.katowice.sko.gov.pl/res/serwisy/pliki/29397105?version=1.0, visited 19 June 2024, p. 15.

[142] Judgment of the Supreme Administrative Court of 26 April 2019, I OSK 8/19.

[143] Judgment of the Voivodship Administrative Court in Gdansk of 13 February 2020, III SA/Gd 796/19.

[144] Kawecka, *supra* n. 140, p. 204.

The final is a negative eligibility criterion indicating several circumstances excluding entitlement to the nursing benefit. The right cannot be effectively claimed when the entitlement to the nursing benefit would collide with a simultaneous collection of other public allowances. Article 17(5)1a of the Act on Family Benefits stipulates that the nursing benefit is not granted if the caregiver has an established right to, among others, old-age pension, disability pension, survivor's pension, or social pension. The goal of this regulation is to close the way to claiming the nursing benefit for individuals who already have a different source of income.[145]

In practice, however, despite clear regulations, it is common for individuals obtaining financial support from the state to nevertheless seek the right to the nursing benefit.[146] Pressured by the massive inflow of cases, the courts have begun to decide by omitting the above legal provisions. Most of these cases concern a collision between the nursing benefit and an old-age or disability pension.

First, it must be noted that the Law on Family Benefits explicitly regulated the entitlements' collision by prescribing that the concurrence of the right to the nursing benefit and other public payments can be solved by choosing one of them. However, this solution, anchored in Article 27(5), is only limited to cases regarding maternity allowance, nursing allowance, special attendance allowance, family benefit, and the caregiver benefit. It does regulate the collision with the right to pension.

The administrative courts' initial position followed a legalistic approach, that individuals with entitlement to old-age or disability pension could not seek the right to the nursing benefit.[147] These rulings emphasized that the goal of the nursing benefit is to compensate for the caregiver's lost income. Since pension affords an equivalent of remuneration for work, it serves the same ends. Consequently, if one of the payments had already been granted, the right to another was denied.[148]

This interpretation was shorth-lived. Resulting from further adjudicative practice were two strands of reasoning grating the right to the benefit despite other entitlements. The first one

[145] Pławucka, *supra* n. 91, p. 338.

[146] Małysa-Sulińska and Kawecka, *supra* n. 93, p. 147.

[147] Judgment of the Supreme Administrative Court of 6 April 2017, I OSK 2950/15; Judgment of the Supreme Administrative Court of 10 July 2018, I OSK 134/18; Judgment of the Supreme Administrative Court of 30 November 2020, I OSK 1334/20; Information on the Activity of Administrative Courts in 2020, No. WOP.0676.1.2021, 12 August 2021, https://orka.sejm.gov.pl/Druki9ka.nsf/0/A1EFAF49682E458AC125874800267E91/%24File/1525.pdf, visited 19 June 2024, p. 169.

[148] A. Szczechowicz, 'Prawo do Emerytury a Świadczenie Pielęgnacyjne – Spory i Kontrowersje', 1 *Ruch Prawniczy, Ekonomiczny i Socjologiczny* (2021) p. 158.

consisted in adjusting the amount of the pension to equal the amount of the nursing benefit, provided that the pension was lower.[149] To reach this conclusion, the courts relied on systematic interpretation of the Act on Family Benefits which led them to decide that the provision in question excludes eligibility not entirely, but only up to the amount of the pension received.[150] It would be contrary to the principle of equality, the argument goes, to deprive caregivers of the benefit despite their pension being lower.[151]

This approach was questioned within the legal doctrine. Opponents argue that by applying this interpretation, the courts openly contradict clear and binding legal provisions. Additionally, by adjusting the amount of the pension, they in fact create a new kind of benefit. The amount of the nursing benefit was set by law and cannot be changed through judicial decision-making.[152] Thus, the courts deciding otherwise and reconstructing new legal norms, engage in the law-making. Beyond that, through systematic lens, the nursing benefit and the right to pension are regulated within separate regimes of social assistance and social insurance, and their amounts cannot simply be compared against one another. Hence, even if driven by moral considerations, these interpretations transgress the scope of judicial power, thus encroaching upon the exclusive domain of the legislature.

The second approach to the issue followed, allowing caregivers with the right to pension to choose the more favorable entitlement.[153] This way of reasoning was instigated by the judgment of the Constitutional Tribunal which dealt with the issue of entitlements' collision.

The relevant case SK 2/17 declared the article 17(5)1a of the Act on Family Benefits, stating that the nursing benefit is not granted when caregiver is entitled to a partial disability pension (*renta z tytułu częściowej niezdolności do pracy*), unconstitutional.[154] The Constitutional Tribunal found that the above provision contradicts the principle of equality of Article 32(1) and

[149] Judgment of the Supreme Administrative Court of 28 June 2019, I OSK 757/19; Judgment of the Supreme Administrative Court of 8 January 2020, I OSK 2392/19; Judgment of the Supreme Administrative Court of 30 April 2020, I OSK 1546/19.

[150] Judgment of the Voivodship Administrative Court in Cracow of 11 April 2019, III SA/Kr 137/19; Judgment of the Voivodship Administrative Court in Gorzow Wielkopolski of 20 February 2019, II SA/Go 833/18.

[151] Judgment of the Supreme Administrative Court of 28 June 2019, I OSK 757/19.

[152] Nitecki, *supra* n. 9, p. 181.

[153] Judgment of the Supreme Administrative Court of 27 May 2020, I OSK 2375/19; Judgment of the Supreme Administrative Court of 18 June 2020, I OSK 254/20; Judgment of the Supreme Administrative Court of 10 August 2020, I OSK 487/20; Judgment of the Supreme Administrative Court of 24 August 2020, I OSK 650/20; Pławucka, *supra* n. 91, p. 337.

[154] Judgment of the Constitutional Tribunal of 26 June 2019, SK 2/17.

the state's obligation of Article 71(1) to provide support to families in difficult existential and social circumstances. It held inadmissible to differentiate, on the basis of an established right to a partial disability pension, between the legal situation of persons giving up work in order to care for disabled relatives. The exclusion of the caregivers-pensioners from the personal scope of the right to the nursing benefit is done by ignoring the fact that their standing is similar to that of other caregivers. Individuals entitled to pension also withhold from work to provide care since the law allows them to engage in gainful activity next to receiving a disability pension.

Following the constitutional judgment, lower courts have gradually withdrawn from relying on the first approach of adjusting the amount of pension. Consequently, the option to choose between the entitlements has become the dominating one. Crucially, the constitutional ruling only dealt with one type of pensions – partial disability pension – but the lower courts began to apply this reasoning as well to cases dealing with the old-age pensions.[155]

The courts have agreed that a textual interpretation of the requirement stemming from Article 17(5)1a is not sufficient.[156] Instead, the provision must be read in a broader, systemic context. The value-laden considerations regarding equality and social justice reinforced this argument and spoke on behalf of applying by analogy Article 27(5) which provides explicit legal basis for the right to choose between the concurring entitlements.[157] That was despite the fact that the latter did not refer to the nursing benefit's collision with the right to pension.

It is crucial to note that this interpretation implies as well that, should the suspended entitlement become more favorable than the active one, the beneficiary can change their mind regarding which entitlement they want to collect. Article 17(5)1a rules out the entitlements' simultaneous collection and demands to choose one of them, but it does not nullify the entitlement to the suspended benefit.[158] The choice has consequences only for the payment, not for the entitlement which cannot be waived.[159]

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[155] Judgment of the Voivodship Administrative Court in Gliwice of 18 January 2023, II SA/Gl 1631/22.

[156] Judgment of the Supreme Administrative Court of 18 November 2022, I OSK 21/22; Judgment of the Supreme Administrative Court of 16 March 2022, I OSK 1242/21.

[157] Judgment of the Supreme Administrative Court of 16 March 2022, I OSK 1160/21.

[158] Judgment of the Supreme Administrative Court of 18 November 2022, I OSK 21/22; Judgment of the Supreme Administrative Court of 18 June 2020, I OSK 254/20; Judgment of the Supreme Administrative Court of 27 May 2020, I OSK 2375/19; Judgment of the Supreme Administrative Court of 11 August 2020, I OSK 764/20, Judgment of the Supreme Administrative Court of 15 December 2020, I OSK 1983/20; Judgment of the Voivodship Administrative Court in Wroclaw of 31 January 2023, IV SA/Wr 543/22; Judgment of the Voivodship Administrative Court in Poznan of 17 February 2023, IV SA/Po 29/23.

[159] Judgment of the Voivodship Administrative Court in Olsztyn of 23 February 2023, II SA/Ol 872/22.

This strand of adjudication is another example of the court's far-reaching activism. When adjudicating, the courts make a caveat that their decisions should not be considered as creating a new legal provision, nor as encroaching upon the competences of the legislature.[160] However, their decisions do exactly that. The courts decide without an explicit legal basis. Even if this approach is less controversial than the initial idea of adjusting the amount of pension, both approaches are grounded in extralegal reasoning.

Another change in adjudication followed the entry into force of the SK 2/17 ruling. As the ruling had not been implemented, the implications for the practice were far-reaching. In the SK 2/17 ruling, the Constitutional Tribunal postponed the moment of the nullification of the unconstitutional provision concerning the partial disability pension.[161] This was done to give the legislature additional time to re-regulate the entitlements' concurrence. It was at that juncture that administrative courts began to allow caregivers to choose between the payments. This *status quo* changed once the six-month-long postponement terminated and part of Article 17(5)1a was abolished. The courts began to decide that, due to the elimination of the negative criterion, individuals with an established right to partial disability pension can apply for the nursing benefit on general terms, that is without any further reservations.[162] In other words, caregivers with a right to partial disability pension did not have to suspend it anymore. The courts admitted they were aware that allowing for a simultaneous collection of two payments results in a privileged position of some caregivers versus the others. However, the responsibility for this rests with the legislature which did not act despite having been given additional time to do so.[163] Following the entry into force of the ruling, there was no legal basis for demanding that the caregivers choose one of the payments.

To conclude, the situation of caregivers is unstable and differs from one case to another. Especially, the SK 2/17 ruling only tackled the case of partial disability pension and its application to other types of payment is dubious. In any case, when seeking their rights in courts, caregivers

[160] Judgment of the Supreme Administrative Court of 18 November 2022, I OSK 21/22.

[161] Judgment of the Constitutional Tribunal of 26 June 2019, SK 2/17, at 4.

[162] Judgment of the Supreme Administrative Court of 11 August 2022, I OSK 2052/21; Judgment of the Voivodship Administrative Court in Poznan of 17 February 2023, IV SA/Po 833/22; Judgment of the Voivodship Administrative Court in Opole of 19 January 2023, II SA/Op 321/22; Judgment of the Voivodship Administrative Court in Poznan of 6 October 2022, IV SA/Po 506/22; Judgment of the Voivodship Administrative Court in Rzeszów of 13 December 2022, II SA/Rz 828/22.

[163] Judgment of the Voivodship Administrative Court in Poznan of 20 January 2023, IV SA/Po 757/22.

cannot reasonably foresee the decision in their case. The result may be twofold. On the one hand, the court can oblige them to choose one of the payments. On the other, the right may be claimed without having to give up the other entitlement. This creates a situation of considerable uncertainty especially given that, in principle, an individual should suspend one of the entitlements prior to lodging an application for the nursing benefit. Now, that the courts began to allocate the nursing benefit despite other entitlements, individuals lack certainty whether the suspension is still necessary.[164]

Beyond that, the legislature's failure to implement the ruling generates additional costs for the state budget. In the absence of adequate regulation, caregivers are entitled to receive two benefits simultaneously. Thus, increased spending which the lawmaker clearly wanted to avoid by refusing to change the law allowing the caregivers to choose the payment, did nevertheless occur. This outcome is fundamentally at odds with the overarching principle applying to care-related benefits, stipulating inadmissibility of a simultaneous collection of two benefits serving to secure the same needs.

Finally, it is worthwhile to look for more general solutions to the issue at hand. It is notable that if the eligibility for the nursing benefit was divorced from work incapacity of caregivers, and as suggested earlier, linked to long-term care dependency of the caretakers, this would exclude an automatic inner contradiction between the underlying social risk and the professional activity of the caregiver. What follows, if solutions allowing work-care reconciliation were in place, the collision between pension-related income substituting that from work and the benefit-related income, would cease to exist.

## 4. Conclusion

The conclusions from the above analysis must be considered with respect to each section separately. The first part explored the systemic deficiencies in the regulation of eligibility for the cash benefits offered to caregivers. It demonstrated the need for large-scale transformation of the domestic care system. First, the implementation of the new social contingency of long-term care dependency is necessary to lay the groundwork for further distinction between the disability- and

[164] *Ibidem*.

dependency-related care schemes. Divorcing the eligibility for care benefits from work incapacity would also prepare the ground for adopting solutions allowing for work-care reconciliation. Moreover, the scrutiny illustrated the necessity to eradicate familialistic patterns from the domestic care-related regulations as a means for the social policy to catch up with the evolving societal and family arrangements. This can be done not merely by allowing friends and other persons from outside the family to act as caregivers, but primarily by developing deinstitutionalized forms of care such as professional care services of high quality and making them widely accessible. Finally, the analysis demonstrated ambiguity related to the presence of the three highly similar schemes, making clear that unification of the domestic care-related cash benefits is needed.

The second section investigated the inconsistencies occuring within the judicial decision-making and engaged in-depth with the specific issues relating to the practice of the nursing benefit. It demonstrated that judicial efforts to change the unfavorable *status quo* are ineffective given the inactivity of the legislature, contributing to the perpetuation of the existing issues. With regard to the constitutional judgments concerning the eligibility of further relatives and the collision of entitlements, their immediate implementation leading to the change of law, is necessary to guarantee coherent adjudication and thus, to restore the state of legal certainty for individuals claiming their rights before the administration and the courts.

Finally, it is notable that all three adjudicative issues turned out to have their roots in the systemic deficiencies of the current regulation of eligibility for care-related cash benefits. Hence, legislative intervention tackling the overarching problems of familialism, work-care reconciliation and disability versus dependency, would contribute to alleviate the emergence of increasingly complex and inconsistent judicial decision-making.

## Chapter 4
## Gender-based differentiation in retirement age

This chapter examines the domestic old-age policy differentiating between men and women in terms of retirement age. Retirement age reform was one of the key electoral promises of the Law and Justice party. This commitment set out to reverse the laws implemented by the previous government which resulted in both an increase and equalization of the pensionable age for men and women. Having won the elections in 2015, the new majority quickly delivered on its promise regarding the re-regulation of old-age policy. The new legislation entered into force in October 2017 and restored the pensionable age of 60 for women and 65 for men.[1]

The transformation was controversial as the Polish society had long been strongly divided over the issue of pensionable age. The main arguments against its lowering concerned the negative long-term economic consequences and pointed to the demographic trends as indicators speaking on behalf of adopting exactly opposite policy approaches, leading to the increase and equalization of the retirement age. The reforms' advocates, on the other hand, were against the solutions extending the periods of occupational activity and viewed the gender-based differentiation, allowing women to enjoy earlier retirement, as a just compensation for the unpaid female care work.

The analysis in this chapter considers the solution from a legal standpoint. It aims to assess whether the policy in question is justified in the context of the demand for equal treatment.[2] It further explores the law's impact on the constitutional objective of pursuing substantive gender equality[3]. To this end, the investigation examines whether the policy in question leads to the narrowing of gender-based economic inequalities occurring in the field of pensions, or whether, to the contrary, it widens these gaps.

### 1. Gender-based inequalities in the context of the old-age benefits

[1] R. Pacud, 'Ryzyko emerytalne kobiet i mężczyzn' in B. Godlewska-Bujok et al. (eds.), *Między ideowością a pragmatyzmem. Tworzenie, wykładnia i stosowanie prawa. Księga jubileuszowa dedykowana Profesor Małgorzacie Gersdorf* (Wolters Kluwer 2022) p. 1029; G. Meardia and I. Guardiancich, 'Back to the familialist future: the rise of social policy for ruling populist radical right parties in Italy and Poland', 1 *West European Politics* (2022) p. 143.

[2] Article 32 of the Constitution.

[3] Article 33 of the Constitution.

To assess the gender-based differentiation in retirement age against the principle of equality, we must first address why governments decide to introduce such differentiating measures in the first place. The main equality-driven argument raised by the lawmaker to justify the reform was that it accelerates the way towards gender equality by offsetting the preexisting inequalities. Therefore, to decide whether the policy is indeed equality-enhancing, we must first invoke and categorize the prevailing gender inequalities. Only then it will be feasible to assess if these differences decrease as a result of the implemented differentiation.

This section summarizes the fundamental assumptions behind the traditional gender roles and provides an overview of gender inequalities ensuing therefrom. These issues are essential to both domestic and global debates on gender-based differentiations in social security as providing justifications for the respective lawmakers to introduce gender-sensitive old-age policies.

The gender dynamic underlying social security provision is complex and shaped by a variety of interconnected and mutually reinforcing factors. The three main themes tackled below involve: traditional female roles including the discourse on gendered division of labor, the social and economic gender inequalities ensuing from these traditional social structures, and the implications of the latter two issues for unequal outcomes in the social security, meaning divergent levels of protection afforded to men and women. Summarized will be only the leading narratives relevant for the legal analysis of the pensionable age policy in the context of equality.

### 1.1. Traditional family structures as the root causes of gender-based inequalities

The concept of traditional family is the starting point for understanding the gender perspective underlying the introduction of a differentiating old-age policy. It is unfeasible to consider the whole spectrum of arguments raised in this context, but the core ones revolve around the long-established, traditional, gender-based division of familial and at-home duties as well as these patterns' negative implications for women's position in different domains of life. The dominating practice has been that the bulk of household work is discharged by women. Likewise, women have provided informal care both for children and the disabled or heavily dependent elderly family members. These embedded structures comprise a phenomenon of gendered division of labor. Another concept employed to denote this pattern is the "male breadwinner model" which

emphasizes that gainful activity is a predominantly male responsibility while women are providers of unpaid work.

It is notable that social and cultural differences between genders have been gradually decreasing, a change which is driven by the shifting family structures and a growing variety of lifestyle choices implementing more equal division of household labor and thus, challenging the prior patterns. However, eradicating the deep-seated social differences is a long-term goal, the achievement of which lies in the far future.

For now, factual gender inequalities prevail and have significant repercussions for women's social, economic, and cultural standing as well as lead to the unequal positioning of women versus men in several spheres of life. Especially, traditional division of labor laid the groundwork for gendered labor market inequalities. More precisely, women's obligations related to motherhood and caregiving affect their professional activity and career prospects. Women's labor market position is weaker by default due to their potentially irregular and interrupted employment which is commonly associated with lower productivity.[4] Consequently, female employees are paid less than male ones and are forced to work on short-term contracts.[5] They face obstacles when re-entering labor market. The ramifications are that while women face the so-called motherhood penalties with adverse impact on their personal and professional development, men benefit from continued professional activity and develop their careers.

The mutual links between the above gendered aspects are vital. It is the embedded social and cultural traditional patterns that have led to the creation of economic penalties for women. From an opposite angle, the hindrances faced by women when aiming to re-enter the labor market as well as the economic disadvantages they face versus male workers, often discourage them from taking up gainful activity, reinforcing thus the prevalence of traditional approaches to labor division. Noting this vicious circle and creating solutions to break it, should be the starting point for any gender equality-related efforts.

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[4] M. Lis and B. Bonthius, 'Drivers of the Gender Gap in Pensions: Evidence form EU-SILC and the OECD Pension Model', 1917 *Social Protection & Jobs* (2019) p. 13 et seq.; A. Górnicz-Mulcahy and M. Lewandowicz-Machnikowska, 'Społeczne i prawne aspekty dyskryminacji płacowej kobiet' in R. Babińska-Górecka et al. (eds.), *Prawo pracy i prawo socjalne. Teraźniejszość i przyszłość* (E-Wydawnictwo. Prawnicza i Ekonomiczna Biblioteka Cyfrowa 2021) p. 80; I. Sierpowska, 'Kobieta w pomocy i polityce społecznej', *Wrocławskie Studia Erazmiańskie* (2015) p. 180.

[5] T. Petrova and T. Inglot, 'Politics and Current Challenges of Demography in Central and Eastern Europe', 4 *East European Politics and Societies* (2020) p. 883.

Hence, resulting from the socio-cultural inequalities are differences of economic nature. The latter, on the other hand, lead to disparities in social security provision. It follows from the very design of the contribution-based social security schemes that shorter, interrupted and badly remunerated employment results in low benefits. Even though the social schemes are gender-neutral in that they address women and men equally, they generate different results depending on whether the recipient is male or female, the phenomenon which is studied under the term of "gendered outcomes". The notion of gender pension gap denotes the average difference in the amounts of pensions received by male and female pensioners. It tackles women's economic disadvantage as a culmination of gender-based obstacles faced throughout family and professional life.[6]

Research demonstrates that ensuing from low pensions is an increased risk of poverty which targets elderly women disproportionately more often than men of the same age.[7] In all OECD countries women are at greater risk of falling into poverty than men and this difference exacerbates in old age.[8] The EU data on at-risk-of-poverty pensioners indicate that in 2019 this problem concerned 17% of women and 13.1 % of men.[9] A separate field of research on "feminization of poverty" explores this gender-based phenomenon.[10] Undeniably, elderly women are facing greater economic disadvantages than elderly men.[11]

### 1.2. Eradicating gendered outcomes through old-age policy

[6] Sierpowska, *supra* n. 4, p. 170.

[7] A. Shola-Orloff and M. Laperrière, 'Gender' in D. Béland et al. (eds.), *The Oxford Handbook of the Welfare State* (Oxford University Press 2021) p. 352.

[8] S. Shaver, 'Gender Issues in Welfare States' in B. Greve (ed.), *Routledge Handbook of the Welfare State* (Routledge 2019) p. 82.

[9] Eurostat, *At-risk-of-poverty rate by poverty threshold and most frequent activity in the previous year,* https://ec.europa.eu/eurostat/databrowser/view/ILC_LI04__custom_470517/bookmark/table?lang=en&bookmarkId=f30fed7d-2db8-4382-a8a9-66cec101d907, visited 20 June 2024.

[10] The issue was brought up for the first time during the Fourth World Conference on Women which took place in Beijing in 1995. To counter feminization of poverty was named a strategic objective; *see* UN, *Report form the Fourth World Conference on Women. Beijing, 4-15 September 1995*, https://www.un.org/womenwatch/daw/beijing/pdf/Beijing%20full%20report%20E.pdf, visited 20 June 2024, at 67 et seq; C. Chinkin, 'Gender and Economic, Social, and Cultural Rights' in E. Riedel, G. Giacca and C. Golay (eds.), *Economic, Social, and Cultural Rights in International Law* (Oxford University Press 2014) p. 146.

[11] L. Tessier, N. De Wulf and Y. Momose, 'Long-term care in the context of population ageing: What role for social protection policies?', 3-4 *International Social Security Review* (2022) p. 23.

Especially in jurisdictions which openly subscribe to the goal of gender equality, the adoption of adequate solutions alleviating disadvantages suffered by women and hindering their personal and professional development, must be considered as a responsibility of the state. Indeed, the questions regarding non-discrimination have been of great importance in the social rights debate.[12] The centrality of the goal of gender equality has led to the emergence of an umbrella term of "gender mainstreaming", encompassing all gender equality-enhancing public efforts.[13] The approach of "gender mainstreaming" demands that both male and female perspectives are considered when drafting legal measures so that equal enjoyment of rights and equal participation in social, economic and cultural life, can be progressively achieved.[14]

Since the feminist and gender-sensitive discourses on public policy started to intensify approximately three decades ago, family policy has been shifting to unburden women of unpaid care work and increase their labor market participation as well as to foster inclusion by promoting gender-neutral design of family-supporting schemes. Despite significant progress in the framing of family-supporting schemes, women continue to be the leading beneficiaries of these solutions. That is because the caregiving obligations are still discharged predominantly by women.[15] Additionally, practice illustrated that overly broad benefits provided as direct income transfers might disincentivize women's reengagement with the labor market after having children. Such a negative effect might be generated by fully paid maternity leaves or generous cash for care benefits.[16] To balance active labor market policies with an effective family-friendly approach is a

[12] Chinkin, *supra* n. 10, p. 159.

[13] The policy mission of gender mainstreaming was internationally recognized at the UN Fourth World Conference on Women in Beijing in 1995. It then became the official policy approach of the EU and its Member States featured in the Amsterdam Treaty of 1997; C. Booth and C. Bennett, 'Gender Mainstreaming in the European Union. Towards a New Conception and Practice of Equal Opportunities?', 4 *The European Journal of Women's Studies* (2002) p. 431.

[14] European Parliament, *Gender mainstreaming in the EU: State of play,* January 2019, https://www.europarl.europa.eu/RegData/etudes/ATAG/2019/630359/EPRS_ATA(2019)630359_EN.pdf, visited 20 June 2024; Chinkin, *supra* n. 10, p. 134.

[15] K. Suwada, 'Genderizing Consequences of Family Policies in Poland in 2010s: A Sociological Perspective, 5 *Society Register* (2021) p. 48 et seq; Shola-Orloff and Laperrière, *supra* n. 7, p. 352.

[16] Such an effect was noticeable after the introduction in Poland of a universal care benefit of PLN 500. Economic research demonstrated that the strongest adverse impact on female labor participation was present during the four years following the policy's implementation (2015-2019). Within this timeframe, the benefit was granted to families with at least two children, whereas for those with one child, means-testing applied. Hence, women quit jobs to pass the mean-testing; *see* P. Radzik. 'Wpływ rządowego programu "Rodzina 500+" na wsółczynnik aktywności zawodowej kobiet', *Studia Ekonomiczne Zeszyty Naukowe Uniwersytetu Ekonomicznego w Katowicach* (2018) p. 69; M. Gajewicz, 'Aktywność zawodowa kobiet a świadczenie wychowawcze', 1 *Prace Naukowe Uniwersytetu Ekonomicznego we Wrocławiu* (2019) p. 40; *see* also F. Bettio, 'Can We Call It a Revolution? Women, the Labor Market, and European Policy' in D. Auth, J. Hergenhan and B. Holland-Cunz (eds.), *Gender and Family in European Economic Policy* (Springer 2017) p. 30-31; Shola-Orloff and Laperrière, *supra* n. 7, p. 356.

challenge faced by the contemporary welfare systems. Social arrangements must provide financial help to incentivize family formation and support parents in raising children without discouraging women from reentering the labor market.[17]

In the specific context of old-age pensions, the leading solution to alleviate inequalities in the amounts of benefits has been to implement legislation which applies different protection standards to women and men. Predominantly, explicit preferences have been created for women and embedded in law, providing for different, lower eligibility criteria or creating advantages in the mechanisms for benefits calculation. When leading to *de facto* improvements in gender equality, such measures are not considered in terms of discrimination. Quite to the contrary, due to their equality-enhancing character, they have been addressed as the so-called "positive measures". This term denotes a legal solution created to correct the initial disadvantages faced by a certain group of individuals by granting them preferential treatment.

Gender-differentiating policies face permanent allegations regarding their compatibility with the demands for equal treatment. Primarily, the argument goes, the ever-changing social, cultural, and economic circumstances call for reassessments of the solutions' necessity as well as their impact on gender equality indicators. It must be subject to repeated examinations whether preferential solutions in fact advance their initial gender-equalizing objectives. If that is not the case, they amount to directly discriminating measures and must be abolished.

The policy of gender-based differentiation in retirement age is claimed to constitute one of the gender-sensitive positive measures aiming to alleviate inequalities.[18] In the eyes of its proponents, lower retirement age of women offsets the social and economic inequalities between genders. Since that is the leading articulated objective, the examination of the effectiveness of the policy in question must trace whether the inequalities lessened as a result of its implementation. Issues such as gender earnings gap, or the status of traditional familial and care patterns, are the points of reference for assessing whether the policy has made a lasting impact on eradicating these gendered obstacles to equal enjoyment of rights by men and women. They allow to scrutinize the

[17] Suwada, *supra* n. 15, p. 42 et seq.; Petrova and Inglot, *supra* n. 5, p. 883.

[18] *See* Article 11(1e) of the Convention on the Elimination of All Forms of Discrimination against Women (CEDAW); *see* also UN, Committee on Economic, Social and Cultural Rights (CESR), General Comment No. 6 on the Economic, Social and Cultural Rights of Older Persons, 8 December 1995, https://www.refworld.org/legal/general/cescr/1995/en/27839, visited 20 June 2024, at 3; Resolution of the European Parliament of 13 September 2011 on the situation of women approaching retirement age, No. 2011/2091(INI), 13 September 2011, https://www.europarl.europa.eu/doceo/document/TA-7-2011-0360_EN.html, visited 20 June 2024.

viability of the argument that the lower retirement age for women affords a preferential treatment and advances a goal of substantive equality between genders.

## 2. Evolution of the domestic gender-sensitive pensionable age regulations

Aware of the scale of social and economic gender inequalities standing behind the introduction of an old-age policy differentiating between men and women regarding retirement age, we can move on to scrutinizing the law in question in the context of the domestic guarantees of equality.

We should begin by reiterating the relevant constitutional provisions. Gender-based differentiation must be considered against the backdrop of the demands for equal treatment before the law and in the process of its enforcement, as well as in the context of the general prohibition of discrimination on any ground, all enshrined in Article 32 of the Constitution. Even more pertinent in the case of the differentiation based on sex is the constitutional stipulation of gender equality of Article 33. The Constitution enumerates two aspects subject to protection. Article 33(1) provides that men and women shall have equal rights in family, political, social, and economic life, whereas the second paragraph proclaims that women and men shall have equal rights to, among others, social security.

Two conclusions follow. First, the fact that the Constitution mentions the achievement of *de facto* equality between men and women among the state goals is indicative of the overall direction of public policy, including in the field of old-age pensions. Next, given that the Constitution explicitly recognizes equal status of men and women in all domains of life, the principle of nondiscrimination will be applicable to any cases where gender-based differentiation occurs within the law.

Crucially, no explicit indications regarding the regulation of retirement age can be derived from the constitutional right to social security. While the Constitution provides an explicit anchor for the implementation of pension-related entitlements in that Article 67(1) stipulates the right to social security after reaching the universal retirement age, it neither specifies concrete thresholds, nor demands or prohibits the differentiation between women and men in this regard.

Having recalled the relevant legal framework, the starting point to verify the admissibility of gender-differentiating regulations would be to explore the previous domestic *status quo* on pensionable age and to trace how the above constitutional guarantees have been interpreted in the

specific context of retirement age. The law on retirement age has been amended multiple times over the last three decades since the democratic transition. Throughout the 1990s and the early 2000s, gender-differentiating provisions on pensionable age were in force and considered to afford an uncontroversial standard solution. The ensuing different treatment of female and male pensioners was perceived in terms of a preference granted to women.[19] It was claimed to offer a compensation for the bulk of unpaid household work provided by women. The additional years spent in retirement by female pensioners were regarded as offering a just repayment.

Nevertheless, the first doubts as to whether the lower pensionable age indeed benefits women, appeared around the turn of the century. The alleged negative consequences of the solution were of an economic nature and ensued from domestic contribution-based arrangements for old-age pensions according to which shorter contribution period translates into lower amounts of benefits. It came to wider attention that women retiring earlier suffered from major economic penalties compared to male pensioners who retired five years later.

The constitutional jurisprudence invalidating gender-based differentiation followed. For instance, in 1997 the Constitutional Tribunal struck down the provisions on the lower retirement age for female civil servants by rejecting the view held previously, and represented among others by the Supreme Court, according to which the economic disadvantages faced by women, resulting from the regulations are alleviated by the advantage of the earlier entitlement to the old-age pension benefits.[20] The Constitutional Tribunal denied that this is able to offset the economic penalties. It also reiterated that positive measures addressed to women, such as the differentiation at stake, are only admissible when they lead to *de facto* equality, which must be understood primarily in economic terms.[21] The outcomes were quite opposite in the case at hand, demanding the declaration of unconstitutionality. By closely following the above argumentation, the Constitutional Tribunal has also nullified the differentiations applying to female employees in other professions, namely to women working in academia[22], pharmacists[23], and teachers[24].

[19] *See* Judgment of the Constitutional Tribunal of 5 December 2000, K 35/99, at. 5; Judgment of the Constitutional Tribunal of 29 September 1997, K 15/97, at. 3.

[20] Judgment of the Constitutional Tribunal of 29 September 1997, K 15/97.

[21] *Ibidem*, at 31-33.

[22] Decision of the Constitutional Tribunal of 24 September 1991, Kw. 5/91.

[23] Decision of the Constitutional Tribunal of 13 June 2000, K 15/99.

[24] Decision of the Constitutional Tribunal of 28 March 2000, K 27/99.

Eventually, the laws implementing a gender-based differentiation in pensionable age were in force through 2012, with universal retirement age of 60 for women and 65 for men. A policy reform which became effective on 1 January 2013 was designed to gradually increase the retirement age to 67 for men and women. In the case of female employees, for which the threshold was increased by seven years, the process of getting to the final pensionable age of 67 was spread over nearly thirty years. Accordingly, the retirement age equalization was to be achieved by 2040. Until then, the pensionable age was to be calculated individually, depending on gender and the year of birth.[25] This trajectory towards gender-neutral old-age regulations lasted until 1 October 2017, when the new government undertook a policy reversal by restoring the previous retirement age of 60 for women and 65 for men.

## 3. Constitutional jurisprudence on gender-based regulation of pensionable age

Before evaluating the policy in question against the backdrop of equality, we shall reiterate what the constitutional court has previously said on this issue. While the Constitutional Tribunal has, on many occasions, spoken out on retirement age, of importance for the present inquiry are only two judgements which dealt with the gender-based differentiation pertaining to the universal retirement age.[26] These rulings illustrate the evolution of the Constitutional Tribunal's position. They also provide an overview of different – legal, social, and economic – points raised in the debates on retirement age. What is pivotal, the judgments were issued in 2010 and 2014 respectively, meaning that the Constitutional Tribunal reviewed the above-mentioned mutually opposing domestic old-age legislation, implemented by different political majorities. While the first judgment evaluated the constitutionality of the provisions differentiating between men and women regarding pensionable age, the second one dealt with the law aiming to equalize the retirement age for both genders.

In the first case, K 63/07, the Constitutional Tribunal examined the provisions against the backdrop of the constitutional notion of equality of Article 32 and the principle of gender equality of Article 33, while paying close attention to the constitutional stipulation of equal rights to social

[25] Pacud, *supra* n. 1, p. 1028.

[26] Previous judgments of the Constitutional Tribunal dealt with former regimes of old-age pension. The ruling K 63/07 was the first one dealing with the universal statutory retirement age implemented under the new pension regime in force since 1 January 1999.

security to be enjoyed by men and women.[27] When scrutinizing the admissibility of the differentiating measures through the lens of proportionality, the constitutional court stated that underlying the question are the factual inequalities between men and women which still prevail within the society. They are a consequence of the uneven distribution of at-home and caregiving duties ingrained in the traditional family structures and the male breadwinner model. As a result of gendered division of labor thus conceived, for decades, women's responsibility included both professional and household work.[28] In this context, an extraordinary positive measure consisting in the implementation of a lower retirement age was considered a solution alleviating the disadvantages suffered by women.

In the course of its previous jurisprudential practice, the Constitutional Tribunal has coined a term of "corrective preference" (*uprzywilejowanie wyrównawcze*) to refer to the varied categories of positive measures aiming to close the gaps between genders. It was mainly applied in the context of legal arrangements granting women preferential treatment versus men, aimed at alleviating the factual inequalities between genders arising in the social reality.[29] In the present ruling, the Constitutional Tribunal recalled that the legal solutions amounting to "corrective preference", including the gender-based pensionable age differentiation, did not count as discriminatory measures.[30] Beyond that, to uphold the policy choice under scrutiny, the Constitutional Tribunal invoked that the lawmaker enjoys wide discretion when taking decisions concerning social security, primarily when designing the old-age schemes. Consequently, the differentiating regulations were found not to have violated the constitutional notion of equality, including the prohibition of discrimination, as well as gender equality.

Despite the declaration of constitutionality, the Tribunal formulated several recommendations for the law-making practice indicating that future regulations should head towards the retirement age equalization. The Constitutional Tribunal raised the issue separately from the main reasoning, as part of the so-called signaling decision (*postanowienie sygnalizacyjne*), constituting a formal notice issued together with the ruling and addressed to the

[27] Judgment of the Constitutional Tribunal of 15 July 2010, K 63/07.

[28] *Ibidem*, at 10.2.

[29] In the following, different denominations will be used to refer to these types of legal solutions addressed to women. They will be mentioned as: temporary special measures, positive measures, positive discrimination and preferential treatment.

[30] Judgment of the Constitutional Tribunal of 5 December 2000, K 35/99, at 5; Judgment of the Constitutional Tribunal of 23 October 2007, P 10/07; Judgment of the Constitutional Tribunal of 11 December 2008, K 33/07, at 3.2.2.

legislature, the role of which is to point out the necessity of prospective legislative action.[31] The signaling decision S 2/10 has confirmed that the goal of retirement age equalization is relevant considering the dynamically shifting demographic, economic and social circumstances.[32] The constitutional court noted that the factual differences between genders are decreasing, whereas the remaining biological ones will continue to have lesser impact on drafting the eligibility criteria within the system of old-age pensions. The Constitutional Tribunal further reinforced its argumentation by reiterating that the need for equalization follows from the EU law. In this context, it invoked the Directive 79/7 on the progressive implementation of the principle of equal treatment for men and women in matters of social security (Directive 79/7)[33], constraining the governments to closely observe the progress in terms of equal treatment of men and women, including in the realm of pensions. The role of Directive 79/7 for scrutinizing gender-differentiating solutions against the principle of equality is considered below.

Finally, it is worth mentioning that three female judges of the Constitutional Tribunal enclosed dissenting opinions calling to eliminate the policy providing for a gender-based differentiation. Judge Teresa Liszcz opposed the view that the biological differences between men and women can be considered of sufficient relevance as to allow for a differentiation within the regime of old-age pensions.[34] Judge Sławomira Wronkowska-Jaśkiewicz argued, from a different angle, that the lower retirement age of women, commonly regarded as a form of preference, in fact discriminates against them in terms of their right to social security.[35] Finally, judge Ewa Łętowska pointed out that the problem at stake is not the differentiation as such but the method of benefits' calculation which systematically discriminates against women. Since there is only one universal mechanism for calculating the benefits which is applicable to men and women, then within the system of defined contribution, lower retirement age will always lead to worse outcomes for women.[36]

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[31] Decision of the Constitutional Tribunal of 15 July 2010, S 2/10.

[32] Judgment of the Constitutional Tribunal of 15 July 2010, K 63/07, at 10.6.

[33] Council Directive 79/7/EEC of 19 December 1978 on the progressive implementation of the principle of equal treatment for men and women in matters of social security.

[34] Dissenting opinion of Judge Teresa Liszcz to the judgment of the Constitutional Tribunal of 15 July 2010, K 63/07, at 1.

[35] Dissenting opinion of Judge Sławomira Wronkowska-Jaśkiewicz to the judgment of the Constitutional Tribunal of 15 July 2010, K 63/07, at 6.

[36] Dissenting opinion of Judge Ewa Łętowska to the judgment of the Constitutional Tribunal of 15 July 2010, K 63/07, at 6.

It is notable that the arguments included in the dissenting opinions pay more attention to the factual on-the-ground implications of the gender-based regulations for women's economic standing than the reasoning of the entire bench of the Constitutional Tribunal. Three female constitutional judges thus noted the complexity of the issue at stake which led them to conclude that, in order to examine the solutions' effects on equality, one must also take account of the beyond-legal factors involved, such as those regarding the amount of old-age benefits, the domestic model of old-age pensions and the mechanisms for acquiring pension.

In the second judgment, K 43/12, the Constitutional Tribunal scrutinized an exactly opposite legal arrangement equalizing the retirement age. The Constitutional Tribunal opened the reasoning by invoking the pertinent international law (the International Covenant on Economic Social and Cultural Rights and the UN Convention on the Elimination of All Forms of Discrimination against Women) as well as the Directive 79/7. The constitutional court underscored that the supranational legal standard constraints the lawmaker to aim towards the equalization of pensionable age and noted that the special measures providing for gender-based differentiation in the realm of pensions are only admissible temporarily. It further named the dominating tendencies in the comparative old-age legislation to argue in favor of the gender-neutral retirement age regulation.

The Constitutional Tribunal pointed out the need to consider the policy in a broader social and economic context. It drew attention to the significant shifts in the traditional family structures as well as the conventional gendered division of labor, resulting in a more equal division of household duties and care work between men and women. The constitutional court further underscored the increasing number of lone women living independently and providing for themselves as well the growing female labor market participation as signs of the decreasing factual differences between genders. The Constitutional Tribunal agreed that the difference in universal pensionable age has long constituted a measure offsetting the economic disadvantage suffered by women in the field of pensions. However, it found that the overall social and economic progress has been substantial enough to justify the nullification of special treatment. The Constitutional Tribunal concluded by stipulating an obligation on the part of the lawmaker to continue to abolish gender-based positive measures.[37]

[37] Judgment of the Constitutional Tribunal of 7 May 2014, K 43/12, at 4.2.3.

To additionally back up its position, the Constitutional Tribunal invoked the slow-paced and gradual implementation process as enabling, both the public authorities, and the benefit's recipients, to adjust to the legal change. It also invoked the demographic trends and the growing life expectancy, including longer average female lifespans, as arguments speaking on behalf of women's retirement age increase. Based on the above, the Constitutional Tribunal found the law under scrutiny to be compliant with the constitutional provisions on equality and gender equality, thereby validating the reform making pensionable age equal for both genders.

The main conclusion to be drawn from the above jurisprudence is that both, the differentiation, and the equalization of pensionable age have been found compatible with the domestic legal framework.[38] Additionally, in both rulings, the policy of lower retirement age for women was qualified as a positive measure. The Constitutional Tribunal thus upholds the view that the solution in question helps to advance the constitutional goal of gender equality.

## 4. Gender-based differentiation in pensionable age against the backdrop of equality

Mindful of the extant constitutional practice and considering an additional decade of socio-economic progress that has taken place since then, we shall now undertake a repeated scrutiny of the differentiation against the backdrop of the constitutional demands for equality. Especially, it bears reviewing whether, in the present domestic context, the differentiation may still be regarded as amounting to a positive measure furthering the constitutional objective of *de facto* gender equality.

To begin with, it is worthwhile to invoke the lawmaker's own views on the issue. It is especially vital to find out how the lawmaker justified the introduction of the policy reversal, and what were the law's articulated objectives. As follows explicitly from the legal justification enclosed to the bill, lower pensionable age of women was considered in terms of a special measure granting women preferential treatment.[39] This assertion was justified by invoking the Constitutional Tribunal's reasoning from the K 63/07 ruling which confirmed the constitutional compliance of the differentiating pensionable provisions. The lawmaker argued as well that the

[38] Pacud, *supra* n. 1, p. 1035.

[39] Draft Law No. 62 of 29 November 2015 on Old-age and Disability Pensions from the Social Insurance Fund, p. 25-26; *see* also Pacud, *supra* n. 1, p. 1036.

policy aims directly at substantive equality between men and women.[40] It further follows from the bill that the legislature acknowledged the financial disadvantage ensuing from the new legal arrangement and targeting women, but stated that it would be offset by "other personal and familial advantages" from which women would benefit due to the earlier retirement.[41] In other words, the lawmaker held that alone women's ability to fully engage in family life compensates for the economic penalty of the lower amounts of pension benefits.

### 4.1. *Status quo* on gender-based inequalities

We must begin by addressing the state of gender-based inequalities. This is crucial to assess whether the decline in the factual inequalities between genders has been continuous and reached a point rendering special positive measures unjustifiable from the equality standpoint. Or whether, to the contrary, the inequalities prevail and demand the state's positive measures. If the latter was true, the second step would be to scrutinize if pensionable age differentiation, once in force, indeed alleviates these prevailing *de facto* gaps, thereby leading to greater equality of genders.

In the signaling decision S 2/10, the Constitutional Tribunal held that the factual gender disparities will continue to diminish in the following decades, meaning that they will have progressively lesser impact on drafting the old-age regulations. It is true that since the ruling was issued, traditional family structures have been challenged by the new social patterns, resorting to a more equal division of household and caring duties. What follows, we have been witnessing increasing female labor participation which, coupled with developing childcare and other family-supporting schemes, has improved the economic standing of women.

The substantial progress notwithstanding, women are still unable to enjoy their rights in the fields of employment and old-age pensions on an equal footing with men. According to gender equality research, women continuously spend twice as much time as men engaging in unpaid care for children or the elderly relatives dependent on long-term care.[42] They continue to be the main

[40] Draft Law No. 62 of 29 November 2015 on Old-age and Disability Pensions from the Social Insurance Fund, p. 26; A. Bień-Kacała and J. Kapelańska-Pręgowska, 'Niższy wiek emerytalny kobiet: przywilej czy dyskryminacja? Perspektywa prawnomiędzynarodowa i konstytucyjna', 1 *Praca i Zabezpiecznie Społeczne* (2022) p. 14.

[41] Draft Law No. 62 of 29 November 2015 on Old-age and Disability Pensions from the Social Insurance Fund, p. 26; Meardia and Guardiancich, *supra* n. 1, p. 141.

[42] Bettio, *supra* n. 15, p. 33.

beneficiaries of the family-supporting cash for care schemes.[43] To be able to combine gainful activity with caregiving, women are still forced to refrain from work, reduce work hours or undertake part-time jobs.[44] Consequently, despite improvements, labor market participation of women is still significantly lower than men. In 2023, 66% of working age Polish men were professionally active, whereas for women it was 52.3%.[45] The gender structure of labor market paired with the fact of female work being undervalued, translates in gendered differences in the amounts of pensions.[46] According to research which divided domestic pensions into several categories depending on their amounts, the biggest section of female pensioners (39,7%) received the benefit of up to PLN 2000, whereas the biggest section of male pensioners (72,6%) received pension of PLN 2600 and higher. The average amount of old-age pension in March 2022 was PLN 2792 for men and PLN 2341 for women.[47] When considering this data in a comparative perspective, the domestic gender pension gap is lower than the EU average.[48] However, cross-national data show that the pension gap in the EU countries narrows, whereas no such tendency is visible in Poland.[49]

On the other hand, demographic trends of decreasing working age population and the ensuing growing number of pensioners dependent on social security benefits, have been putting

[43] Suwada, *supra* n. 15, p. 48 et seq.

[44] European Commission, Directorate-General for Employment, Social Affairs and Inclusion Social Protection Committee, *2021 Pension Adequacy Report: Current and Future Income Adequacy in Old Age in the EU. Vol. 1*, June 2021, https://op.europa.eu/en/publication-detail/-/publication/4ee6cadd-cd83-11eb-ac72-01aa75ed71a1, visited 4 July 2024, p. 104; Górnicz-Mulcahy, Lewandowicz-Machnikowska, *supra* n. 4, p. 81; L.J. Cook and T. Inglot, 'Central and Eastern European Countries' in Béland et al., *supra* n. 7, p. 888; Shola-Orloff, Laperrière, *supra* n. 7, p. 356.

[45] Statistics Poland, *Employed, unemployed and economically inactive (preliminary results of the Survey on Economic Activity of the Population)*, 23 February 2024, https://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5475/12/59/1/pracujacy_bezrobotni_i_bierni_zawodowo_wyniki_wstepne_bael_-_4_kwartal_2023_roku.pdf, visited 20 June 2024, p. 1.

[46] Shaver, *supra* n. 8, p. 86; Tessier, De Wulf and Momose, *supra* n. 11, p. 27; European Commission, *supra* n. 44, p. 102 et seq.

[47] Social Insurance Institution, *The structure of the level of benefits paid by the Social Security after the March 2022 indexation,* 2022, https://www.zus.pl/documents/10182/39637/Struktura+wysoko%C5%9Bci+%C5%9Bwiadcze%C5%84+wyp%C5%82acanych+przez+ZUS+po+waloryzacji+w+marcu+2022+r..pdf/75b859ca-4130-0372-9d23-27c1882aced6?t=1697110177487, visited 4 July 2024.

[48] Recent comparative research estimated the Polish gender pay gap at around 7% which is significantly lower than the EU average. The gender pension gap was estimated at 20.4% versus the EU median of 29.4%; European Institute for Gender Equality, *Gender Equality Index 2019: Poland*, 7 October 2019, https://eige.europa.eu/publications/gender-equality-index-2019-poland, visited 20 June 2024; Eurostat, Gender pension gap by age group, https://ec.europa.eu/eurostat/databrowser/view/ILC_PNP13__custom_470372/bookmark/table?lang=en&bookmarkId=ca6425d8-bd3e-4a09-b6d8-c181ea76bc6a, visited 20 June 2024.

[49] European Commission, *supra* n. 44, p. 105; Górnicz-Mulcahy, Lewandowicz-Machnikowska, *supra* n. 4, p. 82.

pressure on the domestic social structures, especially on the old-age schemes. This leads to pessimistic economic predictions regarding lower replacement rates and lower amounts of future payments. In 2019, the income replacement rate in Poland was 56.4%. According to estimations, in 2040 it will be 37.0%, while in 2060 only 24.9%.[50] And while these trends are equally negative for both male and female pensioners, considering the already present gender-based differences in the amounts of pensions, the financial gaps will continue to widen with a disproportionally adverse impact on women.

Consequently, although phasing out, the deep-seated social and economic gendered structures continue to produce negative economic effect on female financial standing of which the gender pension gap is an illustrative example.[51] The above demonstrates that the factual differences are still markedly present and ingrained in the domestic structures of labor and old-age. While the overall socio-economic progress is significant, the eradication of disparities is an ongoing process. As of now, gender-based economic disparities prevail.

### 4.2. The need for positive measures in the field of old-age pensions

In light of the above, it bears considering the potential social policy solutions to tackle the prevailing gender disparities of economic nature. For as long as factual obstacles to equal enjoyment of rights by men and women exist, the domestic and the European legal framework demand that the government takes appropriate measures to root them out. It is especially true, given that the state is legally constrained to actively pursue the goal of *de facto* equality between genders which, in the domestic context, was attached a constitutional rank.

Consequently, affirmative action bridging gender-based factual imbalance must be undertaken.[52] Alone in the field of old-age pensions, these measures can take various forms and become entrenched in different structures. Legal solutions advancing the present goal include, for instance, the so-called gender-responsive budgeting, obliging the legislatures to calculate public expenditure in a way which considers gendered outcomes and allocates resources to address them

[50] G. Uścińska, 'Realizacja prawa do emerytury – przesłanki prawne, ekonomiczne i społeczne' in D. Bach-Golecka (ed.), *Kobiety wobec wyzwań współczesności* (Wolters Kluwer 2021) p. 41.

[51] Górnicz-Mulcahy, Lewandowicz-Machnikowska, *supra* n. 4, p. 80 et seq.; E. Poprawska, I. Kwiecień and A. Jędrzychowska, 'The determinants of the women's pension gap vs. the knowledge of the Polish pension system design in the light of the survey findings', 1 *Polityka Społeczna* (2022) p. 5.

[52] Chinkin, *supra* n. 10, p. 156; C. de la Porte, 'EU social policy and national reform' in Greve, *supra* n. 8, p. 484.

accordingly. Similarly, straightforward solutions bolstering an equality-enhancing calculation of benefits within the system of old-age pensions are common and recommended by the EU institutions.[53] Such mechanisms factor in the gender-based differences in life expectancy or discontinuous labor market participation caused by motherhood and caregiving, and provide adequate compensations for these periods which are then calculated into the assets accumulated in the individual saving accounts. Separate pension schemes such as survivor's pension can be drawn up to target specific social and factual risks contributing to female poverty.[54]

### 4.3. Pensionable age solutions in a comparative perspective

Driven by the negative demographic trends, transformations of old-age structures have been underway in many European jurisdictions.[55] Reforms are passed to offset the financial burden caused by the shrinking working age population and the increasing life expectancy.[56] In the context of the old-age schemes, these goals are pursued by phasing out early retirement regulations or restricting the eligibility criteria for universal pension benefits. Further solutions, including the changes to the mechanisms for calculating and indexing pensions, seek to impede the decreasing income replacement rates.[57] Undoubtedly, the leading old-age policy choices opted for in the European states have been to increase the universal retirement age and, where that was previously not the case, make it equal for men and women.[58]

It is worthwhile to consider the domestic solutions against the broader European background. Poland is one of the last jurisdictions sustaining a gender-based differentiation in the pensionable age.[59] Within the EU, 20 countries provide equal retirement age for men and women,

[53] European Parliament, *supra* n. 18, at 3.

[54] European Commission, *supra* n. 44, p. 15.

[55] B. Greve, 'Future of the welfare state?' in Greve, *supra* n. 8, p. 530.

[56] Pacud, *supra* n. 1, p. 1030.

[57] European Commission, *2021 Pension Adequacy Report: Current and Future Income Adequacy in Old Age in the EU–Vol. 2: Country Profiles*, June 2021, https://op.europa.eu/en/publication-detail/-/publication/4849864a-cd83-11eb-ac72-01aa75ed71a1, visited 4 July 2024, p. 56.

[58] D. Pieters, *Navigating Social Security Options* (Springer 2019) p. 9; Uścińska, *supra* n. 50, p. 39; K. Hinrichs and J.F. Lynch, 'Old-age pensions' in Béland et al., *supra* n. 7, p. 499; Greve, *supra* n. 8, p. 530; European Commission, *supra* n. 57, p. 72.

[59] Pacud, *supra* n. 1, p. 1030.

while seven (including Poland) differentiate in this respect.[60] Nevertheless, for instance in Czechia, Lithuania, and Croatia, where the differentiating schemes are still in force, the equalizing legislation has already been adopted. Consequently, it has become rare for gender to be institutionalized as a criterion differentiating the pensionable age.[61] Additionally, considered against the backdrop of the remaining national laws implementing the differentiation, the Polish regulations provide for the highest difference between the statutory age for men and women.[62] The exact same gender-based difference of five years is effective in Austria.

Regarding the second common reform of increasing retirement age, it has even been adopted in countries which already now provide pensionable age thresholds higher than the ones set in Poland. Such a policy approach is evident in some of the most developed European countries. In Denmark, for instance, the gender-equal pensionable age of 67 is being increased to reach 69 in 2035. In the following years, in both Sweden and the Netherlands, retirement age will be gradually adjusted to the increasing life expectancy.[63]

Accordingly, the policy reversal in Poland opposes the dominating European trajectory of making the old-age eligibility criteria stricter and gender-neutral. It goes without saying that this does not automatically render domestic solutions contrary to the EU or domestic law. It indicates, however, that the European trends have been adverse, and they have been such for substantial economic and demographic reasons.

### 4.4. European jurisprudence on the domestic gender-based differentiation

Both the ECtHR and CJEU have ruled on the domestic pension policies, although the judgments concerned the specific issue of the retirement age for judges.[64] Nevertheless, the position of the

[60] Equal pensionable age for men and women is provided in: Belgium, Cyprus, Denmark, Estonia, Finland, France, Germany, Greece, Hungary, Ireland, Italy, Latvia, Luxembourg, Malta, Portugal, Slovakia, Slovenia, Spain, Sweden, the Netherlands. Different pensionable age for men and women is effective in: Austria, Bulgaria, Croatia, Czechia, Lithuania, Romania. Information retrieved from the Mutual System on Social Protection (MISSOC) 2022 comparative tables on old-age insurance systems among the EU countries.

[61] Bień-Kacała and Kapelańska-Pręgowska, *supra* n. 40, p. 15;

[62] In Bulgaria and Romania, the difference is four years.

[63] Information retrieved from the MISSOC 2022 comparative tables on old-age insurance systems among the EU countries.

[64] CJEU 5 November 2019, Case C-192/18, *Commission* v *Poland*; ECtHR 24 October 2023, No. 25226/18, 25805/18, 8378/19, 43949/19, *Pająk and Others* v *Poland*.

European courts on the gender-based differentiation in retirement age presented in these judgments is crucial and must be included in the present analysis.

Prior to recalling the judgment of the CJEU, a short summary of the relevant EU regulations seems necessary for context. Although the EU law does not provide a mandatory requirement for the member states to implement gender-neutral solutions regarding retirement age, the prohibition of gender-based differentiation as amounting to an inadmissible discriminatory practice can be derived from the EU regulations on equal treatment in social security context, as well as from the previous jurisprudential practice of the CJEU which, in light of the changing socio-economic circumstances, declared the solution as no longer amounting to a positive measure allowed under the EU law. Next to these binding solutions sanctioning the direction for the development of the old-age systems, the EU encourages the member states to equalize retirement age for men and women through soft-law recommendations, such as the White Paper on adequate, safe, and sustainable pensions.[65]

It must be reiterated that the EU law classifies gender-based differentiation in retirement age as contrary to the principle of equal treatment. This follows explicitly from Article 9(f) of the Directive 2006/54 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (Directive 2006/54).[66] On the other hand, the Directive 79/7 enumerates the decision on the determination of pensionable age and the possible differentiation between genders among the solutions within the exclusive authority of the national lawmaker.[67] Similarly, Article 3 of the Directive 2006/54 stipulates that governments may adopt measures which advance the achievement of factual equality between men and women in working life. An explicit anchor for implementing such solutions was also foreseen in Article 157 of the Treaty on the Functioning of the European Union, to which Article 3 of the Directive 2006/54 refers.

The provisions, however, urge that the states remain cautious when implementing positive measures. To be able to claim that the implemented law affords the so-called positive measure, the government must be able to demonstrate that the domestic solution generated positive impact of

[65] *See* for instance European Commission, *White Paper. An Agenda for Adequate, Safe and Sustainable Pensions,* 16 February 2012, https://op.europa.eu/en/publication-detail/-/publication/32eda60f-d102-4292-bd01-ea7ac726b731/language-en, visited 4 July 2024, p. 12, 16.

[66] Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

[67] Article 7(1) a and b of Directive 79/7.

increasing substantive equality between genders. Moreover, Directive 79/7 emphasizes the need to repeatedly assess the policies' indispensability. Its Article 7(2) demands that the states routinely decide whether, given the overall "social development", the circumstances justifying the temporary special measures still exist. Thus, Directive 79/7 places strong emphasis on the merely temporary character of any extraordinary differentiating solutions. Once the circumstances justifying the difference in treatment cease to exist, the states must nullify special measures. In this context, Article 5 obliges the states to abolish any laws, regulations, and administrative provisions which are contrary to the principle of equal treatment.

Hence, in principle, both directives allow the states to adopt measures which accelerate the achievement of substantive equality between genders. Governments have been relying on these provisions to justify the implementation of gender-differentiating measures in the realm of pensions. For decades, the claim regarding the equality-enhancing effect of the differentiation in pensionable age has been considered viable.

However, the jurisprudence of the CJEU has been gradually withdrawing from interpreting the differentiation in pensionable age in such a way. There is already a strand of case law in which the CJEU viewed the differentiation as inadmissible when considered against the demand for equal treatment.[68] As will become evident when engaging with the reasoning reiterated below, this case law was also invoked by the CJEU to declare contrary to the EU law the gender-based differentiation which had been effective in Poland.

Overall, the jurisprudence of the CJEU regarding gender-differentiating legislation has over time become more and more restrictive in that the court began to place ever stronger emphasis on the law's factual impact on gender equality. For instance, the CJEU declared as violating the EU law such domestic regulations which, in order to promote access to employment for younger generations, allowed employers to dismiss workers who reached the retirement age which was lower for women.[69] It found that the law amounted to a direct discrimination on grounds of gender. In a different ruling, the CJEU found contrary to the EU law the domestic legislation which

[68] CJEU 17 May 1990, Case C-262/88, *Barber*, at 32; CJEU 12 September 2002, Case C-351/00, *Niemi*, at 53; CJEU 13 November 2008, Case C-46/07, *Commission* v *Italy*, at 55.

[69] CJEU 18 November 2010, Case C-356/09, *Pensionsversicherungsanstalt* v *Christine Kleist*.

required longer contribution periods from part-time workers, the vast majority of which were women, than from full-time workers.[70] It was found in breach of the Directive 79/7.

Moving on to the CJEU's ruling in the Polish case, it reviewed the domestic regulations providing for a gender-based differentiation in pensionable age of judges against the backdrop of the European provisions on equal pay (Article 157 TFEU) and the prohibition of discrimination on grounds of sex with regard to the scope and access conditions provided in the old-age schemes (Articles 5 and 7 of the Directive 2006/54).[71] First, the CJEU recalled that the EU law prohibits gender-based pay discrimination irrespective of its form and mechanisms. It is on this basis that it has found contrary to the EU law to introduce a differentiation in retirement age[72], a conclusion which likewise follows from the established case law of *Barber*[73], *Niemi*[74], and *Commission v. Italy*[75]. The CJEU further reiterated that the Directive 2006/54 identifies gender-based differentiation in retirement age as contrary to the principle of equal treatment. Therefore, the age-related conditions for receiving a pension were directly discriminatory against women.

In its reasoning, the CJEU has also responded to the point raised by Poland claiming that the differentiation is a positive measure eliminating discrimination against women. It held that this can only be the case if regulations in force "contribute to helping women to conduct their professional life on an equal footing with men"[76]. And this is not the outcome of the law under scrutiny as it "does not offset the disadvantages to which the careers of female public servants are exposed".[77] Consequently, the CJEU has ruled that Poland had failed to fulfill its obligations ensuing from the respective provisions on equal pay and prohibition of discrimination.

The judgment of the European Court of Human Rights followed.[78] The applicants were female judges who alleged that the law in force violated the prohibition of discrimination (Article

[70] CJEU 22 November 2012, Case C-385/11, *Isabel Elbal Moreno* v *Instituto Nacional de la Seguridad Social (INSS), Tesorería General de la Seguridad Social (TGSS)*.

[71] CJEU 5 November 2019, Case C-192/18, *Commission* v *Poland*.

[72] *Ibidem*, at 75.

[73] CJEU 17 May 1990, Case C-262/88, *Barber*, at 32.

[74] CJEU 12 September 2002, Case C-351/00, *Niemi*, at 53.

[75] CJEU 13 November 2008, Case C-46/07, *Commission* v *Italy*, at 55.

[76] CJEU 5 November 2019, C-192/18, *Commission* v *Poland*, at 80; *see* also CJEU 29 November 2001, Case C-366/99, *Griesmar*; CJEU 13 November 2008, Case C-46/07, *Commission* v *Italy*.

[77] CJEU 5 November 2019, Case C-192/18, *Commission* v *Poland*, at 81.

[78] ECtHR 24 October 2023, No. 25226/18, 25805/18, 8378/19, 43949/19, *Pająk and Others* v *Poland*.

14 ECHR) in conjunction with the right to respect for private life (Article 8 ECHR).[79] It must be noted that the regulations of retirement age for female judges allowed to continue work after reaching the pensionable age but – contrary to the universal old-age regime – made the service contingent upon the decision of the Minister of Justice and the National Council of the Judiciary. Additionally, to submit a request to the above authorities, the law required that the female judge in question delivers a medical certificate confirming her intellectual fitness. No according requirement was foreseen for male judges.

In accordance with the ruling, regulations introducing lower retirement age for female judges were in breach of the prohibition of discrimination considered together with the right to respect for family life. The European Court of Human Rights held that the biological differences between genders were irrelevant for female judges' factual ability to perform judicial duties. Especially, there was no evidence confirming that female judges were less apt than male judges to perform their responsibilities after reaching the retirement age. Similarly, the gender-based obligation to undergo medical examination to prove the overall physical and mental fitness was found as amounting to a discrimination on grounds of sex. Finally, the ECtHR stated that the law has led to the loss of earnings on the part of the applicants and the negative consequences of this fact were exacerbated by the absence of legal possibility to find alternative employment.

The main conclusion ensuing from these rulings is that the domestic policy of gender-based differentiation was found incompatible with both the ECHR and the EU standard on equal treatment. And while the above rulings did only refer to the difference in treatment applicable in the old-age regime for judges, the argumentation invoked by both courts is of equal pertinence in the context of the universal pensionable age regulations. Especially vital to overturning the viability of the argument presented by the Polish government claiming that the differentiation amounted to a positive measure, are the points raised by the CJEU which has fiercely denied that the laws produce a positive impact on gender equality.

### 4.5. Gender-based differentiation as a positive measure: implications for gender equality

[79] The second allegation raised in the case was the lack of access to a court (Article 6§1 ECHR) following the decision of the Minister of Justice and the National Council of the Judiciary declining applicants the possibility of continued service beyond the retirement age. In the judgment, the ECtHR ruled that there has been a violation of the right to access to a court.

Considering that the factual inequalities are still a major issue standing in the way of gender equality, and mindful that the special measures are needed to eradicate them, we shall assess whether – in line with the law's articulated objectives – the domestic differentiation in pensionable age is an effective tool to achieve this goal. In other words, the analysis must address whether the laws indeed accelerate the achievement of substantive gender equality.

It was stated before but must be reiterated at this point that, within the domestic model of defined contribution wherein the accumulated financial assets determine the amount of the future benefits, shorter periods of professional activity will always lead to lower payments.[80] Hence, the amount of old-age pension of female and male pensioners with equal past incomes will differ and it will do so to the detriment of women. Coupled with the fact that female earnings are lower than male ones by default, which means that the above hypothetical situation of equally high income is very rare in practice, the solution encouraging women to leave the labor market five years earlier than men culminates in an even worse financial standing of female pensioners versus male ones.[81]

The implementation of the gender-differentiating policy was not preceded by thorough calculations of its divergent impact on both genders' financial positions. The lawmaker had not paid sufficient attention to the law's on-the-ground economic consequences. No mechanisms were provided to offset the disproportionate financial disadvantage suffered by women. If the pensionable age differentiation was to institute a real preference for female pensioners, lower retirement age should be accompanied by appropriate tools entrenched in the pension scheme, offsetting the decrease of the amounts of benefits. Measures should be in place to render women's pension sufficiently high as to enable them earlier retirement without financial penalties. The adoption of the current legal arrangement took place by entirely ignoring the functioning of the relevant mechanisms for benefits calculation which has led to an additional decrease of the already low amounts of women's benefits.[82]

Hence, the provisions not only fail to deliver a positive impact on gender equality but exacerbate the preexisting inequalities which makes them counterproductive versus the declared objectives. Consequently, the current solution is incompatible with the constitutional notion of

[80] Górnicz-Mulcahy and Lewandowicz-Machnikowska, *supra* n. 4, p. 84.

[81] A. Bień-Kacała, 'Legislation in Illiberal Poland', 3 *The Theory and Practice of Legislation* (2021) p. 281.

[82] Dissenting opinion of Judge Ewa Łętowska to the judgment of the Constitutional Tribunal of 15 July 2010, K 63/07, at 8.

equality as well as the substantive constitutional goal of striving for *de facto* equality between genders.

It is worthwhile to address an argument which is often put forth by the proponents of the gender-based differentiation, claiming to offset the gender pension gap resulting from shorter retirement age for women. The argument goes that once the retirement age is reached, women are free not to make use of their entitlement of going into pension and instead, continue working.[83] This statements was also brought up by the lawmaker when the law introducing the differentiation was proceeded.[84] The same aspect of the non-mandatory character of retirement was also mentioned in the K 63/07 ruling of the Constitutional Tribunal as rendering the domestic old-age pension scheme adjustable to the individual expectations regarding labor market participation.[85] It is being argued as well that remaining professionally active is additionally beneficial because the longer the gainful activity beyond the retirement age, the higher the future pension. More favorable terms for the calculation of benefits apply beyond the retirement age. For instance, with respect to a female employee at the age of 60, continued employment until the age of 65 will result in the increase of the initial benefit by 20.2%.[86]

Upon closer inspection, however, the argument turns out ill-suited to alter the overall negative evaluation of the policy in question. First, the issue being assessed here are the basic eligibility criteria for the old-age pension regarding men and women. In that case, subject to comparison are the ensuing levels of benefits providing fundamental protection against the risk of old age enjoyed by men and women respectively. It is therefore irrelevant from the perspective of the present scrutiny whether women have the legal possibility to continue working and what financial advantages follow therefrom. These potential benefits do not constitute basic circumstances which will apply to every female pensioner. And the latter undeniably create a worse off financial situation for women versus men, the fact which has even been acknowledged in the justification enclosed to the draft law implementing the differentiation.[87]

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[83] Under domestic law, termination of employment relationship with a woman following the achievement of the retirement age amounts to discrimination on grounds of sex; *see* Pacud, *supra* n. 1, p. 1036; M. Gersdorf and M. Żmuda, 'Ewolucja orzecznictwa Sądu Najwyższego na temat zasadności wypowiedzenia umowy o pracę', 6 *Praca i Zabezpieczenie Społeczne* (2008) p. 11.

[84] Draft Law No. 62 of 29 November 2015 on Old-age and Disability Pensions from the Social Insurance Fund, p. 25.

[85] Judgment of the Constitutional Tribunal of 15 July 2010, K 63/07, at 10.4.

[86] Uścińska, *supra* n. 50, p. 41.

[87] Draft Law No. 62 of 29 November 2015 on Old-age and Disability Pensions from the Social Insurance Fund, p. 26.

The second notable response to the claim is that the idea of prolonged professional activity and the policy of earlier retirement introduced by the gender-differentiating policy are mutually exclusive. Talking women into extending the periods of their professional activity beyond the retirement age opposes the reform's declared objectives. The main idea behind the reinstatement of the lower retirement age for women was to grant them "preferential treatment" to compensate for their household and care work. Earlier retirement was meant to allow women full engagement in family life. The question which follows is how the idea of prolonging working life beyond the retirement age relates to that initial political promise. What is the point of introducing a lower retirement age if to remedy for the economic disadvantage ensuing therefrom, women are encouraged to stay professionally active after reaching the prescribed pensionable age. There is no reason to create differentiation if to alleviate its negative outcomes women must nevertheless withdraw from relaying on the alleged preference.

In light of the above considerations, the conclusive legal assessment of the policy in question must divert from the ones delivered in the past by the Constitutional Tribunal. Contrary to the arguments presented in both constitutional rulings, the analysis has demonstrated that gender-based differentiation in pensionable age does not amount to a positive measure granting women preferential treatment. Within the domestic system of pension calculation, and the social and economic realities of the labor market, the difference in treatment does not lead to factual improvements advancing the enjoyment of rights by women on an equal footing with men. What is more, next to being ineffective in upholding the achievement of gender equality, differentiation deepens the factual inequalities between genders. The policy under scrutiny therefore amounts to discrimination on grounds of gender.

## 5. Conclusion

This Chapter has sought to explore whether the lower pensionable age set for women is, first, compatible with the constitutional demands for equality, and second, effective in pursing the declared objective of enhancing gender equality.

When assessing the policy, the investigation has placed a strong emphasis on the issue of the economic disparities between men and women. It demonstrated that the asymmetry created within the law turned out to have palpable negative impact on women's economic standing by

shortening the period of assets accumulation which translated in lower pension benefits. Consequently, the end goal of achieving *de facto* substantive equality of men and women turned out not to be effectively pursued by the entrenchment of the pensionable age differentiation. And because the presence of a notable gender pension gap predated the domestic introduction of the gender-differentiating measure, lower pensionable age additionally widened the preexisting economic differences. Hence, the solution under scrutiny is only seemingly gender-sensitive, when in fact disfavoring women. An important contribution to this final assessment was made by the pertinent rulings of the CJEU and the ECtHR which have both stated that gender-based differentiation in pensionable age cannot be considered in terms of a positive measure.

The above leads to a conclusion that in the sphere of old-age pensions, domestic law hinders equal enjoyment of rights by men and women. In this context, abolishing the differentiation in pensionable age constitutes the first step in restoring the legal trajectory towards gender equality. For it is only after the discriminating policy is eradicated from the domestic legal structures that social policy can turn to bridging the economic gaps present in the old-age system.

## Chapter 5
## The right to abortion

Poland has never scored high in reproductive rights indicators. Especially, the domestic abortion regime, established during the democratic transition, has been known as one of the most restrictive in Europe.[1] However, recent challenges to reproductive healthcare have been unprecedented. The current political majority's permanent attempts to further limit abortion availability eventually proved successful when a near-total ban on abortion was implemented. Other reproductive rights were curbed as well. Primarily, reforms of in vitro fertilization made the availability of the procedure contingent on economic and marital status, while access to emergency contraception was restricted.[2] The state's activity must be considered in terms of a widespread backlash against women's rights[3], thus reinforcing Poland's status as a regional outlier in terms of the provision of reproductive healthcare.

The present chapter seeks to investigate one of the above legal transformations in the field of reproductive rights, resulting from a single constitutional ruling which limited domestic availability of legal abortion.[4] The chapter's approach to the subject its threefold. First, with a view to drawing a broader picture of the abortion regime, the analysis considers the legal *status quo* ensuing from the judgment against the backdrop of the prior abortion rights practice. Second, following the social rights-driven approach to reproductive rights which views the latter as inherent to the right to healthcare[5], discussed are the change's negative implications for women's overall

[1] Commissioner for Human Rights of the Council of Europe, *Report following her visit to Poland from 11 to 15 March 2019*, No. CommDH(2019)17, 28 June 2019, https://rm.coe.int/report-on-the-visit-to-poland-from-11-to-15-march-2019-by-dunja-mijato/168094d848, visited 1 July 2024, at 64 et seq; R. Ingbrant, '"Gender restoration" and "masculinisation" of political life in Poland. The controversies over the abortion legislation after 1989' in Y. Gradskova and I. Asztalos Morell (eds.), *Gendering Postsocialism: Old Legacies and New Hierarchies* (Routledge 2018) p. 195.
[2] Data taken from the European Contraception Policy Atlas on Poland, https://www.epfweb.org/node/745, visited 1 July 2024.
[3] A. Krajewska, 'Connecting Reproductive Rights, Democracy, and the Rule of Law: Lessons from Poland in Times of COVID-19', 6 *German Law Journal* (2021) p. 1083; Commissioner for Human Rights of the Council of Europe, *Third party intervention by the Council of Europe Commissioner for Human Rights, K.B. v. Poland and 3 other applications (applications nos. 1819/21, 3682/21, 4957/21, 6217/21), K.C. v. Poland and 3 other applications (applications nos. 3639/21, 4188/21, 5876/21, 6030/21), and A.L. - B. v. Poland and 3 other applications (applications nos. 3801/21, 4218/21, 5114/21, 5390/21),* No. CommDH(2021)31, 28 October 2021, https://rm.coe.int/third-party-intervention-by-the-council-of-europe-commissioner-for-hum/1680a460ef, visited 1 July 2024, at 15 et seq.
[4] Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20.
[5] This perspective on abortion was entrenched in the Committee on Economic, Social and Cultural Rights (CESCR), *General Comment No. 22 (2016) on the right to sexual and reproductive health*, No. E/C.12/GC/22; see A. Śledzińska-Simon, 'Constitutional framings of the right to abortion: A global view', 2 *International Journal of Constitutional*

physical and mental well-being.[6] Third, the focus of the analysis extends beyond the domestic availability of abortion and encompasses the procedure's factual accessibility which shall be universal and non-discriminatory in nature.[7]

The analysis is structured as follows. The opening section is devoted to explaining the legal *status quo* on abortion effective until the K 1/20 judgment nullified one of the legal grounds for pregnancy termination. Next, with reference to the relevant jurisprudence of the ECtHR, discussed are the systemic deficiencies which for years have been curbing access to abortion in legally prescribed circumstances. The analysis then turns to the constitutional ruling K 1/20 and engages in-depth with the legal reasoning provided therein to assess its viability against the backdrop of the previous constitutional practice. The following two sections lay out the abortion regime in force since the K 1/20 ruling and discuss the practice of abortion law in the aftermath of the judgment. Especially, the investigation dissects the considerable chilling effect produced by the judgment impeding access to abortion based on the remining legal grounds as well as considers the implications for women's attitudes towards childbearing.

## 1. Availability of pregnancy termination under the "abortion compromise"

Domestically, the right to terminate pregnancy is regulated in Article 4a of the Act on Family Planning, Protection of the Human Fetus and Conditions Permitting Pregnancy Termination (the Law on Abortion) adopted in January 1993.[8] This legislation allowed for pregnancy termination in cases of rape or incest which have been certified to the police, incurable and severe fetal abnormality, the so-called fatal fetal abnormality (FFA), as well as on grounds of the danger to the

*Law* (2023) p. 403; such an approach to abortion rights was applied by the Constitutional Court of Colombia which has recently found that criminalization of abortion violates women's right to have their health protected; *see* Judgment of the Constitutional Court of Colombia of 21 February 2022, C-055/2022.

[6] Reproductive rights can be analyzed from a variety of legal standpoints which, beyond the indicated provisions, may involve the rights to autonomy, security, freedom of conscience, privacy, self-determination, or equality; *see* European Network of National Human Rights Institutions, *Written observations in application no. 40119/21. M.L. v. Poland* (2022) at 32; European Parliament, Resolution on global threats to abortion rights: the possible overturning of abortion rights in the US by the Supreme Court, No. 2022/2665(RSP), 9 June 2022, https://www.europarl.europa.eu/doceo/document/TA-9-2022-0243_EN.html, visited 1 July 2024, at Q.

[7] See Judgment of the Constitutional Court of Colombia of 21 February 2022, C-055/22, at 302 where the court invoked abortion's availability, access, quality and acceptability as the four basic internationally recognized components of the right to health to be considered in the context of abortion.

[8] The Act of 7 January 1993 on Family Planning, Protection of the Human Fetus and Conditions Permitting Pregnancy Termination (Journal of Laws of 1993, No. 17, item 78).

woman's life or health. Importantly, the right to abortion, just like any other reproductive right, was not written into the Constitution.

Since its adoption, the law has been amended only once and this reform was short-lived. Following the 1996 presidential elections won by a pro-choice candidate, the abortion law was liberalized, allowing to undergo the procedure on broad social grounds.[9] More specifically, the right was granted in cases of "material or personal hardship".[10] Amended provisions entered into force in January 1997 but have been subject to constitutional scrutiny soon afterwards, upon referral by a group of senators. On 28 May 1997 the Constitutional Tribunal declared the regulations unconstitutional.[11] Since then, up until 2020, the law has not been changed.

Consequently, the domestic legislation granting access to abortion has always been strict and counted among Europe's most stringent solutions.[12] Several factors were decisive for the domestic entrenchment of such an abortion regime and are worthy of brief consideration as providing relevant context for the subsequent domestic practice of abortion law.

First, we must note the specific domestic legal, political, and social transitional context of the early 1990s, in which the regulations were discussed and adopted. Poland has always been a deeply religious state, and the importance of the Catholic Church grew further after the country freed itself from the Soviet influence. The political and moral views of both society and political elites have been conservative. According to the strand of catholic teaching relevant during the transition, abortion was an element of what Pope John Paul II called "a culture of death", a reflection of the global trends towards an overbroad expansion of freedom.[13] Consequently, it was unthinkable at that time to proceed any liberal mechanisms for pregnancy termination. Especially, to grant abortion rights based solely on women's request was never profoundly debated.

However, it was not only the conservative Christian attitude of the Polish society that caused the adoption of restrictive abortion laws. The Catholic Church itself had a strong political

[9] R. Cholewiński, 'The Protection of Human Rights in the New Polish Constitution', 2 *Fordham International Law Journal* (1998) p. 263.
[10] Article 4a(1)(4) of the Law on Abortion.
[11] Judgment of the Constitutional Tribunal of 28 May 1997, K 26/96; *see* also J. Heinen and S. Portet, 'Reproductive Rights in Poland: when politicians fear the wrath of the Church', 6 *Third World Quarterly* (2010) p. 1012.
[12] A. Gliszczyńska-Grabias and W. Sadurski, 'The Judgment That Wasn't (But Which Nearly Brought Poland to a Standstill). 'Judgment' of the Polish Constitutional Tribunal of 22 October 2020, K1/20", 1 *European Constitutional Law Review* (2021) p. 134; M. Bucholc, 'Abortion Law and Human Rights in Poland: The Closing of the Jurisprudential Horizon', 1 *Hague Journal on the Rule of Law* (2022) p. 74.
[13] G. Pappin, 'Contemporary Christian Criticism of Liberalism' in A. Sajó, R. Uitz and S. Holmes (eds.), *Routledge Handbook of Illiberalism* (Routledge 2022) p. 48; Bucholc, *supra* n. 12, p. 82.

leverage in the Round Table talks. It has always been involved in domestic politics and was especially engaged in the discussions on such a controversial and value-laden matter as abortion. The Church's powerful position, and the fact that the representatives of its leadership took part in the political negotiations following the collapse of communism, was not only a matter of the country's Christian heritage but primarily, an expression of gratitude for the Church's significant role in overthrowing the communist rule. Accordingly, the Church's input in the final framing of abortion rights was significant, reinforcing the presence of the anti-abortion narratives in the national debates.[14]

Finally, the popular will of the society after the fall of communism was to divorce everything that had to do with the prior anti-Polish political agenda. Since the communist stance on abortion was very liberal, providing access to abortive services on broadly defined socio-economic grounds of difficult living conditions[15], a pushback against this solution meant opting for a more restrictive approach to abortion rights that would underscore the reemergence of Poland's traditional catholic values.[16]

Nevertheless, the debate preceding the adoption of the law on abortion was lengthy and complex. Right next to the economic transformation, decommunization and the questions relating to the desired relationship between the state and the Catholic Church, abortion constituted the main controversy tackled during the democratization process.[17] The issue was so contested that the ultimate national consensus which culminated in the passage of the Law on Abortion has been commonly referred to as "abortion compromise". The term underscores that this piece of legislation is an outcome of a countrywide agreement, reached despite the competing positions and interests represented by different political forces. Primarily, however, it has been understood as a "concession" of the Catholic Church in favor of all those supporting the idea of the domestic availability of abortion.[18]

## 2. Domestic practice of abortion rights

[14] Heinen and Portet, *supra* n. 11, p. 1007-1008.
[15] Article 1(1)(1)(b) of the Law on Abortion.
[16] Ingbrant, *supra* n. 1, p. 195; S. Szlek Miller, 'Religion and Politics in Poland: The Abortion Issue', 1-2 *Canadian Slavonic Papers* (1997) p. 66, 75; Bucholc, *supra* n. 12, p. 81.
[17] Gliszczyńska-Grabias and Sadurski, *supra* n. 12, p. 143.
[18] Szlek Miller, *supra* n. 16, p. 133.

Despite the adoption in the early 1990s of the Law on Abortion providing three grounds for claiming the right to pregnancy termination, women seeking to undergo the procedure have been routinely deprived of such possibility.

One of the main factors which have for years been limiting *de facto* access to abortion is the broad domestic regulation of the right to conscientious objection, invoked by medical practitioners. Based on Article 39 of the Act on the Professions of Physician and Dentist[19], medical practitioners are allowed to object to performing abortion on grounds of personal or religious beliefs. No referral mechanism was put in place to assist patients in finding alternative service providers. Regulations of this kind which obliged medical practitioners to advise patients were found contrary to the Constitution back in 2015.[20] Additionally, the current framing of the right to conscientious objection does not provide patients with any legal remedy to question the doctor's invocation of the clause. Conceived this broadly, the conscious clause has created a significant imbalance between the rights of healthcare practitioners and the rights of their patients.[21] Moreover, the problem is not limited to the individual medical practitioners. Many public hospitals are known for refusing to perform abortions on any grounds, a practice called "institutional objection"[22]. Organizations engaged in women's rights advocacy have been requesting that, with an aim to assist women in finding the institution willing to perform abortion, the Ministry of Health publishes an official and easily accessible list of doctors and hospitals invoking the conscience clause. No such document has been drafted yet.

The lack of effective implementation of the abortion laws and the absence of a respective procedural framework securing *de facto* access to abortion healthcare[23], have both been heavily criticized by international human rights bodies.[24] Also, the jurisprudence of the ECtHR provides an in-depth analysis of these deficiencies and makes clear that over the last three decades, Poland has routinely failed to provide effective access to abortion under the circumstances provided by

[19] The Act of 5 December 1996 on the Professions of Physician and Dentist (Journal of Laws of 2023, item 1516).
[20] Judgment of the Constitutional Tribunal of 7 October 2015, K 12/14.
[21] For the domestic practice of conscientious objection, *see* A. Krajewska, 'Revisiting Polish Abortion Law: Doctors and Institutions in a Restrictive Regime', 3 *Social & Legal Studies* (2022) p. 427 et seq.
[22] B. Merner et al., 'Institutional objection to abortion: A mixed-methods narrative review', 19 *Women's Health* (2023) p. 1 et seq.
[23] Commissioner for Human Rights of the Council of Europe, *supra* n. 1.
[24] Human Rights Committee, *Concluding observations on the seventh periodic report of Poland,* No. CCPR/C/POL/CO/7, 23 November 2016, https://documents.un.org/doc/undoc/gen/g16/260/78/pdf/g1626078.pdf?token=fmOQT8WzNrC8eZRl6Z&fe=true, visited 1 July 2024; *see* also Bucholc, *supra* n. 12, p. 79.

law. It is worthwhile to recall the landmark ECtHR rulings to provide an overview of the issues that have been impeding the domestic provision of abortion well before the laws' further restriction in 2020.

The European Convention on Human Rights does not provide the right to abortion. Neither has an individual right to terminate pregnancy been reinterpreted in the case law of the ECtHR. The CoE member states are granted a wide margin of appreciation to regulate domestic access to abortion.[25] Hence, ECtHR recognizes even restrictive abortion regulations if they had been provided by law following a prescribed law-making procedure. If the right to abortion is granted domestically, the ECtHR derives a positive obligation of the state to put in place a pertinent legal framework allowing the right to be effectively exercised.[26] Access to abortion cannot be merely illusory. Crucially, when scrutinizing domestic procedures for obtaining legal abortion, the ECtHR commonly raises the arguments regarding women's health and well-being, which makes the social rights-dimension of abortion relevant in the ECHR context. It is in this vein that the ECtHR has assessed the domestic law and has repeatedly confirmed Poland's failure to secure an effective right to abortion in circumstances prescribed by law. The most relevant cases against Poland in which such violation was found are *Tysiąc* v *Poland*[27], *R.R.* v *Poland*[28], and *P. and S.* v *Poland*[29].

The judgment *Tysiąc* v *Poland* concerned a woman suffering from severe myopia and holding a disability assessment who, after becoming pregnant, was advised by three independent ophthalmologists that her eyesight will continue to deteriorate during pregnancy. Following these professional assessments, the applicant has decided to undergo therapeutic abortion, but the consulted medical practitioners have all refused to issue the legally required certificate. Even after having eventually obtained the document, which was issued by a general practitioner, the applicant was denied the right to abortion by a public hospital where the pregnancy termination procedure had already been scheduled. Consequently, the applicant was forced to give birth. During the pregnancy and after the delivery, the applicant's eyesight worsened significantly, and she was certified with a severe disability. She lodged criminal proceedings against the doctor who refused to perform abortion but has lost the case. Before the ECtHR, the applicant alleged the violation of

[25] B. Ní Ghráinne and A. McMahon, 'Access to Abortion in Cases of Fatal Foetal Abnormality: A New Direction for the European Court of Human Rights?', 3 *Human Rights Law Review* (2019) p. 561 et seq.
[26] *Ibidem*, p. 561 et seq.
[27] ECtHR 20 March 2007, No. 5410/03, *Tysiąc* v *Poland*.
[28] ECtHR 26 May 2011, No. 27617/04, *R.R.* v *Poland*.
[29] ECtHR 30 October 2012, No. 57375/08, *P. and S.* v *Poland*.

Articles 3, 8, and 13 ECHR stipulating the rights to respect for private and family life, prohibition of torture and inhumane or degrading treatment as well as the prohibition of discrimination, respectively.

Based on the above factual circumstances, ECtHR decided to consider the case against the backdrop of Article 8 ECHR. It did not recognize the applicant's claims relating to the alleged violation of Article 3. It has also held that the applicant's arguments formulated in the context of Article 14 ECHR largely overlap with the issues raised under Article 8 ECHR and as such, the Court considered it necessary to focus exclusively on the implications for the applicant's right to privacy.

The European Court of Human Rights found a violation of the right to respect for private and family life. Justification invoked severe deficiencies in the domestic procedure for obtaining legal therapeutic abortion. The court found that there were no mechanisms in place allowing the patient to seek a second opinion regarding the procedure's legal admissibility. Likewise, there was no legal framework to resolve the conflicts regarding the abortion's necessity occuring either between the pregnant woman and the doctor or between the doctors themselves. The domestic procedure was therefore deemed unsatisfactory for lacking clear indications permitting to determine whether the legal conditions for abortion had been met. As asserted by the ECtHR, these legal shortcomings caused a state of prolonged uncertainty on the part of the applicant seeking abortion and made her subject to significant psychological distress.[30]

The second ruling, *R.R.* v *Poland*, concerned an applicant who was repeatedly denied access to prenatal genetic tests when seeking further diagnostics after her doctor informed her about the possible malformation of the fetus she was carrying. Six weeks passed until she was finally admitted to the hospital and underwent further tests. During that time, the applicant was denied medical counselling and access to the relevant examinations in several institutions. The scans ultimately confirmed that the fetus was malformed and suffered from Turner syndrome. Despite the applicant having requested abortion on the same that day she received the examination results, abortion was denied because the legally prescribed time limit had already passed.

The European Court of Human Rights agreed with the applicant's claims that she was treated in a humiliating way amounting to inhumane and degrading treatment, in breach of Article 3 ECHR. The court held as well that the applicant's suffering was aggravated by the fact that she

[30] ECtHR 20 March 2007, No. 5410/03, *Tysiąc* v *Poland,* at 124.

was legally entitled to the diagnostic services which were technically available and should have been performed. Next to the violation of Article 3 ECHR, the ECtHR has also found a breach of Article 8 ECHR caused by Poland's failure to implement effective mechanisms allowing the applicant to access genetic tests and, based on the results, make an informed decision regarding pregnancy termination. The absence of the pertinent mechanisms equaled ineffective implementation of the relevant provisions of the domestic law providing the right to abortion.

Finally, *P. and S.* v *Poland* was issued on behalf of a minor who was denied abortion despite the fact that the pregnancy resulted from rape. When seeking medical assistance to obtain legal abortion, the underage applicant and her mother were denied access to abortion at the medical center nearest their place of living. They were also denied referral to different institutions where the procedure could have been performed and were erroneously and misleadingly advised regarding legal requirements for abortion. Additionally, the public hospital involved informed the press about the circumstances of the case, thereby disclosing sensitive personal information. Moreover, the applicant was taken away from her mother and put in foster care due to the alleged pressure exerted upon her in order to talk her into undergoing abortion.

The European Court of Human Rights held that the relevant procedures allowing to reconcile the right to conscientious objection, invoked by medical practitioners, against the applicant with her right to obtain legal abortion, were lacking. It further stressed that resulting from the absence of the implementation mechanisms, was a severe discrepancy between the legal entitlement to obtain abortion when the pregnancy results from a criminal act and the impediments faced by the applicant in practice, stripping her of the right to "timely and unhindered" access to abortion. Minding the above, the ECtHR concluded that there has been a violation of Article 8 ECHR.

The court ruled further that the decision to place the underage applicant in the juvenile center was made on purpose and aimed at separating her from her parents to prevent the abortion. This amounted to a violation of the applicant's rights to liberty and security under Article 5(1) ECHR. The fact that domestic authorities instigated criminal proceedings against the minor applicant, who herself had been a victim of sexual assault, and later executed the decision leading to the applicant's separation from her mother, was considered inadmissible. Coupled with other relevant circumstances, including the doctors pressuring the applicant to withdraw from abortion,

the overall procrastination on the part of the medical personnel, and the lack of medical counselling, the circumstances of the case amounted to a violation of Article 3 ECHR.

The above jurisprudence has shown that, next to having one of the most restrictive abortion regimes in Europe, Poland has failed to secure effective access to legal abortion in the limited circumstances prescribed by law. Especially, in its current framing, the domestic right to conscientious objection granted to medical practitioners, is contrary to the ECHR standard. As invoked in cases *R.R.* v *Poland* and *P. and S.* v *Poland*, states are "obliged to organise their health services to ensure that an effective exercise of the freedom of conscience of health professionals in a professional context did not prevent patients from obtaining access to services to which they were legally entitled."[31] The domestic practice fails to meet these requirements. Despite the far-reaching deficiencies and violations found by the ECtHR, none of the rulings were implemented, leaving erroneous the legal and factual circumstances surrounding the exercise of abortion rights. This inaction was heavily criticized by the CoE institutions, albeit with no palpable effect on the practice.[32]

3. The overturning of the legal *status quo* on abortion

The fact that the Law on Abortion has not been changed since the late 1990s does not mean that there was no political will to amend it. Quite to the contrary, moral disagreement about abortion has been ongoing and there have been permanent attempts from both sides of the political spectrum to either restrict or liberalize the provisions. The pro-life legal initiatives were followed by the adverse pro-choice proposals advocating for the recognition of women's right to abortion on request.

Although the abortion law was already strict and access to the procedure was significantly limited in practice, the efforts to further limit abortion availability dominated. The fact that these initiatives were put forth consecutively, under different political majorities, shows that the overall conservative attitude towards women's reproductive rights prevailed over the years. Bills aiming

[31] ECtHR 30 October 2012, No. 57375/08, *P. and S.* v *Poland*, at 106; ECtHR 26 May 2011, No. 27617/04, *R.R.* v *Poland*, at 206.
[32] Commissioner for Human Rights of the Council of Europe, *supra* n. 1, at 81.

to introduce a total ban on abortion were proceeded among others in 2011, 2013, and 2015, albeit unsuccessfully. Despite multiple attempts, the law has not been changed until 2020.

The momentum for amending the abortion laws came under the current government which, from the outset, supported the pro-life initiatives. The first attempt took place in 2016 and, after its failure, a similar bill was submitted in 2018.[33] Both legislative proposals provided for a total ban on abortion and aimed to introduce criminalization of the pregnant woman undergoing the procedure and the medical practitioner performing it.[34] When the legislation was proceeded in Parliament, the national feminist movements, human rights activists, and the political opposition protested countrywide. Especially noteworthy was one massive march against the introduction of the new law, commonly referred to as either Black Monday or Black Protest, which turned out to have been the biggest public manifestation since the collapse of communism.[35] At that time, the protests proved successful in hindering the adoption of the new provisions.[36] This, however, only meant the reform's postponement and not its complete removal from the political agenda of the governing majority.

On 19 November 2019, a group of members of the Parliament filed a motion with the Constitutional Tribunal requesting a constitutional review of the Law on Abortion. The alleged unconstitutionality concerned one of the three existing legal grounds for terminating pregnancy: high probability of the fetus's severe damage or its incurable life-threatening ailment. On 22 October 2020, the Constitutional Tribunal found unconstitutional the legal provision allowing abortion based on FFA.[37]

It was mentioned above that, since its adoption in the 1990s, there has only been one successful attempt to liberalize the Law on Abortion beyond the scope of the "abortion compromise". Soon afterwards, however, the Constitutional Tribunal struck down the provision allowing for the termination of pregnancy on broad social grounds.[38] Crucially, the constitutional

[33] Krajewska, *supra* n. 3, p. 1083.
[34] Gliszczyńska-Grabias and Sadurski, *supra* n. 12, p. 134.
[35] P. Cullen and E. Korolczuk, 'Challenging abortion stigma: framing abortion in Ireland and Poland', 3 *Sexual and Reproductive Health Matters* (2019) p. 11.
[36] European Parliament, Resolution on the first anniversary of the *de facto* abortion ban in Poland, No. 2021/2925(RSP), 11 November 2021, https://www.europarl.europa.eu/doceo/document/TA-9-2021-0455_EN.html, visited 1 July 2024, at G; E. Korolczuk, 'Mass Mobilization Against the Ban on Abortion', 5 April 2016, *BalticWorlds*, http://balticworlds.com/mass-mobilization-against-the-ban-on-abortion/, visited 1 July 2024; Commissioner for Human Rights of the Council of Europe, *supra* n. 1, at 71; Bucholc, *supra* n. 12, p. 84.
[37] Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20.
[38] Judgment of the Constitutional Tribunal of 28 May 1997, K 26/96.

jurisprudence has never come any further than this. Especially, the constitutionality of the three existing exceptions to the general prohibition of abortion has not been questioned since 1993 when the Law on Abortion was adopted.[39] Considered from an opposite angle, this means that there was no previous constitutional practice which could have laid the groundwork for drawing legal conclusions of such severity as those reached by the Constitutional Tribunal in the K 1/20 judgment. Obviously, since the right to abortion is not of a constitutional rank, the nullification of the FFA ground cannot be claimed to afford a direct violation of the Constitution. However, by the same token, the constitutionality of the FFA ground is by no means straightforwardly excluded. It is neither the explicit constitutional provisions nor the previous constitutional jurisprudence that support the declaration of unconstitutionality of the FFA abortion exception.

In light of the above constitutional ambiguity, it seems especially relevant to invoke the concrete legal reasoning mounted by the Constitutional Tribunal when striking down the FFA ground. For reasons of space, as well as due to the complexity of the argumentation invoked in the judgment, the following overview only reiterates the leading narratives and the most fundamental statements formulated by the Constitutional Tribunal to uphold the view regarding the irreconcilability of the provision allowing for pregnancy termination in the case of fetal disability with the Constitution.

The Constitutional Tribunal declared Article 4a(1)(2) of the Law on Abortion, allowing for pregnancy termination in cases of severe anomaly of the fetus, inconsistent with the right to protection of life[40], considered in conjunction with the value of human dignity[41]. In essence, the Tribunal grounded its judgment in the fetus-protective arguments stipulating that the "unborn life" is subject to constitutional protection from the moment of conception. It stated that severe fetal disability, as a condition justifying the limitation of the fetus's protection, and thus, pregnancy termination, does not find a constitutional basis, and consequently, must be declared unconstitutional. It bears noting that referring to the fetus as an "unborn life" is already in itself value-laden and points to the radicalization of the constitutional language and politicization of the constitutional review process.[42]

[39] European Parliament, *supra* n. 36, at X.
[40] Article 38 of the Constitution.
[41] Article 30 of the Constitution.
[42] D. Szelewa, 'Killing "Unborn Children"? Catholic Church and Abortion Law in Poland Since 1989', 6 *Social & Legal Studies* (2016) p. 751.

### 3.1. Formal and substantive deficiencies of the K 1/20 ruling

It is both the ruling's formal side as well as its substance which raise significant concerns regarding their legality, and will be addressed separately below. First, there are doubts as to whether the ruling can be considered as having a binding legal effect.[43] These objections are based on the Constitutional Tribunal's composition when handing out the judgment. More precisely, sitting on the bench were the so-called "doubler judges" appointed by following unconstitutional procedure. These claims form part of a larger debate on the ongoing reforms of the Constitutional Tribunal's as causes of its erroneous composition, leading to the Tribunal's lack of legal legitimacy to deliver binding constitutional judgments.

In this context, three main formal aspects render the ruling invalid.[44] First, when deciding the case, the Constitutional Tribunal was composed of, among others, three judges which had been appointed following improper procedure.[45] Second, the bench was presided by a judge wrongfully elected to the position of the Constitutional Tribunal's President (her status as a constitutional judge, to the contrary, is not being questioned).[46] Finally, following its adoption, the ruling was not published by the government, contrary to the constitutional requirement of "immediate" publication following from Article 190(2).[47] This led to the situation whereby, despite having been issued on 22 October 2022, the judgment's official publication, and therefore, its entry into force, took place on 27 January 2023. The government has not only procrastinated the official publication of the judgment, but the ruling itself provided no transitional period allowing individuals as well as medical institutions to adjust their activity to the legal changes and follow through with procedures which had already been set in motion.

These formal aspects have straightforward legal consequences and as correctly suggested by many legal scholars, render the judgment unlawful.[48] However, there has been no legal

[43] Krajewska, *supra* n. 3, p. 1084; Bucholc, *supra* n. 12, p. 87.
[44] I enumerate them after Gliszczyńska-Grabias and Sadurski, *supra* n. 12, p. 135 et seq.
[45] *See* Judgment of the Constitutional Tribunal of 3 December 2015, K 34/15; Judgment of the Constitutional Tribunal of 11 August 2016, K 39/16.
[46] Helsińska Fundacja Praw Człowieka, *Dostępność aborcji embriopatologicznej w Polsce*, 2021, https://hfhr.pl/publikacje/dostepnosc-aborcji-embiopatologicznej-w-polsce, visited 4 July 2024, p. 6.
[47] Gliszczyńska-Grabias and Sadurski, *supra* n. 12, p. 135.
[48] E. Łętowska, 'A Tragic Constitutional Court Judgment on Abortion', *Verfassungsblog*, 12 November 2020, https://verfassungsblog.de/a-tragic-constitutional-court-judgment-on-abortion/, visited 1 July 2024; *see* also Statement of the Legal Experts Group of the Stefan Batory Foundation on the Constitutional Tribunal Ruling on

institution within the domestic legal framework capable of reviewing validity of the K 1/20 judgment. Hence, although the formal points raised above reveal the judgment's significant procedural deficiencies, on their own, these factors could not hinder the ruling's entry into force. They did, however, cause the ECtHR to find the domestic abortion regime to be in violation of the ECHR which will be discussed below.

Similarly to the formal features, the ruling's substantive findings are unlawful. Especially, while the reasoning is pretending to be rooted in the previous constitutional jurisprudence, it is in fact based on an opportunistic reinterpretation of selectively chosen constitutional arguments taken out of their original context. The seemingly strongest arguments, making the core of the reasoning, such as those regarding the constitutional protection of the "unborn life", are ill-founded and oppose the previous long-established views on this matter presented by the constitutional law doctrine and the Constitutional Tribunal itself. Below, invoked are the most striking examples of this purported constitutional interpretation.

First, the argumentation was grounded in the constitutional provision stipulating protection of life. It must be noted that the Constitution does not expressly protect the right to life "from the moment of conception".[49] A draft constitution that included such a provision was proceeded in the 1990s but was eventually rejected by the Constitutional Assembly.[50] This makes clear that, even implicitly, protection of the "unborn life" cannot be derived from the constitutional text. The Constitution leaves open the question of when human life begins and ends. The vague formulation of Article 38, stipulating "legal protection of the life of every human being", must be interpreted as leaving the regulation of these matters up to the lawmaker, including through the adoption of the abortion law.[51] The position expressed in K 1/20 ruling opposes such a reading of the constitutional provisions by claiming that it was an intention of the constitution-maker to leave up to the Constitutional Tribunal the decision on the scope of the constitutional notion of a "human being" within the meaning of Article 38.[52]

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Abortion, 28 October 2020, https://www.batory.org.pl/en/oswiadczenie/statement-by-the-legal-experts-group-of-the-stefan-batory-foundation-on-the-constitutional-tribunal-ruling-on-abortion/, visited 1 July 2024.

[49] Łętowska, *supra* n. 48.

[50] Komisja Konstytucyjna Zgromadzenia Narodowego, *Biuletyn XLV* (Wydawnictwo Sejmowe 1997) p. 3-46; Krajewska, *supra* n. 3, p. 1086.

[51] Cholewiński, *supra* n. 9, p. 261.

[52] Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20, at 3.3.3; Bucholc, *supra* n. 12, p. 90.

Next, when constructing the legal argument, the Constitutional Tribunal has mainly relied on one specific constitutional case. It invoked the already mentioned K 26/96 judgment of 1997 nullifying the right to abortion on broad social grounds, legislated in 1996. And when referring to the ruling, the Constitutional Tribunal purported its very essence as to make the arguments raised therein suitable for building its own case. In the K 26/96 judgment, when scrutinizing the provisions allowing for abortion on grounds of material or personal hardship, the Constitutional Tribunal has reached a general conclusion regarding the scope of the protection of the life of the fetus and has stated that "accepting that human life, including life in the prenatal stage, is a constitutional value does not yet prejudge the issue that in certain exceptional situations the protection of this value may be limited or even excluded due to the need to protect or realize other constitutional values, rights or freedoms".[53]

And while the bench deciding the case did not proceed further to conduct a review of the three remaining exceptions allowing for abortion, one of the justices enclosed a dissenting opinion in which he engaged in-depth with the abortion law provisions. Lech Garlicki reiterated that "although the termination of pregnancy always amounts to an interference with the "essence" of the life of the fetus, it is not always prohibited by the Constitution."[54] He enumerated the cases of therapeutic abortion performed to protect the life or health of the mother as well as the abortion in cases of severe fetal impairment, as circumstances in which the conflict between the competing interests at stake – the protection of the lives of the fetus and of the mother – must be resolved in a way to protect the rights of pregnant women. He stressed that such a solution is admissible under the Constitution.

The K 1/20 ruling did not refer to these statements and, to the contrary, has only relied on the arguments invoked to declare abortion on broad social grounds unconstitutional. The Constitutional Tribunal has taken out passages of the reasoning which could easily be bent to the factual circumstances of K 1/20 case. These were repurposed to make the claim that the FFA is incompatible with the Constitution.[55]

What is especially striking, however, is that in the K 1/20 ruling, the Constitutional Tribunal did not consider the protection of the life of the fetus against any other conflicting rights,

[53] Judgment of the Constitutional Tribunal of 28 May 1997, K 26/96, at 4.3.
[54] *Ibidem*, at 8.
[55] Gliszczyńska-Grabias and Sadurski, *supra* n. 12, p. 148.

as suggested by the K 26/96 ruling. The Constitutional Tribunal ignored the rights and freedoms enjoyed by the mother.[56] By doing so, it disregarded the constitutional guarantees securing the standing of a pregnant woman, such as the right to protection of life and health, as well as the guarantees ensuing from the value of human dignity.[57] Only the dissenting opinion enclosed to the K 1/20 ruling has noted that forcing women to give birth to a child with severe or lethal disabilities might lead to a violation of the prohibition of torture and degrading or inhumane treatment.[58] Hence, the ruling has the effect of subjecting women's rights entirely to the protection of the life of the fetus, endorsing thus a new reading of the Constitution which has not previously occurred even in the judgment handed down nearly three decades earlier in a much more conservative political and social reality.

### 3.2. International and comparative abortion law context

In K 1/20 ruling, the Constitutional Tribunal has made several vague references to international law. It has invoked international documents stipulating protection of human life, such as Charter of Fundamental Rights of the European Union, the UN Convention on the Rights of the Child, or the International Covenant on Civil and Political Rights, without however going into the details of how this notion of life is framed or interpreted in practice. Especially, the Constitutional Tribunal failed to make the case that these provisions are in any way relevant to the statements made regarding the protection of the fetus in cases of its severe and irreversible ailment.[59] Moreover, the Constitutional Tribunal invoked the provisions of the ECHR stipulating the right to life even though the ECtHR has never decided in favor of considering fetus "a person" with "the right to life" as follows expressly from a landmark judgment *Vo* v *France*.[60] This justifies the claim that K 1/20 ruling did not at all engage with the international standard of human rights protection. [61] It intentionally left out the substantial body of international jurisprudence as it would deny the legal argument justifying the striking down of the FFA ground.

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[56] M. Wyrzykowski and M. Ziółkowski, 'Illiberal Constitutionalism and the Judiciary' in Sajó, Uitz and Holmes, *supra* n. 13, p. 526.
[57] Judgment of the Constitutional Tribunal of 28 May 1997, K 26/96, at 10.
[58] Dissenting opinion of judge Piotr Pszczółkowski to the Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20.
[59] Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20, at 3.3.4.
[60] ECtHR 8 July 2004, No. 53924/00, *Vo* v *France*, at 84.
[61] Bucholc, *supra* n. 12, p. 76 et seq.

Primarily, the Constitutional Tribunal did not mention that any decision to restrict abortion law is considered a violation of the international human rights standard. For instance, the UN Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health has found the restrictive rights on abortion as well as its criminalization as amounting to a violation of the states' international legal obligations regarding prohibition of discrimination and protection of women's reproductive autonomy and dignity.[62] According to the UN Committee's on Economic, Social and Cultural Rights General Comment on the right to sexual and reproductive health, restrictive abortion laws undermine autonomy and the right to equality and non-discrimination in the full enjoyment of the right to sexual and reproductive health. States must eliminate such regulations.[63] The UN Committee on the Elimination of Discrimination against Women has explained that "violations of women's sexual and reproductive health and rights, such as criminalization of abortion, denial or delay of safe abortion and/or post-abortion care, and forced continuation of pregnancy, are forms of gender-based violence that, depending on the circumstances, may amount to torture or cruel, inhuman or degrading treatment."[64] This conclusion finds confirmation in the international jurisprudence. Such reading of international law prevails since 2016, when the UN Human Rights Committee adopted a groundbreaking decision in the case *Mellet* v *Ireland* which found that the lack of the right to abortion in the case of FFA can amount to inhuman or degrading treatment in violation of Article 7 of the International Covenant on Civil and Political Rights.[65]

Furthermore, when invoking the ECHR, the Constitutional Tribunal did not reiterate the report of the Commissioner for Human Rights drafted after her visit to Poland in 2019, before the adoption of the K 1/20 ruling, which stressed that further limitation of the domestic laws, which had already been restrictive, would violate the fundamental principle of non-retrogression "which prohibits measures that diminish existing rights in the field of health".[66] There is a considerable

[62] Special Rapporteur on the right of everyone to the enjoyment of the highest attainable standard of physical and mental health, *Interim Report*, No. A/66/254, 3 August 2011, https://documents.un.org/doc/undoc/gen/n11/443/58/pdf/n1144358.pdf?token=gWzoFirYkbTAEn8NUh&fe=true, visited 1 July 2024, at 21, 65; European Parliament, *supra* n. 6, at Q.
[63] CESCR, *supra* n. 5, at 34.
[64] CEDAW, *General Recommendation 35 on gender-based violence against women, updating general recommendation 19 (1992)*, No. CEDAW/C/GC/35, 26 July 2017, at 18.
[65] UN Human Rights Committee 17 November 2016, No. 2324/2013, *Mellet* v *Ireland*; K. Sękowska-Kozłowska, 'A tough job: recognizing access to abortion as a matter of equality. A commentary on the views of the UN Human Rights Committee in the cases of Mellet v. Ireland and Whelan v. Ireland', 54 *Reproductive Health Matters* (2018) p. 26.
[66] Commissioner for Human Rights of the Council of Europe, *supra* n. 1, at 86.

body of scholarship as well as international jurisprudence condemning retrogression in social rights protection for being contrary to international law.[67] In this context, the Commissioner has called upon the Polish parliament, which at that time was proceeding bills seeking to introduce a ban on abortion, to reject these restrictive solutions.[68]

Finally, K 1/20 ruling was silent on the fact that, in a comparative European perspective, Poland is an outlier in terms of abortion regulations and the last country to sustain draconian restrictions on abortion. Comparable legal solutions can only be found in Malta.[69] The dominating tendency in the EU countries, which has been found to correlate with the overall economic development[70], has been to broaden women's reproductive autonomy and reduce the number of unintended births.[71] All member states, apart from Poland and Malta, provide legal abortion on request or on broad social grounds.[72] On 9 May 2023, the Spanish Constitutional Court validated domestic liberal law on abortion adopted in 2010.[73] It allows for abortion on request up to 14 weeks of pregnancy, or up to 22 weeks, in cases of serious risk to women's life or health or severe disability of the fetus. The Spanish Constitutional Court has found that such an entitlement stems from women's right to self-determination and human dignity.[74] An unprecedented legal

[67] R. Dixon and D. Landau, 'Defensive Social Rights' in M. Langford and K. Young (eds.), *The Oxford Handbook of Economic and Social Rights* (Oxford University Press 2022); R. Dixon and S. Verdugo, 'Social Rights and Constitutional Reform in Chile: Towards Hybrid Legislative and Judicial Enforcement', 162 *Estudios Públicos* (2021) p. 24; A. Nolan, N.J. Lusiani and C. Courts, 'Two Steps Forward, No Steps Back? Evolving Criteria on the Prohibition of Retrogression in Economic and Social Rights' in A. Nolan (ed.), *Economic and Social Rights After the Global Financial Crisis* (Cambridge University Press 2014) p. 128; CESCR, *General Comment 3: The Nature of States Parties' Obligations (Art. 2, Para. 1, of the Covenant)*, No. E/1991/23, 14 December 1990, https://www.refworld.org/legal/general/cescr/1990/en/5613, visited 1 July 2024, at 9.

[68] Commissioner for Human Rights of the Council of Europe, *supra* n. 1, p. 2.

[69] Center for Reproductive Rights, *European Abortion Laws. A Comparative Overview* (2020), 2020, https://reproductiverights.org/wp-content/uploads/2020/12/European-abortion-law-a-comparative-review.pdf, visited 4 July 2024.

[70] A. Brysk and R. Yang, 'Abortion Rights Attitudes in Europe: Pro-Choice, Pro-Life, or Pro-Nation?', 2 *Social Politics* (2023) p. 6.

[71] I. Szalma et al., 'Fragile Pronatalism and Reproductive Futures in European Post-Socialist Contexts', 3 *Social Inclusion* (2022) p. 83; European Network of National Human Rights Institutions, *supra* n. 6, at 46-47.

[72] Abortion on broad social grounds is effective in Finland. All remaining states guarantee the right to abortion on women's request; Commissioner for Human Rights of the Council of Europe, *Women's sexual and reproductive health and rights in Europe* (2017).

[73] Judgment of the Spanish Constitutional Tribunal of 9 May 2023, STC 44/2023.

[74] Tribunal Constitucional, 'El Pleno del TC Afirma que la Constitución Reconoce a la Mujer el Derecho a Decidir Libremente Sobre la Continuación del Embarazo Dentro de las Primeras Catorce Semanas de Gestación', Nota informativa No. 32/2023, 9 May 2023, https://www.tribunalconstitucional.es/NotasDePrensaDocumentos/NP_2023_032/NOTA%20INFORMATIVA%20N%C2%BA%2032-2023.pdf, visited 1 July 2024.

transformation has recently taken place in France which became the first country in the world to introduce an explicit constitutional right to abortion.[75]

In light of the above formal and substantive objections, the general conclusion to be drawn from the analysis of the K 1/20 ruling's reasoning is that the judgment should be considered ill-founded. There are no arguments to be found in the constitutional text or the previous constitutional practice which could reasonably justify the unconstitutionality declaration pertaining to the FFA ground for performing legal abortion.[76] What is even more striking is that the claims employed by the Tribunal to declare unconstitutionality are themselves contrary to the Constitution. Such *status quo* is unconceivable in a state governed by law and can must be considered in the broader context of the ongoing domestic constitutional crisis.

## 4. Domestic abortion regime through the lens of the ECHR: the case *M.L.* v *Poland*

Notwithstanding the formal and substantive deficiencies, there was no legal avenue available domestically to prevent the K 1/20 ruling from coming into force following its official publication.[77] Medical practitioners immediately began to implement new regulations to avoid any legal repercussions.[78] Consequently, the legal framework in place since the adoption of K 1/20 ruling has been commonly labelled a near-total ban on abortion. This term is accurate because prior to the ruling, almost all legal abortions performed in Poland were due to severe and irreversible fetal damage. For instance, between 2015 and 2017, the FFA ground stood behind 95% of recorded abortion procedures.[79] Therefore, the immediate result of the nullification of the FFA from the list of circumstances permitting legal abortion, was that the right has *de facto* been abolished.[80]

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[75] Article 34 of the Constitution of France.
[76] Gliszczyńska-Grabias and Sadurski, *supra* n. 12, p. 139.
[77] Łętowska, *supra* n. 48.
[78] Krajewska, *supra* n. 3, p. 1084.
[79] In 2015, out of all 1040 conducted abortions, 996 were due to fatal fetal abnormality, which amounts to 95%; The Council of Ministers*, Report of the Council of Ministers on the implementation and effects of the Law of 7 January 1993 on family planning, protection of the human fetus and the conditions for permissible termination of pregnancy in 2021,* No. DSP.WPP.4521.18.2022, 2 November 2022, https://orka.sejm.gov.pl/Druki9ka.nsf/0/75710091486B2822C12588EF0034990C/%24File/2758.pdf, visited 1 July 2024, p. 81.
[80] In 2019, a total number of 1076 abortions were performed, whereas in 2021 only 107; *see* The Council of Ministers, *ibidem*, p. 101.

The lack of consent for such a draconian abortion regime has resulted in women lodging complaints with the ECtHR alleging violation of their right to respect for private and family life under Article 8 ECHR. Over one thousand such applications were submitted since the K 1/20 ruling took effect.[81] They were often supported by human rights organizations such as Amnesty International, Center for Reproductive Rights, Human Rights Watch, or the International Commission of Jurists.[82] And although the ECtHR has already declared one of such applications inadmissible due to the merely potential character of the alleged human rights violation formulated therein, and thus, the absence of the victim status[83], it has recently delivered a ruling addressing for the first time the merits of the abortion regime.

The case *M.L.* v *Poland*[84] concerned a woman who was refused access to legal abortion on grounds of FFA following the K 1/20 judgment's entry into force, even though she has had her medical appointment scheduled and the procedure was due one day after the ruling's official publication. As a result, she was forced to travel abroad and has undergone abortion in the Netherlands. Before the ECtHR, the applicant alleged violation of the prohibition of inhuman and degrading treatment and the right to respect for private and family life.

First, regarding the allegations under Article 3 ECHR, the ECtHR declared them inadmissible for failing to meet the relevant threshold of severity qualifying the treatment as falling within the scope of the said provision. Moving on to the allegations relating to Article 8 ECHR, the court stated that, although ECHR does not guarantee the right to abortion, abortion refusal in the case of FFA must be considered as falling within the ambit of Article 8 ECHR, and consequently, as amounting to an interference with the applicant's rights under this provision. It then went on to scrutinizing whether that interference was admissible by examining whether it was prescribed by law. In this context, the ECtHR agreed with the argumentation raised by the

[81] ECtHR, Notification of 12 applications concerning abortion rights in Poland, Press Release issued by the Registrar of the Court ECHR 217(2021).
[82] *See* Written comments on behalf of Amnesty International, the Center for Reproductive Rights, Human Rights Watch, the International Commission of Jurists (ICJ), the International Federation for Human Rights (FIDH), the International Planned Parenthood Federation European Network, Women Enabled International, Women's Link Worldwide and the World Organisation Against Torture (OMCT), 19 November 2021, https://reproductiverights.org/wp-content/uploads/2022/01/Written-Comments_KB-v-Poland-and-3-other-applications.pdf, visited 1 July 2024; *see* also Center for Reproductive Rights, 'Regression on Abortion Access Harms Women in Poland', 26 January 2022, https://reproductiverights.org/regression-abortion-access-harms-women-poland/, visited 1 July 2024.
[83] ECtHR 16 May 2023, No. 3639/21, *A.M. and Others* v *Poland*.
[84] ECtHR 14 December 2023, No. 40119/21, *M.L.* v *Poland*.

applicant and stressed that the legal amendment ensuing from the ruling, on the basis of which the refusal took place, did not satisfy the requirement of lawfulness. The court explained that the judgment was delivered by a composition of the Constitutional Tribunal that included judges appointed in unlawful procedures, contrary to the ECHR, the fact which had already been confirmed in the ruling *Xero Flor* v *Poland*.[85] It has also found that depriving the applicant of the right to abortion while she had already qualified for the procedure and was awaiting the scheduled appointment, amounted to an arbitrary decision-making. For the above two reasons, the interference was found not to have been in accordance with the law.

Domestic authorities must implement the *M.L* v *Poland* ruling and ought to consider the substantive findings from the judgment in the future domestic practice of abortion law. The ruling thereby offers a precedent endangering the continuity of the current legal *status quo*, especially given that the K 1/20 constitutional judgment's formal deficiency applies to all cases of refusal to perform abortion on grounds of FFA which took place after the ruling's publication. In this context, *M.L.* v *Poland* is a telling reminder of how insecure the domestic legal framework has been since the capture of the Constitutional Tribunal. It also illustrates the extent to which legal uncertainty has been affecting the rights of individuals even in such an intimate sphere as reproductive health.

## 5. Implications of the K 1/20 judgment

This section of the analysis explores the judgment's implications, distinguishing between those of legal and social nature. Under the former heading, the ruling's impact on the access to abortion rights is examined by invoking several infamous examples of abortion refusals in cases of FFA, some of which ended tragically for pregnant women. Based on the available statistical data, the analysis also comments on the geographical differences in abortion accessibility. Next, moving on to the outcomes of social nature, the investigation turns to the ruling's effect on abortion incidence as well as on women's reproductive choices. Considered jointly, this two-fold overview should draw a broader picture of the real-life abortion experience in the post-2020 domestic legal reality.

[85] ECtHR 7 May 2021, No. 4907/18, *Xero Flor* v *Poland*.

### 5.1. Abortion accessibility

There are several ways in which the K 1/20 ruling affected access to abortion. These consequences can be classified depending on their relationship to the ruling, that is whether they should have resulted therefrom given the scope of unconstitutionality declaration and the moment of the ruling's entry into force. In this context, we can distinguish between legal and beyond-legal, *de facto* implications. While the former refer to the judgment's prescribed outcomes on performing abortion on grounds of FFA, the latter denote the implications which took place beyond the scope of judgment's prescribed effectiveness and cover the cases of the FFA-based abortion refusals which took place prior to the ruling's publication as well as the abortion refusals in the remaining two cases prescribed by law.

Proceeding in chronological order, a significant chilling effect which occurred prior to the ruling's official publication must be mentioned first. It hindered the effectuation of the right to abortion in cases of severe disability of the fetus when the FFA legal ground was still in force. Already two days after the ruling, some public hospitals in Warsaw addressed formal requests to their medical staff not to perform abortions on grounds of fetal abnormality.[86] The justification for these orders was that, since it was unknown when exactly the ruling would become effective, it was legally more prudent to immediately abstain from performing abortions as to avoid repercussions in case of an unexpected entry into force of the new regulations. Consequently, medical practitioners refused to perform the procedure out of fear of criminal liability. It bears recalling that, under Article 152(1) of the Penal Code[87], any person assisting in the unlawful termination of pregnancy incurs criminal liability of up to three years of imprisonment. If the abortion was performed on a fetus capable of living outside of the mother's womb, this can result in imprisonment for up to eight years, in line with Article 152(3) of the Penal Code.

The scale of the chilling effect produced by the ruling prior to its entry into force was subject to a research study conducted by Helsinki Foundation for Human Rights which requested

[86] The press was reporting about such cases; *see* P. Rojek-Socha and M. Sewastianowicz, 'Przerwanie ciąży przed i w trakcie publikacji wyroku TK legalne - ważna godzina, *Prawo.pl,* 28 October 2020, https://www.prawo.pl/prawnicy-sady/zaostrzenie-prawa-aborcyjnego-w-polsce-od-kiedy-kary-dla-lekarzy,504087.html, visited 1 July 2024; *see* also M. Chrzczonowicz, 'Szpitale bezprawnie wstrzymują zabiegi aborcji. "Tak na wszelki wypadek, ze strachu"', *OKO.Press*, 16 December 2020, https://oko.press/szpitale-bezprawnie-wstrzymuja-zabiegi-aborcji-tak-na-wszelki-wypadek-ze-strachu, visited 1 July 2024.

[87] Penal Code (Journal of Laws 2024, item 17).

over 100 hospitals whether they would perform abortions based on fetal disability given the lack of official publication of the K 1/20 ruling.[88] In response, 38% of hospitals acknowledged that they would no longer perform abortion.[89] Some of them confirmed explicitly that this decision results from the constitutional judgment, while others did not state any reasons.[90]

Only select hospitals took an alternative approach and followed the premise that the ruling could only generate legal consequences after its entry into force. Based on this assertion, they scheduled and performed abortions until late January 2021. Even in such cases, the eventual coming into force of the ruling resulted in the cancellation of the pending appointments. Such were the circumstances in the above-commented *M.L.* v *Poland* judgment and the fact that in the case of the applicant the appointment has been cancelled after the procedure for obtaining abortion had already been put in motion was recognized by the ECtHR as being arbitrary in nature and caused the declaration of the violation of Article 8 ECHR.[91] Indeed, it follows from the domestic formal rule of law requirements, and more precisely, from the principle of protection of individual trust in state and law, that an individual should be given enough time to prepare for a legal change negatively affecting the scope of their rights.[92]

However, as mentioned above, the consequences of the K 1/20 ruling were not limited to the FFA ground. Despite its strictly limited scope, the judgment turned out to have a negative impact on women's rights to terminate pregnancy based on the two remaining legal circumstances. Four concrete cases of abortion refusals will be invoked to illustrate the hindrances faced by women when accessing abortion based on the danger posed to the life or health of the mother as well as due to the pregnancy being a result of a criminal act.[93] It is relevant in this context that medical experts in the field of gynecology and obstetrics indicate that all lethal fetal abnormalities should automatically be qualified as a threat to the mother's health and life.[94] Hence, even though three situations invoked below concerned women who were carrying fetuses with irreversible

[88] Helsińska Fundacja Praw Człowieka, *supra* n. 46.
[89] *Ibidem*, p. 8.
[90] *Ibidem*, p. 13.
[91] ECtHR 14 December 2023, No. 40119/21, *M.L.* v *Poland*.
[92] R. Mańko, '*Exceptio popularis*: Resisting Illiberal Legality' in R. Mańko et al. (eds.), *Law, Populism, and the Political in Central and Eastern Europe* (Routledge 2023) p. 116 et seq.
[93] J.W Jacobs et al., 'Pathology and Abortion Rights Advocacy: Considerations in a Post-Roe World', 6 *American Journal of Clinical Pathology* (2022) p. 776.
[94] K. Nocuń, 'Jędrzejko: Aborcja płodu z wadą letalną jest legalna – to ratowanie życia lub zdrowia kobiety', *Prawo.pl*, 13 February 2023, https://www.prawo.pl/zdrowie/wada-letalna-czy-aborcja-jest-legalna,519753.html, visited 1 July 2024.

damages, the condition of the threat to the health and life are relevant when deciding whether the legal conditions for pregnancy termination were met in these cases.

First, in September 2021, a 30-year-old pregnant woman died of septic shock because the doctors did not perform a life-saving abortion on time.[95] Even though the mother's health was severely endangered, and the diagnostics confirmed a general body infection, the doctors insisted to wait until the fetus was declared dead. After this happened, the woman went into cardiac arrest and died.[96]

January 2022 witnessed the second case of death.[97] Woman who was pregnant with twins was admitted to the hospital with abdominal pain and vomiting. After two days, one of the fetuses died but the doctors refused to remove it from the womb by relying on the laws in force prohibiting abortion in such cases. Consequently, the patient was forced to carry the dead fetus for another seven days until the second fetus died. Even afterwards, the doctors procrastinated performing the abortion for another two days. Following the removal of the dead fetuses from her body, the woman's medical condition deteriorated, and after being hospitalized for several weeks, she eventually died.

Another case of abortion refusal concerned a woman who was carrying a fetus having lethal damages consisting in an absence of flat bones of skull.[98] Fetuses with this malformation usually do not survive the birth. When the woman found out about the disability and the lack of the legal possibility for obtaining an abortion, she suffered from a mental breakdown. Her psychological condition confirmed by two independent psychiatrists. They both issued a medical expertise finding that the continuation of pregnancy will contribute to further regression of the woman's mental health. Consequently, the pregnant woman requested an abortion on grounds of risk to

[95] K. Bennhold and M. Pronczuk, 'Poland shows the risks for women when abortion is banned', *New York Times,* 12 June 2022, https://www.nytimes.com/2022/06/12/world/europe/poland-abortion-ban.html, visited 1 July 2024; A. Włodarczak-Semczuk and K. Pempel, 'Death of Pregnant Woman Ignites Debate about Abortion Ban in Poland', *Reuters*, 6 November 2021, https://www.reuters.com/world/europe/death-pregnant-woman-ignites-debate-about-abortion-ban-poland-2021-11-05/, visited 1 July 2024.

[96] European Parliament, *supra* n. 36, at J.

[97] D. Tilles, 'Woman dies in Poland after having to carry dead foetus for seven days', *Notes From Poland*, 26 January 2022, https://notesfrompoland.com/2022/01/26/woman-dies-in-poland-after-being-made-to-carry-dead-foetus-for-seven-days/, visited 1 July 2024; W. Strzyżyńska, 'Polish state has 'blood on its hands' after death of woman refused an abortion', *The Guardian*, 26 January 2022, https://www.theguardian.com/global-development/2022/jan/26/poland-death-of-woman-refused-abortion, visited 1 July 2024.

[98] D. Wantuch, 'Szpital w Białymstoku odmówił aborcji. Powołał się na opinię Ordo Iuris. Federa zapowiada pozew', *Wysokie Obcasy*, 3 December 2021, https://www.wysokieobcasy.pl/wysokie-obcasy/7,163229,27862402,szpital-w-bialymstoku-odmowil-aborcji-powolal-sie-na-opinie.html, visited 1 July 2024.

mother's health but the hospital denied it claiming that mental health issues cannot be considered a severe threat to mother's health within the meaning of Article 4a(1)(1) of the Law on Abortion.

Consequently, despite clear indications, none of the above cases was qualified as posing a threat to the mother's health or life.[99] These pregnant women were denied medical help to which they were legally entitled, in clear violation of the constitutional provisions stipulating healthcare and protection of life. It is undeniable that in all cases imminent danger to the life of the mother occurred, fulfilling the legal conditions for pregnancy termination. There was no viable justification for the doctors' repeated refusals to perform the life-saving abortion.

Likewise, K 1/20 ruling has further limited access to abortion in cases when the pregnancy results from rape or incest. In March 2023, an information about a 24-year-old woman with mental disability who became pregnant as a result of rape and was denied abortion, started to circulate in the media.[100] She was refused the right to terminate pregnancy despite having obtained a certificate from the police which constitutes a formal requirement for seeking abortion when pregnancy is a consequence of a criminal act. The woman was refused access to abortion in several hospitals near her place of residence and did not receive any counselling on where the procedure could be performed. Eventually, she was helped by an NGO which arranged an abortion in Warsaw.

Finally, drawing a full picture of the post-2020 abortion accessibility requires adding that, next to being significantly limited as a result of the K 1/20 ruling, access remains highly contingent on the region. That is because, for cultural and historical reasons, moral attitudes toward abortion, including those held by medical practitioners, differ throughout the country. Certain regions are commonly known for their conservative stance on abortion whereas in bigger agglomerations and urban centers the attitudes are much more liberal which is reflected in the numbers of performed abortions.[101]

To illustrate these correlations, the data from the Council of Minister's annual reports on the implementation of the Law on Abortion, must be invoked. The most recent report, containing a summary of all abortions performed countrywide, was drafted in 2021. It indicates that a total

[99] Nocuń, *supra* n. 94.
[100] Biuletyn Informacji Publicznej RPO, 'Nieporadnej ze względu na stan zdrowia kobiecie odmówiono legalnej aborcji z powołaniem na klauzulę sumienia', 10 March 2023, https://bip.brpo.gov.pl/pl/content/rpo-mz-nfz-aborcja-niepelnosprawna-dziewczynka-klauzula-sumienia-odpowiedz, visited 1 July 2024.
[101] On how religion correlates with abortion attitudes, *see* A. Adamczyk, 'Religion as a micro and macro property: investigating the multilevel relationship between religion and abortion attitudes across the globe', 38 *European Sociological Review* (2022) p. 816 et seq.

number of 107 legal abortions were conducted. Out of these, 32 on grounds of the risk to the health or life, 75 based on fatal fetal abnormality (the condition was still in force in January 2021), and none when the pregnancy was a result of the criminal act.[102] It is relevant to consider how these procedures were distributed geographically, across different regions. In the eastern part of Poland, which is known to be more conservative than the central and western parts of the country, a total number of 10 abortions were reported.[103] The remaining 97 procedures were performed in the voivodships located in the western and central parts of the country, Most of the procedures were carried out in the regions where the biggest Polish cities are located.[104] Comparing the overall number of abortions performed in 2021 to the numbers from the years preceding the adoption of the K 1/20 judgment, a dramatic decrease is visible, confirming the claim formulated earlier that the nullification of the FFA ground resulted in a near-total ban on abortion. For instance, in 2019, 1076 abortions were performed which is ten times more than in 2021.[105]

As evidenced, the K 1/20 ruling has produced an outcome reaching far beyond the judgment's original scope. The consequences were much broader, with significant negative implications for the nationwide access to abortion.

### 5.2. Social consequences

The above-discussed consequences of the K 1/20 ruling hindering effective access to abortion in cases of FFA and beyond, were desired by the governing majority which wanted to limit abortion practice to the furthest extent possible. There are, however, two further implications of which the same cannot be said, and which should be considered in terms of the ruling's unintended consequences.

The realities of the current domestic abortion regime confirm the accuracy of the premise that a legal ban on abortion is not effective in reducing abortion incidence.[106] In fact, an opposite

[102] The Council of Ministers, *supra* n. 79, p. 101.
[103] In voivodships: Warmińsko-mazurskie (0), podlaskie (5), lubelskie (4), podkarpackie (0), świętkorzyskie (1). In Podkarpackie, abortion has been *de facto* inaccessible long before the adoption of the K 1/20 judgment. In 2017, none of the 1076 abortions were performed there, whereas in 2016 only 2.
[104] In voivodships: dolnośląskie (13), mazowieckie (29), zachodniopomorskie (16); The Council of Ministers, *supra* n. 79, p. 102.
[105] Helsińska Fundacja Praw Człowieka, *supra* n. 46, p. 15.
[106] M. Levels, 'To Reduce Abortion Incidence, Do Not Restrict Abortion Supply. Reduce Demand', *Population Europe*, https://population-europe.eu/research/policy-insights/reduce-abortion-incidence-do-not-restrict-abortion-supply-reduce-demand, visited 1 July 2024.

trend was discovered, confirming that in countries with free access to abortion on request, fewer abortions are performed.[107] In Poland, women seeking the right to abortion in cases of fetal disability, or on any other grounds, are forced to resort to clandestine or abroad abortions.

A nationwide obligation to register all pregnancies[108], implemented after the K 1/20 judgment, has been exerting an additional psychological pressure on women seeking abroad abortions. Medical practitioners have been obliged to indicate information about pregnancy in the national system of medical data. Woman cannot request that the pregnancy remains unregistered, nor can she demand to delete the annotation. The official rationale behind the provisions is to increase women's safety by protecting them from potential medical wrongdoings which could result from the medical practitioners' unawareness that their patient is expecting a child. The common perception is, however, that the registry affords a tool to control the number of pregnancies and thereby, track clandestine and abroad abortions.[109]

The Foundation of Women and Family Planning estimates that the population of women travelling abroad to undergo abortion reaches between 80 to 120 thousand persons annually.[110] However because in the case of abroad abortions, economic status and social background are decisive for abortion accessibility, it follows that economically disadvantaged women are disproportionally affected by the domestic ban on abortion. Such women are forced to seek help through various initiatives, such as the Abortion Without Borders, which provide medical counselling and financial support necessary to access abortive procedures.[111]

To invoke the final consequence of the K 1/20 judgment, we need to cite a piece of data. A recent public opinion poll revealed that 68% of Polish women ages 18-45 do not want to have children.[112] It is a striking piece of information given that Poland already now has one of the lowest

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[107] J. Su, 'Better Access Leads to Lower Abortion Rates: the Netherlands' Approach to Women's Rights and Reproductive Health, *Fordham International Law Journal*, 10 January 2022, https://www.fordhamilj.org/iljonline/better-access-leads-to-lower-abortion-rates-the-netherlands-approach-to-womens-rights-and-reproductive-health, visited 1 July 2024.

[108] Ministry of Health, *Regulation of the Minister of Health of 26 June 26 2020 on the detailed scope of data of a medical event processed in the information system, as well as the manner and time limits for transferring such data to the Medical Information System* (Journal of Laws 2022, item 1294), at 2(3m).

[109] K. Kocemba, 'Pregnancy Registry in Poland', *Verfassungsblog*, 22 June 2022, https://verfassungsblog.de/pregnancy-registry/, visited 1 July 2024; Strzyżyńska, *supra* n. 97.

[110] Information taken from the official website of The Foundation of Women and Family Planning, https://federa.org.pl/farmakologiczna/, visited 1 July 2024; Krajewska, *supra* n. 21, p. 419.

[111] European Parliament, *supra* n. 36, at L, M.

[112] Public Opinion Research Center, *Women's procreative attitudes,* Research Communication No. 3, 2023, https://www.cbos.pl/SPISKOM.POL/2023/K_003_23.PDF, visited 4 July 2024, p. 1.

fertility rates in the EU.[113] The dire reality of abortion access and the quality of abortion services provided in Poland following the entry into force of the K 1/20 ruling, allows to make a plausible link between the changes to the abortion law and the results of the recent opinion poll regarding women's reproductive choices. The fact that women are now, by means of law, forced to give birth to a severely disabled fetus, makes them afraid of becoming pregnant. According to the current regulations, as soon as woman becomes pregnant, her dignity and rights to life and healthcare become subordinated to the protection of the life of the fetus. Decisions regarding pregnancy which concern such an intimate sphere of sexual and reproductive autonomy are now marked by state's coercion.[114]

The conclusion is therefore that the anti-natalist trend is yet another, albeit unintended, implication of the legal *status quo* on abortion. Hence, the current abortion regime is not only contrary to the domestic and international law, as demonstrated throughout this analysis, but is also unfounded in the context of the demographic downturn and the overall pro-natalist attitude of the current governing majority evident in the burgeoning family policies.

## 6. Conclusion

The above analysis demonstrated that the transformation of the Law on Abortion has resulted from a ruling which was formally and substantively ill-founded and, in the absence of the domestic constitutional crisis, would never have been considered effective. Formal deficiency of the K 1/20 judgment as a circumstance inhibiting its binding legal effect was confirmed in a recent ECtHR ruling in the case *M.L.* v *Poland* which considered the domestic abortion refusal in the case of FFA as a violation of Article 8 ECHR. Finally, along with being erroneous for formal and substantive reasons, the ruling proved to be fundamentally at odds with the international human rights standard.

The examination further evidenced that the coming into effect of the K 1/20 judgment has not only nullified one of the legal grounds for performing abortion, but beyond that, impeded the realization of the right to abortion based on the remaining legal circumstances. This generates a

[113] According to Eurostat, in 2022 Poland's fertility rate was 1.29. Worse rates were only noted in Spain (1.16), Lithuania (1.27), Italy (1.24), and Malta (1.08); *see* Eurostat, *Total fertility rate 2022 (live births per woman),* https://ec.europa.eu/eurostat/statistics-explained/index.php?title=Fertility_statistics, visited 1 July 2024.

[114] R. Piotrowski, 'Nowa regulacja przerywania ciąży w świetle Konstytucji', 8 *Państwo i Prawo* (2021) p. 75.

state of permanent uncertainty on the part of pregnant women regarding the legal *status quo* on abortion availability and must be viewed as yet another domestic impediment to the enjoyment of basic human rights. As illustrated by the concrete cases of abortion refusals, resulting from the current practice of abortion laws are the violations of women's rights to timely and unrestrained access to healthcare which, in some cases, had repercussion for the exercise of the legal protection of life. Hence, considered against the backdrop of the constitutional rights to have one's health and life protected, in the realm of abortion rights, the state fails to comply with the constitutionally derived positive obligations following from these substantive guarantees. Additionally, the fact that women themselves consider the law in terms of a significant threat to their health and life is noticeable in the dramatic negative shift in female attitudes towards childbearing.

Following the K 1/20 judgment, the already present limitations on women's rights, ensuing from the procedurally deficient and ineffectively implemented domestic abortion regime, have further exacerbated, causing a significant decline in the domestic protection of reproductive rights. In light of the above, the domestic regulation of the right to abortion must be considered as amounting to an inadmissible limitation of women's rights and freedoms.

# Chapter 6
# Housing

Over the last decade, domestic housing policy underwent a radical transformation. Driven by the intent to mitigate the mounting economic pressures affecting housing availability and costs, the government decided to visibly increase the levels of intervention in the housing market. The reforms consisted in the implementation, one after another, of two major housing programs, both of which were claimed to have redefined the state's approach to the issue. Primarily, however, while the premise that housing constitutes one of the leading political priorities has not changed over the course of two parliamentary terms, the mechanisms implemented to achieve the set goals, on the contrary, changed dramatically.

The two policies had opposite aims reflecting the basic housing policy divide between social construction and homeownership promotion. The first one, called Housing Plus, was a flagship government program diverting the focus to direct provision of housing through public construction of social dwellings. Following its failure, the government instantly returned to the ownership-supporting model by introducing a new comprehensive initiative called Safe Loan 2%, offering direct interest rate subsidies to mortgage loans. Thus, the trajectory of housing policy was one of a futile withdrawal from homeownership promotion.

This chapter aims to investigate the shift in Poland's housing policy as well as its effectiveness in responding to scarcity and affordability issues. However, minding that housing programs do not operate in a vacuum and that economic context is especially relevant when scrutinizing their pertinence and outcomes, the analysis pays attention to the housing market conditions prevailing during the programs' introduction as well as to the previous state activity in this realm, including to similar policy choices opted for in the past.

That said, the analysis is structured as follows. The opening section provides an overview of the housing market conditions by explaining the state of domestic housing availability, costs, and the social housing landscape. Next, the analysis draws out the state's legal obligation to engage in housing provision and comments on government's concrete approaches thereto, reconstructed from the past housing policies. The subsequent sections are devoted to an in-depth exploration of the two major policies implemented during the last decade, pursuing opposite objectives in the realms of private homeownership and social rental.

## 1. Housing market conditions

It is commonplace that shelter constitutes a basic human need.[1] Adequate living conditions have long been considered to provide individuals with not only physical but also psychological security.[2] This fundamental role of accommodation in our lives prompted the transformation of housing-related demands into claims of legal nature. This process culminated in a broad international recognition of the human right to housing.[3] Likewise, in the domestic legal system, housing rights have been attached a constitutional rank.[4]

Over time, it became evident that housing is not only a free-standing human right but a foundation enabling unrestrained exercise of other rights and freedoms[5], such as privacy or individual autonomy.[6] Research indicates that adequate living conditions inform decisions regarding family formation and reproduction.[7] Consequently, housing is the bedrock of community-building.[8] Overall, from today's perspective, both the status of housing as a social right and the role of housing provision inherent to the modern welfare state, are undisputed.

And yet, despite these global efforts to provide households with decent housing circumstances, over the last two decades, instead of becoming more accessible, housing turns out increasingly less available and affordable for a significant section of the global population. During that time, housing markets have been undergoing transformation which resulted in unprecedented challenges for prospective renters and home buyers. Crucial in this context was a shift in

[1] The term 'housing' as used throughout this chapter is to be understood broadly – not *sensu stricto* as a single-family house but as any type of housing and irrespective of the form of tenure.
[2] D. Donnelly, J. Finnerty and C. O'Connell, 'The Right to Housing' in G. McCann and F. Ó hAdhmaill (eds.), *International Human Rights, Social Policy and Global: Critical Perspectives* (De Gruyter 2020) p. 209.
[3] Article 25(i) of the Universal Declaration of Human Rights and Article 11(1) of the International Covenant on Economic, Social and Cultural Rights were pioneers in this respect.
[4] Article 75 of the Constitution.
[5] Special Rapporteur on Adequate Housing as a Component of the Right to an Adequate Standard of Living, and on the Right to Non-discrimination in this Context, Report No. A/HRC/31/54, 30 December 2015, https://documents.un.org/doc/undoc/gen/g15/294/52/pdf/g1529452.pdf?token=iQk3NWWmxABbLORtcZ&fe=true, visited 2 July 2024, p. 11; J. Hohmann, 'The right to housing' in M. Moos (ed.), *A Research Agenda for Housing* (Edward Elgar 2019) p. 15; Donnelly et al., *supra* n. 2, p. 209.
[6] R. Arundel and C. Hochstenbach, 'Divided access and the spatial polarization of housing wealth', 4 *Urban Geography* (2020) p. 497; R. Arundel, The end of mass homeownership? Housing career diversification and inequality in Europe, PhD Thesis, Universiteit van Amsterdam, 20 January 2017, https://dare.uva.nl/search?identifier=aa6990ca-fdaa-4ab5-873d-571278a0446c, visited 2 July 2024, p. 13.
[7] A. Matel, 'Stay or move out? Young adults' housing trajectories in Poland over time and throughout economic cycle', *Housing Studies* (2022) p. 19.
[8] Hohmann, *supra* n. 5, p. 15.

understanding of the fundamental role of housing in people's lives. Having become the most common form of wealth[9], housing started to be perceived more as a commodity and a potential source of income, than a social good providing individuals with a sense of security and allowing human development. In the global discourse on housing rights, this phenomenon has been referred to as financialization.[10]

The economic consequences of people's changed understanding of housing which led to heightened investment in housing markets, include skyrocketing real estate prices, growing rental costs and declining housing availability, particularly acute in urban areas progressively unable to house their growing populations.[11] On top of that, even in welfare states with large social housing sectors, approaches to housing provision and allocation have been challenged by financial crises which led to recessions followed by cutbacks in public expenditure directed to securing adequate housing conditions. These negative economic phenomena have been affecting individual capacity to satisfy one's own housing needs, a trend which is true for households on both ends of income distribution. Hence, we have been witnessing a global housing affordability crisis.

Aware of the relevance of this global economic context for the analysis of housing policies, before tackling the two major housing programs, the investigation must address whether and how the above negative economic factors affect the domestic housing market. This will allow to determine the most burning domestic housing issues, and further on, assess the pertinence of the implemented housing programs against this background. Consequently, a range of aspects making up the domestic housing environment are considered below.

### 1.1. National housing stock

According to data collected by Statistics Poland for the purposes of the National Population and Housing Census conducted in 2021, there are 12,535 million households[12] and 13,495 million

[9] T. Fahey and M. Norris, 'Housing' in D. Béland et al. (eds.), *Oxford Handbook of the Welfare State* (Oxford University Press 2021) p. 676.
[10] B. Kimhur, 'How to Apply the Capability Approach to Housing Policy? Concepts, Theories and Challenges', 3 *Housing, Theory and Society* (2020) p. 257; Hohmann, *supra* n. 5, p. 25.
[11] M. Moos, 'Housing today' in Moos, *supra* n. 5, p. 2.
[12] Statistics Poland, *Families – preliminary results of the National Population and Housing Census 2021*, 30 January 2023, https://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/6494/9/1/1/rodziny_-_wyniki_wstepne_nsp_2021.pdf , visited 2 July 2024, p. 5.

dwellings in Poland.[13] The number of units is, however, not representative of the actual capacity of the national housing stock because it accounts for the dwellings which are inhabitable as well as those used for purposes other than residential. The domestic housing gap, meaning the difference between the number of households and the number of housed dwellings, is estimated at about 1,5 to 2 million.[14]

In recent years, housing supply has been on the rise which is evident when looking at the significant annual housing output. To be more precise, 234,916 dwellings were completed in 2021, compared to 293,393 in Germany which was the only EU country which outnumbered Poland in this respect.[15] Between 2017 and 2022, a total number of 1,2 million new units were built which makes an annual average of 210,800 dwellings. It is crucial that these growing availability rates do not translate into housing being more accessible for those in need given that, in 2022, only 1% of the new-build dwellings were affordable for low-income households, and only about 2,5% were developed within the public sector.[16] In 2022, 98,4% of the new housing was developed within the private sector, with 60,9% thereof built by private developers.[17] Based on the declining number of issued residential building permits, it is estimated that the annual housing output will decline in the coming years.[18] Shrinking construction ensues from extreme inflation rates which followed the covid pandemic and were later additionally induced by the outbreak of the war in Ukraine.

It is important to emphasize that, despite private developers' leading role in new housing provision, they have an extremely poor reputation. They are associated with the occurrence of all housing-related issues. Developers are commonly accused of driving up housing prices, and consequently, fueling the unaffordability crisis. Beyond that, they are responsible for the

[13] Statistics Poland, *Equipping dwellings and buildings with technical installations and devices – preliminary results of the National Population and Housing Census 2021*, 30 June 2022, https://stat.gov.pl/spisy-powszechne/nsp-2021/nsp-2021-wyniki-wstepne/wyposazenie-mieszkan-i-budynkow-w-instalacje-i-urzadzenia-techniczne-wyniki-wstepne-nsp-2021,3,1.html, visited 2 July 2024, p. 2.

[14] Ministry of Infrastructure and Development, National Housing Program, 27 September 2016, https://www.gov.pl/attachment/7793dbba-5063-491c-9b98-196b5fe469f0, visited 2 July 2024, p. 45; C. Kowanda, 'Najem społeczny. Dlaczego u innych działa a w Polsce nie wyszło', *Polityka*, 18 July 2023, https://www.polityka.pl/tygodnikpolityka/rynek/2219080,1,najem-spoleczny-dlaczego-u-innych-dziala-a-w-polsce-nie-wyszlo.read, visited 2 July 2024.

[15] European Mortgage Federation, HYPOSTAT 2022. A review of Europe's mortgage and housing markets, September 2022, https://hypo.org/app/uploads/sites/2/2022/09/HYPOSTAT-2022-FOR-DISTRIBUTION.pdf, visited 2 July 2024, p. 113.

[16] Supreme Audit Office, *Operation of the Housing Plus program. Information on the results of the audit*, No. P/21/026, 23 March 2022, https://www.nik.gov.pl/kontrole/P/21/026/, visited 2 July 2024, p. 11.

[17] Deloitte, Property Index 2022, August 2022, https://www2.deloitte.com/pl/pl/pages/real-estate0/articles/Raport-Property-Index-2022.html, visited 2 July 2024, p. 11.

[18] European Mortgage Federation, *supra* n. 15, p. 160.

occurrence of poor-quality development. The term *patodeweloperka* was coined in this context which can be translated as "pathological development". It describes negative practices in housing construction and is used to refer to the production of extremely small (below 25 square meters), high-density housing with limited access to sunlight and no green spaces. Although such construction is still merely exceptional, in the face of private investors' capability to circumvent any new measures tackling "pathological development", big cities have been struggling to adopt effective legislation to counter the issue.

Poland has been struggling with housing quality on the national scale. Despite significant improvements in housing circumstances achieved since the democratic transition, a large section of society is still experiencing housing precarity. Back in 2011, around 5 million people lived in sub-standard housing conditions, meaning old, unrenovated dwellings without sewerage infrastructure or running water.[19] According to research, individuals housed in sub-standard dwellings face elevated health and safety risks.[20] Additionally, Eurostat reports that approximately 36% of Poles live in overcrowded dwellings, compared to the EU average of 17%.[21]

Next, the structure of housing tenure must be mentioned. Poland's housing market has been traditionally characterized by high owner-occupancy rates. Similarly to other post-socialist countries, Poland is a hyper-ownership state with a predominantly owner-occupied housing stock.[22] In 2021, the domestic homeownership rate of 85,6% was the sixth highest rank in the EU.[23] Higer rates occurred for instance in Lithuania (88,6%), Slovakia (92,3%), and Romania (95,3%), whereas the EU average in 2021 was 70%.[24] The massive privatization of the public housing stock during the democratic transition was supposed to jump start private ownership and

[19] Supreme Audit Office, *Activities of municipalities to improve the technical condition of buildings with sub-standard housing conditions*, No. P/22/078, 9 May 2023, https://www.nik.gov.pl/kontrole/P/22/078/, visited 2 July 2024, p. 7.
[20] In the English-speaking discourse, this issue is referred to as energy poverty; for the health-related implications of poor living conditions in the Polish context, *see* J. Sokołowski, J. Frankowski and P. Lewandowski, 'Energy poverty, housing conditions, and self-assessed health: evidence from Poland', *Housing Studies* (2023) p. 1 et seq.; H. Milewska-Wilk and K. Nowak, *Dane o mieszkalnictwie w Polsce. Definicje, źródła, zestawienia, zmiany*, 2022, https://obserwatorium.miasta.pl/wp-content/uploads/2022/11/Dane-o-mieszkalnictwie-w-Polsce.pdf, visited 2 July 2024, p. 30.
[21] Eurostat, *Overcrowding rate by age, sex and poverty status*, 20 June 2024, https://ec.europa.eu/eurostat/databrowser/view/ILC_LVHO05A__custom_6337587/bookmark/table?lang=en&bookmarkId=b75f024b-5068-4af2-bb50-c3fa84a01da5, visited 2 July 2024.
[22] Some authors refer to this trend in terms of an ideology of homeownership; *see* R. Ronald, *The Ideology of Home Ownership. Homeowner Societies and the Role of Housing* (Springer 2008); A. Ogrodowczyk and S. Marcińczak, 'Market-Based Housing Reforms and the Residualization of Public Housing: the Experience of Lodz, Poland', 2 *Social Inclusion* (2021) p. 92
[23] European Mortgage Federation, *supra* n. 15, p. 159.
[24] European Mortgage Federation, *supra* n. 15, p. 114.

immediately increase the nationwide household wealth.[25] Subsequent promotion of owner-occupancy through public programs supporting mortgage lending, reinforced these tendencies. The perception that homeownership is the end-goal and considers a guarantee of any household's economic security still prevails.[26]

Domestic emphasis on home ownership has led to the underdevelopment of private rental in Poland.[27] The landlord-tenant relationship is marked by a mutual lack of trust, forcing tenants to rent on unfavorable conditions, including on short-term non-renewable contracts, with additional restrictions concerning the use and rearrangement of the rented unit. Only recently, international investment funds began to buy multifamily housing to renovate it for rental purposes.

Finally, it must be indicated that domestically, private rental is not at all considered a long-term housing solution because Poles cannot afford it. Typically, the rental cost burden is either equal or exceeds the amount of mortgage repayments for a comparable unit. It is thus considered a more cost-effective solution to spend this big of a share of household's income on repaying one's own property, rather than on contributing to someone else's capital gain, without any prospects of ownership.

### 1.2. Affordability

While Poles prefer owner-occupancy to private rental, buying a house is mostly possible due to private money lending. In this context, the outline of housing affordability should begin by summarizing the domestic money lending conditions.

First, mortgage loans are heavily overpriced. Poland continuously has the second highest average mortgage interest rate in the EU, oscillating around 8%[28], with more expensive loans occuring only in Hungary. For comparison, in more economically developed Western European jurisdictions, such as France and Germany, the average rates are 1,1%, and 1,3% accordingly.

[25] P. Lis, *Polityka państwa w zakresie finansowania inwestycji mieszkaniowych* (C.H.Beck 2008) p. 48 et seq.; M. Lux and P. Sunega, 'Public Housing in the Post-Socialist States of Central and Eastern Europe: Decline and an Open Future', 4 *Housing Studies* (2014) p. 506; G.M. Dotti Sani and C. Acciai, 'Two hearts and a loan? Mortgages, employment insecurity and earnings among young couples in six European countries', 11 *Urban Studies* (2018) p. 2458.
[26] Arundel, *supra* n. 6, p. 6.
[27] Dotti Sani and Acciai, *supra* n. 25, p. 2458.
[28] Statista, *Average mortgage interest rate in Europe in from 2021 to 2023, by country,* 30 May 2024, https://www.statista.com/statistics/615037/mortgage-interest-rate-europe/, visited 2 July 2024.

Second, nearly all domestic mortgages (93,7% in 2021) are granted at variable interest rates which negatively affects consumer's protection and economic comfort of long-term mortgage repayments.[29] Fixed-rate loans have only been introduced in 2020.[30] This gap can be illustrated by invoking once again the examples of France and Germany. In 2021, adjustable-rate mortgages accounted for 2,6% and 9,7% of loans granted in France and Germany accordingly.

Additionally, the soaring post-pandemic and war-induced inflation resulted in the Central Bank of Poland raising the interest rates to the extent that the amounts of average mortgage payments doubled in 2022 relative to 2021.[31] The Central Bank of Poland has increased the interest rates from a record low level of 0,1% to 6,75% at which they remained between December 2022 and September 2023, and were then only lowered to 5,75% which remains accurate at the time of writing.

Moreover, mortgage lending criteria have been heavily restricted, causing household credit scores to drop. Although the domestic money lending policy has never been consumer-friendly, current draconian conditions are unprecedented, exacerbating housing unaffordability for the growing parts of the population. It is estimated that due to interest rates increases and tightened lending requirements, the creditworthiness of Poles decreased by 60-70% relative to 2021.[32] Young adults with moderate income are progressively unable to take on mortgage loans.[33] Consequently, the number of granted mortgages declined dramatically. In 2022, Polish banks awarded 126,000 mortgage loans which is 50,75% less relative to the record-high number of credit applications lodged in 2021.[34]

Nevertheless, money lending criteria are not the only factor driving the housing affordability crisis. While the phenomenon of rents and property value rising disproportionately to income[35] is by no means limited to Poland, domestically these increases are exacerbated by bad housing market practices.

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[29] European Mortgage Federation, *supra* n. 15, p. 114.
[30] European Mortgage Federation, *supra* n. 15, p. 153.
[31] Rzeczpospolita, 'Raty kredytów się podwoją', 5 May 2022, https://www.rp.pl/nieruchomosci/art36238051-raty-kredytow-sie-podwoja, visited 2 July 2024.
[32] J. Sobolak, 'Trzeba nam czynszówek i katastru. A państwo nie może pomagać ludziom zaciągać kredytu na całe życie', *Gazeta Wyborcza*, 19 September 2022, https://wyborcza.biz/biznes/7,147758,28906944,dr-adam-czerniak-mamy-chaos-w-zakresie-polityki-mieszkaniowej.html, visited 2 July 2024.
[33] European Mortgage Federation, *supra* n. 15, p. 113.
[34] AMRON-SAFRiN, *Ogólnopolski raport o kredytach mieszkaniowych i cenach transakcyjnych nieruchomości*, No. 4/2022, 27 February 2023, https://www.amron.pl/strona.php?tytul=raporty-amron-sarfin, visited 2 July 2024, p. 3.
[35] European Mortgage Federation, *supra* n. 15, p. 113.

For instance, a phenomenon referred to as "flipping" has become widespread from 2016 onwards.[36] It denotes a specific kind of transaction between an individual homebuyer and a developer. It takes place at an early stage of housing construction and therefore only requires a downpayment. The process of "flipping" happens once the development is completed and consists in selling the rights to the property as settled in the initial agreement to a third person, albeit at a markedly higher price than the initial downpayment. These, soon to be forbidden, transactions are highly profitable and carry small risk, since the downpayment usually corresponds to around 10-20% of the unit's final price.

Another issue exacerbating the domestic shortage of affordable housing for rental is the high percentage of vacant properties. Private landlordism, denoting the phenomenon of new dwellings being bought by individuals for investment purposes, has become widespread. Only an estimated quarter of properties which are being sold nationally are acquired by first-time owners. Consequently, there are about 2 million speculative empty properties in Poland, used for purposes other than residential. If dedicated for rental, those units could significantly increase housing availability for households with moderate income.

Both, the problem of vacant dwellings and the flipping practices are domestic facets of the above-mentioned global phenomenon of housing financialization, describing the individual's changing perception of housing value as being purely economic rather than social.[37] These tendencies mean that, next to targeting the economically most vulnerable households, housing affordability is becoming an issue for average-income earners.[38] In urban areas where the lack of affordable dwellings is most palpable, residential housing construction moves to the suburbs, causing outward expansion of cities and massive relocations to the suburban fringes with fewer employment opportunities and limited access to essential public services.[39]

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[36] A. Czerniak, H. Milewska-Wilk and T. Bojęć, 'Zjawisko flippingu na polskim rynku mieszkaniowym', 2 *Studia BAS* (2021) p. 203.
[37] M.B. Aalbers, *The Financialization of Housing. A political economy approach* (Routledge 2016); L. James et al., 'Housing inequality – a systematic scoping review', 5 *Housing Studies* (2022) p. 6.
[38] This is a global trend; *see* Y. Lee, P.A. Kemp and V.J. Reina, 'Drivers of housing (un)affordability in the advanced economies: a review and new evidence', 10 *Housing Studies* (2022) p. 1739; K.B. Anacker, 'Introduction: Housing affordability and affordable housing', 1 *International Journal of Housing Policy* (2019) p. 1 et seq.; S. Gabriel and G. Painter, 'Why affordability matters', 80 *Regional Science and Urban Economics* (2020) p. 4 et seq.; Moos, supra n. 11, p. 5.
[39] Gabriel and Painter, *supra* n. 38, p. 5.

### 1.3. Social housing

Before outlining the total social housing stock, the difference between "social housing" and "public housing", occuring in the domestic context, must be addressed. Although internationally, social housing is the common term used to refer to both social rental and state-supported housing construction[40], domestically it only denotes means-tested social rental. The term social housing includes social rental (*najem socjalny*) addressed to low-income households as well as several other forms of rental, jointly referred to as the non-social rental (*niesocjalne mieszkalnictwo społeczne*).[41] The latter is addressed to moderate-income households capable of committing to carry the long-term rental costs. The scope of the present analysis does not require making such detailed differentiations between the available forms of subsidized housing offered by the state to non-wealthy (low- and moderate-income) households. Accordingly, the term "social housing" will be used in its most basic understanding, that is as encompassing all forms of state support, with extra comments on the target population or means-testing added when necessary.

Social housing stock is owned predominantly by municipalities responsible for the bulk of domestic housing-related duties. Municipalities were vested with the obligation to satisfy housing needs of local communities through provision of social housing.[42] Domestic supply of municipal housing remains scarce, far below the demand. The current waiting period for social housing is approximately three years. As of 31 December 2022, 126,300 households have been waiting for the allocation of social housing.[43] Crucially, not included in this number are households in the lower tier of income distribution, earning too little to afford housing on the market but too much to apply for a dwelling from the social stock. Additionally, the total stock has been shrinking, leading to residualization of domestic social rental.[44] In 2020, municipalities disposed of 648,000

[40] In the U.S. literature, on the other hand, the terms "affordable housing" or "subsidized housing" are preferred.
[41] A. Przymeński, 'Mieszkalnictwo socjalne w Polsce w procesie zmian', 3 *Ruch Prawniczy Ekonomiczny i Socjologiczny* (2021) p. 359.
[42] Housing provision as a task conferred upon municipalities was entrenched in Article 4(1) of the Act of 21 June 2021 on the protection of tenants' rights, the housing stock of the municipality and on amending the Civil Code (Journal of Laws 2023, item 725); *see* Przymeński, *supra* n. 31, p. 355; A. Przymeński, 'Council Housing in Poland. What Should We Do to Achieve its Goals?', 1 *Problemy Polityki Społecznej* (2021), p. 8.
[43] Statistics Poland, *Municipal housing stock in 2022 – preliminary results*, 28 February 2023, https://stat.gov.pl/download/gfx/portalinformacyjny/pl/defaultaktualnosci/5492/15/1/1/mieszkaniowy_zasob_gmin_w_2022_r._-_wyniki_wstepne.pdf, visited 2 July 2024, p. 3.
[44] S. Marcińczak and M. Gentile, 'A window into the European city: exploring socioeconomic residential segregation in urban Poland', 3 *Journal of Economic and Human Geography* (2023) p. 262.

dwellings, but the number dropped to 630,000 in 2021 and to 613,000 in 2022.[45] The size of means-tested social rental sector addressed to low-income households has been stable at about 65,000 units.[46] At the same time, the annual social housing output drops year by year. Back in 2016, it used to be 3% of the total number of new build dwellings, whereas recently only 1,8%.[47]

The already modest housing resources are further decreasing due to the give-away sales. Many properties are in a poor condition and there are no resources to renovate them. Hence, privatization allows local governments to avoid further maintenance costs, especially given that the rent levels remain very low. Consequently, properties are offered to the sitting tenants at below market prices and with additional discounts reaching up to 90% of the unit's estimated value. The decision on the granted bonuses is discretionary and vested with municipalities' executive bodies. A recent control by the Supreme Audit Office discovered multiple irregularities in domestic housing privatization processes. It turned out that housing prices were lowered unlawfully which led to significant losses in municipal budgets.[48] Other forms of bad practice included selling properties to indebted buyers and not informing the tenants about their pre-emption rights.

The analysis conducted in this section demonstrated the variety of overlapping factors shaping the domestic housing market. It has also illustrated that recently, these components have created a housing landscape which is becoming increasingly unfavorable to individuals, making housing more and more inaccessible for the majority of the domestic population.

## 2. Housing policy

The above outline made clear that Poland's longstanding housing issues revolve around availability and affordability. Such housing market conditions require public policy aimed at reducing the housing cost overburden resulting from high rents and draconian mortgage loaning conditions. Moreover, the policy must ensure a growing housing output and the availability of the new build units to families with moderate income. As part of the goals relating to housing

[45] Statistics Poland, *supra* n. 43, p. 1.
[46] Statistics Poland, *supra* n. 43, p. 2.
[47] Supreme Audit Office, *supra* n. 16, p. 35.
[48] Supreme Audit Office, *Sale by municipalities of communal residential real estate without tender. Information on the results of the audit*, No. I/20/002/LBY, 29 October 2020, https://www.nik.gov.pl/kontrole/I/20/002/LBY/, visited 2 July 2024, p. 6.

construction, units must be made accessible for the most economically disadvantaged, to which end the state shall undertake appropriate measures increasing the total social housing stock.

### 2.1. Housing provision as a legal duty

Regardless of the scale of housing challenges, it is by no means obvious that the state remains proactive in the field of housing. Both the presence and the scope of this obligation vary greatly from one jurisdiction to another.[49] The sections below address how precisely this responsibility is understood and realized domestically, and what pertinent legal mechanisms can be adopted to tackle the longstanding housing problems.

The normative foundation of domestic housing policy was provided in Article 75 of the Constitution which stipulates that "public authorities shall pursue policies conducive to satisfying the housing needs of citizens, in particular combating homelessness, promoting the development of low-income housing and supporting activities aimed at acquisition of a home by each citizen". The second paragraph of the same provision entails the protection of tenancy. Similarly to other constitutional social rights, Article 75 was formulated as a directive principle and a policy objective, rather than a source of justiciable individual rights.[50] No subjective rights can be derived therefrom which the legal doctrine has tended to interpret as a manifestation of realism inherent to constitutional provisions.[51] Nevertheless, the mere presence of the constitutional right to housing transforms state's activity aimed towards the improvement of housing availability and affordability into a public duty.[52]

Having said that, to delineate the state's precise role and boundaries of its intervention in the market for the purposes of housing provision, is not an easy task. Despite being attached a constitutional rank, housing provision depends on political will.[53] The additional complexity of

[49] Lee, Kemp and Reina, *supra* n. 38, p. 1739.
[50] L. Garlicki and M. Derlatka, Commentary to Article 75 in in L. Garlicki and M. Zubik (eds.), *Konstytucja Rzeczypospolitej Polskiej. Komentarz. Tom II* (Wydawnictwo Sejmowe 2016) p. 811; B. Banaszak, *Konstytucja Rzeczypospolitej Polskiej. Komentarz* (C.H.Beck 2012) p. 441; I. Sierpowska, 'Socjalne aspekty ochrony prawa do mieszkania', 4 *Studia Erasmiana Wratislaviensia* (2010) p. 279.
[51] *See* Judgment of the Constitutional Tribunal of 12 January 2000, P 11/98.
[52] Garlicki and Derlatka, *supra* n. 50, p. 814; P. Lis, *Polityka mieszkaniowa dla Polski Dlaczego potrzeba więcej mieszkań na wynajem i czy powinno je budować państwo?*, 2019, https://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Interaktywny_Polityka%20mieszkaniowa.pdf, visited 2 July 2024, p. 2.
[53] P. King, 'Housing as a Freedom Right', 5 *Housing Studies* (2003) p. 663; Donnelly et al., *supra* n. 2, p. 218.

housing as a policy issue lays in the fact that the latter, by its very nature, cannot be handled primarily by the state. In principle, housing needs are secured by individuals on the private market whereas interference with free market forces can lead to significant economic distortions. For this reason, the economically liberal welfare states such as Poland, have typically remained cautious in undertaking economic intervention that changes the market-driven housing allocation patterns or engages the state apparatus in housing production.

The most common classification of housing is grounded in a distinction of economic nature and divides housing solutions between those boosting housing demand or its supply. The latter include government subsidies for private developers to deliver affordable residential housing as well as for the municipalities to engage in social housing construction. Support targeting supply can also include renovation of the existing social housing resources. On the other hand, the state's direct support aiming to increase the demand consists in offering direct subsidies to mortgage loan interest rates, thus covering part of the costs of private lending. Beyond that, tax exemptions and reliefs allowing to deduct a chunk of the construction materials costs, can be provided whereas mortgage markets can be regulated.[54] The demand-side policies commonly include housing allowances mitigating rent prices or utility costs as well as direct rent price regulation.[55] Crucially, Article 75 of the Constitution expressly mentions both types of housing solutions, thereby constraining public authorities to develop social housing, on the one hand and to support the aspiring home-owners, on to other.

### 2.2. Domestic forms of housing provision

Over the years, a wide variety of solutions were implemented to improve the domestic housing situation. We will now explore the approaches of different governments. By drawing out the former practice in the field, the following paragraphs provide context for the subsequent analysis of housing policy transformation launched in 2015.

[54] For a comprehensive overview of housing policies of this kind, *see* A. Kholodilin et al., 'The hidden homeownership welfare state: an international long-term perspective on the tax treatment of homeowners Konstantin', 1 *Journal of Public Policy* (2023) p. 86 et seq.
[55] A. Styhre, *The Economics of Affordable Housing* (Routledge 2023) p. 25; G. Metcalf, 'Sand castles before the tide? Affordable housing in expensive cities', 1 *Journal of Economic Perspectives* (2018) p. 61; Lis, *supra* n. 52, p. 8; Sierpowska, *supra* n. 50, p. 282.

The first large-scale housing initiative came with the introduction in 1995 of Social Housing Associations (*Towarzystwa Budownictwa Społecznego*; TBSs).[56] These non-for-profit entities owned and run by municipalities were designed to develop and allocate social housing at below-market prices to moderate-income renters unable to afford a property on the market. Social Housing Associations have soon become the leading and the most dynamic form of social housing development. Although this was initially due to the lack of any viable competition, it turned out that the TBSs proved effective in the long run, despite the new schemes being gradually implemented in the early-democratic times.[57] The TBSs housing development processes will be described in detail below.

It was not until the 2000s when further housing schemes followed. In 2007, a program called "Family's own home" (*Rodzina na swoim*)[58] was implemented, offering direct mortgage loan subsidies for up to eight years, to families or lone parents purchasing their first dwelling. The program was discontinued in 2013. Subsequently, individual housing development was supported through a "VAT return" (*Zwrot VAT*) scheme according to which households could receive a partial refund of the added value tax when buying housing construction materials. Next, a downpayment assistance scheme was adopted called "Housing for Young Adults" (*Mieszkanie dla Młodych*) subsidizing downpayment for households without own savings, otherwise ineligible for a loan. The program was phased out in 2017 as the new governing majority put forth its own large-scale agenda endorsing alternative housing solutions. Beyond the above schemes, the state has also continuously offered means-tested housing allowances as well as rent subsidies to help the low-income households cover basic housing expenses.[59]

As evidenced, housing policies introduced by different political majorities over the past two decades have been aimed at boosting both housing supply and demand. It is noticeable that the initiatives were short-lived and changed along with the transfers of power. The only exception are the TBSs which have been running successfully since the democratic transition and outlived

[56] The Act of 26 October 1995 on Some Forms of Support for Residential Housing Construction (Journal of Laws 1995, No. 133, item 654).
[57] M. Zagozdon, 'Prawne ramy realizacji celu dostępu do odpowiednich, bezpiecznych i przystępnych cenowo mieszkań' in M. Stębelski et al. (eds.), *Zrównoważone miasto Stan faktyczny i wyzwania prawne realizacji agendy 2030* (C.H.Beck 2022) p. 73.
[58] For an overview of this and the other enumerated housing policies, *see* A. Radzimski, 'Subsidized mortgage loans and housing affordability in Poland', 79 *Geo Journal* (2014) p. 475 et seq.
[59] Przymeński, *supra* n. 31, p. 356.

all other housing schemes. What is also relevant in the context of the two policies to be explored below, the programs' leading mechanisms remained alike, offering similar kind of support.[60]

Most importantly, however, domestic policy has been tapping into the dualism of housing schemes as conceived to support either one of the two main housing tenures: rental or ownership. Over the years, the immediate objective has been either to expand the total social housing stock available for rental, or to support the aspiring homeowners in their struggles to afford a dwelling of their own.[61] This distinction is fundamental as being indicative of the state's approach to housing policy. It thereby points to the broader aspirations and whether those involve committing to the long-term provision of social housing through rental, or rather prioritizing individual satisfaction of housing needs on the market. We will now explore this dualism in-depth by tackling two housing programs which have dominated housing policy since 2015 onwards.

## 3. Housing Plus program: public commitment to housing construction

Before the government redefined the approach to housing in 2016, the state support had been mainly addressed to the aspiring home buyers. The programs "Family's own home", "VAT return" and "Housing for Young Adults" encouraged households to either buy or build. Consequently, the contrast between these three substantial initiatives and the scarcity of government's involvement in developing social housing to improve the situation of the low-earning households, was evident. The state aid was tailored to the needs of the more affluent sections of society, people who could afford to borrow money on the private market and commit to long-term repayments. The incoming political majority noticed that housing policy did not pay sufficient attention to the needs of vulnerable households and was disproportionately benefiting individuals with moderate incomes. The goal was to address this deficiency by implementing a new housing agenda.

The new housing policy cycle began in 2016 with the launch of a flagship housing program called Housing Plus (*Mieszkanie Plus*), devoted to centralized construction of social units available for rental to low- and moderate-earning households. Housing Plus was part of a new extensive agenda, called the National Housing Program[62], which gathered the government's leading

[60] Przymeński, *supra* n. 31, p. 366.
[61] Lis, *supra* n. 52, p. 1.
[62] Ministry of Infrastructure and Development, *supra* n. 14.

objectives in the realm of housing as well as concrete legal solutions to pursue them. Right at the center of this transformation was Housing Plus which shifted the policy objective from boosting housing demand to expanding the supply.[63] Thereby, the program was seeking to challenge the long-standing premise that the social housing stock cannot be regarded as a viable alternative to owner-occupancy because of its scarcity and low quality. Housing Plus grew out of a recognition that the state's past failures in the realm of social housing construction can be made up for as soon as the government engages directly in social housing development projects. Primarily, however, centralized social housing construction overturned the long-established *status quo* according to which the development and allocation of social housing was treated as an exclusively municipal responsibility.[64] Given that palpable change in housing supply needs time, the scheme was conceived as a long-term initiative and its operation spanned almost two entire parliamentary terms.

### 3.1. Mechanisms

Housing Plus was designed to improve both housing availability and affordability. First, it specifically aimed to deliver affordable units to low- and middle-earning households. The other objective was to enlarge the nationwide supply of affordable social housing. The additional articulated goals included elimination of the waiting list for social housing offered by municipalities and an overall improvement of housing conditions, with an emphasis on limiting the number of sub-standard dwellings. Importantly, although rental was the primary tenure to be offered, conversion to owner-occupancy was available within the chosen segments of the scheme.

Housing Plus delivered not merely a single housing policy instrument but a wide range of legal, financial, and organizational tools streamlining the processes of social housing development.[65] Consequently, the program's launch required adoption of numerous laws and executive measures. During seven years of the scheme's functioning, implemented was a range of different public-private and central-local forms of cooperation designed to boost housing output. Moreover, from 2019 onwards, complementing Housing Plus was the "Housing for the Start"

[63] Zagozdon, *supra* n. 57, p. 74; Przymeński, *supra* n. 31, p. 366.
[64] *Ibidem*, p. 355.
[65] Supreme Audit Office, *supra* n. 16, p. 12.

(*Miekszanie na Start*) initiative, offering rent subsidies for apartments belonging to the social housing stock, including those developed through the TBSs or Housing Plus.[66]

The central idea of the state's direct involvement in housing development, and one that was claimed to afford the program's main advantage, was to construct on publicly owned properties. Accordingly, a separate entity called National Property Stock (NPS) was created and vested in acquisition, management, and adaptation of state-owned land for housing investments.[67] Although no explicit legal obligation was adopted in this regard, the government expected all state-owned entities to estimate the value of their housing stock and consider transferring at least some of its part to the NPS. Making attractive public land accessible for construction purposes was believed to encourage development by incentivizing private investors to engage in social housing projects.

Crucially, a common misconception about the program, misleadingly reproduced by politicians, was that Housing Plus aimed to deliver "cheap" dwellings. In fact, this was not the sole objective of the program. As indicated earlier, the dwellings to be made available were addressed to households with moderate and low incomes. Accordingly, the program set out to launch two separate construction processes, each tailored to the diverging needs and financial capabilities of different households. First, the "social" part of the program was developing housing projects addressed to low-income households. The other, "market-based", part was conceived to construct housing for moderate-earners with an income too high to pass the means-testing for municipal housing but too low to rent at market prices.[68] The rent levels for housing developed within the market-based part of the scheme were expected to be 25% lower relative to market prices, but no rent regulation was foreseen to enforce these thresholds. The distinction between the "market-based" and the "social" parts of Housing Plus is important given the stark differences in performance and will be employed throughout the remaining analysis.

### 3.2. Implementation

Problems occurred soon after the program's entry into force and it became evident that Housing Plus was unable to operate in its initial framing. To begin with, the functioning of the National

[66] Przymeński, *supra* n. 31, p. 365.
[67] The Act of 20 July 2017 on National Property Stock (Journal of Laws 2017, item 1529).
[68] Supreme Audit Office, *supra* n. 16, p. 12-13.

Property Stock, which was the foundational element of the program, was impeded by the lack of pertinent executive regulations. The absence of legislation frustrated the inclusion and the management of properties. This meant, that first, land could not be efficiently transferred to the NPS, and second, that it could not be successfully allocated for housing projects. It was not until December 2019 when the relevant laws on public auction were amended, allowing public real estate to be made available for housing investments.[69] In mid-2020, after more than three years since the program's launch, the first property was successfully transferred for housing construction purposes.[70]

Another factor that hindered the functioning of the NPS was the unwillingness of the public-owned entities to hand over the land in their possession. Initially, the program did not provide incentives, nor did it regulate any financial compensation for the properties subject to transfer. Thus, the idea that land would be granted for free, collapsed. This *status quo* lasted until the right of public entities to seek compensation was regulated.[71] Moreover, it was not in the best interest of public entities to hand over attractive real estate. First, land remains a source of major profit. Also, it was often the case that long-term construction arrangements had already been made concerning the land at the public companies' disposal.

Consequently, the quality of the NPS properties was poor and they were hardly useful for housing development purposes. Most of the resources was wasteland located in the countryside, and if in the cities, then in peripheral districts with no access to local services and infrastructure such as schools, hospitals, and public transportation. Furthermore, a significant share of these properties lacked energy, water, and sewerage infrastructure.[72] An additional impediment to filling up the NPS with attractive land was the erroneous legislation obligating public entities to share the information on all properties in their possession, including land under the rivers and built-up areas used for railway or roads.[73] This elongated the administrative decision-making regarding the land's usefulness for construction. Whereas according to estimations made by public authorities, the value of gathered land was significant, in reality, the real estate was neither valuable nor suitable

[69] Regulation of the Minister of Development of 3 December 2019 regarding public auction for the real estate forming part of the National Property Stock (Journal of Laws 2019, item 2382).
[70] The agreement was signed on 9 July 2020; Supreme Audit Office, *supra* n. 16, p. 53.
[71] The law was amended on 13 June 2019 (Journal of Laws 2019, item 1309) introducing the obligatory compensation the amount of which was to be determined through the process of real estate appraisal.
[72] Supreme Audit Office, *supra* n. 16, p. 46-45.
[73] *Ibidem*, p. 46-47.

for construction purposes. It turned out that only a small fraction could be used within the Housing Plus.[74]

Another issue was that private developers have showed no interest in engaging in social housing construction, contrary to what was initially assumed. They considered requirements for joining the program too rigid, which discouraged them from applying. The program's idea was that investors would be chosen through competitive public procedures to develop housing at predefined construction costs[75] which turned out to be heavily underestimated.

Consequently, a mixture of different factors including restrictive participation conditions set for investors as well as the initial legal and organizational issues concerning the incorporation and management of land, frustrated the original arrangement of public-private partnership within the market-based part of Housing Plus.

As a result, from 2019 onwards, the management of the market-based housing construction was vested in a newly created public entity, PFR Real Estates (*PFR Nieruchomości*), set to launch partnership with municipalities. It bears recalling that, although the dwellings delivered within the market-based scheme were addressed to financially better-off, they were supposed to be provided for rents about 25% lower than those on the market.[76] Ultimately, however, rents for the developed units were market-driven and determined based on a range of factors such as construction and utility costs, depreciation rate, property taxes, and insurance costs. Consequently, they turned out to be much higher than originally assumed and have even exceeded the costs of rents offered under different forms of municipal rental and by the TBSs. What is more, the cost of long-term rental leading to owner-occupancy was equal or higher than private market rents.[77] Accordingly, Housing for the Start was adopted as a temporary solution offering direct rent subsidies to mitigate the housing cost burden which occurred for individuals following their participation in the program.[78]

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[74] *Ibidem*, p. 46-57.
[75] The development costs for the construction of 1 square meter were determined at around PLN 2000, which was markedly lower than the actual development costs; A. Drozd, 'Wielgo: "Mieszkanie Plus" nie jest dla biednych ludzi', *Bankier.pl*, 9 March 2017, https://www.bankier.pl/wiadomosc/Wielgo-Mieszkanie-Plus-nie-jest-dla-biednych-ludzi-7503633.html, visited 2 July 2024.
[76] Supreme Audit Office, *supra* n. 16, p. 66.
[77] *Ibidem*, p. 67.
[78] The Act of 20 July 2018 on State Assistance in Covering Housing Costs in the Initial Years of Rental (Journal of Laws 2018, item 1540); *see* The Council of Ministers, *Report on the implementation of the National Housing Program in 2022*, March 2023, https://www.gov.pl/attachment/711a9546-e043-4924-9b9d-fd5d7098460c, visited 2 July 2024, p. 5.

Additionally, as follows from the tenants' complaints, the quality of construction was poor.[79] Overall, the dwellings were neither affordable, nor of sufficient quality which gradually led the municipalities to withdraw from the market-driven part of the Housing Plus.[80]

In light of the program's poor performance measured by the number of delivered or under-construction dwellings, a spate of further legislative changes followed in late 2020. In essence, the idea was to drop the model of centralized housing construction and increase the government's direct financial support for divergent forms of development undertaken by municipalities. It was the social part of the scheme that underwent major rearrangements, while the importance of the market-based part continued to decline.

According to the new provisions, support in the form of cheap or non-repayable public grants was arranged to bolster the development of two kinds of housing: means-tested social housing for low-income households and social housing for moderate-income families. This was a notable change relative to the initial framing of the program in that the social part of the scheme was enlarged to develop housing not only for the low- but also for moderate-earning families. Construction could take the form of TBSs or public-private arrangements.

The long-established mechanism of TBSs proved to offer an efficient tool of social housing construction addressed to moderate-income households. The government has decided to reform the TBSs, although the cosmetic character of these changes suggests that they were only implemented to reintroduce TBSs to Housing Plus under a new name, as a seemingly novel solution, rather than to alter their fundamental assumptions. Consequently, TBSs are currently functioning as SIMs. Those which had been established before the amendments can continue to operate in an unchanged form.

Housing construction through TBSs is a complex process involving cooperation of public and private actors. Funding comes from private contributions of prospective renters and from the low-interest public loans granted to municipalities by the National Development Bank. Repayments are covered mainly from the incoming rents. Tenants can also apply for a non-

[79] The poor living conditions in dwellings delivered within the program were described in many periodicals; *see* for instance M. Święchowicz, 'Osiedle Mieszkanie Plus, a obok ogromna chlewnia. "Jesteśmy przerażeni. Smród będzie nie do zniesienia"', *Newsweek*, 16 May 2023, https://www.newsweek.pl/polska/spoleczenstwo/pierwsze-osiedle-z-programu-mieszkanie-plus-mieszkancy-narzekaja-na-jakosc/zqg5ccf, visited 2 July 2024; C. Kowanda, 'Mieszkanie Plus: ostateczne fiasko programu PiS. Absurd goni absurd', *Polityka*, 18 May 2023, https://www.polityka.pl/tygodnikpolityka/rynek/2212892,1,mieszkanie-plus-ostateczne-fiasko-programu-pis-absurd-goni-absurd.read, visited 2 July 2024.

[80] Supreme Audit Office, *supra* n. 16, p. 63.

repayable grant to cover their initial contribution or for the monthly rent subsidies. Importantly, sitting tenants can purchase the dwelling once they have exceeded a predefined period of rental.

The major disadvantage of the TBSs which has been hindering its effective and widespread implementation is that, despite the private contributions and public loans, the construction nevertheless generates direct costs for municipalities. The new legislation offered additional funding arrangement, allowing for up to 35% of investment costs to be covered by non-repayable grants from the National Development Bank.[81] Also, as an alternative to municipal land, TBSs/SIMs can be allocated properties from the NPS. From 2021 onwards, additional non-repayable grants have been offered for revitalization of existing municipal housing stock, covering up to 80% of the costs.[82] Hence, further rearrangements of Housing Plus led to a visible increase of the state's financial participation in municipal development and social housing maintenance costs.

In 2021, another public-private arrangement for housing development was implemented called Dwelling for Land (*Lokal za Grunt*). It allowed municipalities to sell real estate for investment purposes with part of the agreed price settled through delivery of dwellings.[83] Consequently, the initiative implies that a chunk of the property price is paid in cash whereas the remaining part is provided in-kind in the form of the ready-to-rent units. The units that are not subject to Dwelling for Land agreement can be freely managed by investors. The program's main benefit for the municipalities is the expansion of the total social housing stock without direct engagement in housing construction processes. Nevertheless, the Unit for Land program is not a common housing solution and one of the factors contributing to such *status quo* might be that the scheme obliges developers to state a clear date of construction completion in the agreement. Violation of terms can result in financial penalties.

As demonstrated, the implementation of the Housing Plus program was problematic from the outset. It was only after the legal amendments and executive regulations were implemented and the basic mechanisms were amended, resulting in the program's radical transformation, that Housing Plus began to realize the articulated objective of boosting social housing supply.

[81] A separate „Subsidy Fund" was created within the structure of the National Development Bank to allocate the non-repayable aid for municipal housing projects.
[82] The Council of Ministers, *supra* n. 78, p. 41.
[83] The Act of 16 December 2020 on the settlement of the price of dwellings and apartment buildings within the price of the real estate sold from the municipal housing stock (Journal of Laws 2021, item 223)

### 3.3. Output

The aim of the following paragraphs is to assess the extent to which the scheme has managed to expand social housing stock and its affordability. To this end, the investigation will refer to available data on Housing Plus outcomes.[84]

The drafters of Housing Plus declared that the program would deliver 100,000 dwellings by 2019. It ensues from the report by the Supreme Audit Office following a control carried out five years into the program's operation, that through 2019, a total number of 15,300 dwellings were completed while another 20,500 were still under construction.[85] Out of these, 1,839 were addressed to moderate-income households and completed within the market-based part of the scheme. Within the social part of the program, developed were 8,570 dwellings for low-income individuals and 4,896 dwellings for moderate-income families.

A slightly more optimistic perspective was presented in the most recent data published by the Ministry of Development and Technology, demonstrating that as of 30 April 2023, 3,468 units for moderate-income households were delivered, and 1,571 were under construction within the market-based part.[86] Within the social scheme, 10,201 dwellings were completed and 9,020 were under construction for low-income households, while 6,197 dwellings were delivered and 19,459 were under construction for moderate-income families. Assuming that all initiated constructions would be successfully completed, the total number of dwellings delivered through Housing Plus would reach 52,300 dwellings. These figures amount to only half of what should have been achieved by 2019, compared to the government's initial estimations.

However, the scheme's failure was not only quantitative but also qualitative when considering the high rent levels and poor quality of housing delivered within the market-based part of the program. Especially disappointing is the program's ineffectiveness in housing provision for the most economically disadvantaged, given that the social part of the program and the common perception of Housing Plus as being focused on the construction of "cheap" housing were the main labels attached to the scheme from the very beginning.

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[84] Fahey and Norris, *supra* n. 9, 666.
[85] Supreme Audit Office, *supra* n. 16, p. 14.
[86] Data taken from a governmental website, https://www.gov.pl/web/rozwoj-technologia/narodowy-program-mieszkaniowy, visited 2 July 2024.

Hence, while the core idea behind Housing Plus, being to expand the supply of affordable social housing, was accurate in light of the housing market conditions prevailing in 2016, the same cannot be said about the legal means pursued to achieve the set goal. Ultimately, the most extensive use of the legal instruments offered by Housing Plus was made by municipalities.[87] They turned out best suited to discharge the duties relating to construction and allocation. It took the government three years to notice that to deliver on any of the articulated objectives, the scheme had to be adjusted to benefit municipal development to a larger extent. The program's gradual repurposing to support municipal housing projects, which proved effective in boosting the output, confirmed that the central state should not have interfered with the field of housing construction in the first place.[88]

Consequently, the general conclusion to be drawn is that, notwithstanding the manifold adjustments made to improve the program's functioning, Housing Plus did not deliver on its promise to significantly improve the number of affordable units dedicated for low- and moderate-income households. It has likewise failed to achieve the collateral objectives regarding an overall improvement of housing circumstances, getting rid of sub-standard dwellings and eliminating the waiting lists for social housing.

An undeniable root cause of the program's failure was the overestimation of the central state's capacity to contribute to social housing development. That is to say, no centralized scheme was needed to boost municipal construction. Adequate instruments were already in place, such as the TBSs. It seems justified to claim that, if provided with additional funding from the central government, municipalities would have been able to enlarge the public housing stock with the use of the existing legal tools.[89]

Consequently, it did not come as a surprise that, in the face of the upcoming elections, Housing Plus was discontinued in 2023 and supplanted by new housing policies which aimed to quickly improve housing situation. Following the closing of Housing Plus, the government offered tenure conversion to sitting tenants.[90] To finance the transaction, the latter can either take a private

[87] Supreme Audit Office, *supra* n. 16, p. 23-24.
[88] Przymeński, *supra* n. 31, p. 369.
[89] M. Kamiński, 'Projekt ustawy o pomocy państwa w oszczędzaniu na cele mieszkaniowe – założenia', 4 *Nieruchomości* (2023) p. 40.
[90] Information taken from a governmental website, https://www.gov.pl/web/rozwoj-technologia/nowa-atrakcyjna-oferta-dojscia-do-wlasnosci-albo-zakupu-mieszkan-polskiego-funduszu-rozwoju-nieruchomosci, visited 2 July 2024.

loan or convert rental agreement into one leading to owner-occupancy.[91] Despite private investors' requests to make the properties remaining in the NPS accessible for private housing development, the government has accurately chosen to use the land exclusively for prospective social housing projects.

## 4. Safe Loan 2% program: return to homeownership promotion

The adoption in 2023 of several new housing schemes addressed to prospective home buyers marks the second juncture in the domestic housing policy. First, in July 2023, a housing initiative called Safe Loan 2% (*Bezpieczny kredyt 2%*) entered into force. The program provided first-time homebuyers with direct interest rate subsidies to mortgage loans, securing a fixed interest rate of 2% for up to ten years.[92]

The second scheme called Home Savings Account (*Konto mieszkaniowe*), which launched simultaneously, aimed to encourage households to save up for their first own housing. The scheme was conceived to either support the purchase of the first dwelling or to fund an individual construction. Once opened, the account obligated to regular monthly payments for a period of three to ten years and with a guaranteed annual interest rate paid by the state corresponding to the level of inflation or to the level of increase of real-estate prices, whichever was more favorable for the saver. This capital gain was exempt from taxation. Minimum and maximum thresholds of monthly payments were set to enforce regularity of economization.

Given that another program, the so-called Housing without Downpayment (*Mieszkanie bez wkładu własnego*) had already been running since September 2022 and offered public guarantees for downpayments on a mortgage, it is evident that the introduction of the above two programs meant a full-fledged revival of homeownership promotion. It is thus clear that following the discontinuation of Housing Plus, domestic housing policy circled back to its previous emphasis on owner-occupancy.

Out of the three mentioned programs, the analysis below focuses on Safe Loan 2% as the new leading housing policy instrument and one which is exactly opposite to Housing Plus by

[91] J. Sobolak, 'Wkrótce ruszy program wykupu "Mieszkań plus". Na jakich warunkach?', *Gazeta Wyborcza*, 15 June 2023, https://wyborcza.biz/biznes/7,147758,29870720,rusza-program-wykupu-mieszkan-plus.html, visited 2 July 2024.
[92] The Act of 1 October 2021 on Family Loan and Safe Loan 2% (Journal of Laws 2024, item 531).

setting out the state's direct involvement in mortgage market processes to incentivize housing demand.

### 4.1. Mechanisms

As an introduction, a brief outline of direct mortgage subsidies as instruments of housing policy, is worthwhile. Although domestically, the popularity of direct interest subsidies has only surged recently, the idea is far from new.[93] Comparable schemes have been adopted in Western Europe since the 1960s.[94] The underlying objective of mortgage subsidies is to create favorable loaning conditions.[95] By offering direct cash transfers from the state budget, guaranteeing below-market interest rates for loans taken by the first-time homebuyers, these solutions have proved to offer an effective demand-side policy increasing homeownership rates. The mechanism is that the state covers the difference between the interest rate applicable on the market and the lowered, fixed one, determined in the respective government program.[96] State aid does not apply throughout the entire mortgage length but is usually offered in the initial years of mortgage repayment. To qualify for the program, borrowers must meet the general money lending criteria. Additional requirements may apply, such as floor space limitations, the obligation for the dwelling to be used to satisfy the borrower's own residential needs, as well as the prohibition of sale or lease during subsidization period. The main advantage of mortgage subsidies thus conceived is that they lower the total borrowing costs thereby increasing homeownership affordability for many households which would otherwise not be able to purchase their own dwelling.

The Safe Loan 2% program employes the same mechanism. The government secures a fixed two percent interest rate on the loan, a condition which is extremely favorable considering rates applicable to commercial loans, oscillating around 8-9%.[97] Money lending is operated by private banks which joined the program. Eligible are lone individuals, married and unmarried couples, and families with children. Borrowers cannot be older than 45, unless the loan is granted

[93] E. Eichenhofer, *Sozialrecht* (C.H.Beck 2017) p. 292.
[94] W. Nieciuński, 'Kwestia mieszkaniowa' in A. Rajkiewicz J. Supińska and M. Księżopolski (eds.), *Polityka społeczna. Materiały do studiowania* (Wydawnictwo Śląsk 1998) p. 195.
[95] Milewska-Wilk and Nowak, *supra* n. 20, 53.
[96] Council of Europe, *Housing Policy and Vulnerable Social Groups* (Council of Europe Publishing 2008) p. 37-38.
[97] *See* the data of the European Central Bank, https://data.ecb.europa.eu/data/datasets/MIR/MIR.M.PL.B.A2CC.O.R.A.2250.PLN.N, visited 2 July 2024.

to a couple, in which case the age requirement must be satisfied by one person. Subsidies are granted exclusively to the first-time homebuyers, meaning that individuals applying for the subsidies cannot currently own a dwelling nor have owned one in the past.

The preferential loaning conditions are granted for the purchase of a unit at either primary or secondary market, for individual housing construction, as well as when buying land for prospective development.[98] Contrary to the Housing for Young Adults program which operated in the past, no floor space limits apply.[99] Similarly, no income thresholds have been set to limit the eligibility. The maximum mortgage loan amounts are PLN 500,000 for lone individuals and PLN 600,000 for couples, families with at least one child or lone parents. A maximum amount of non-mandatory downpayment has been set at PLN 200,000, meaning that the total loan amount cannot exceed PLN 700,000 and PLN 800,000 accordingly.[100] If downpayment takes the form of land, inclusive of the real estate value, the loan amount can reach up to PLN 1 million.[101] Subsidies are granted for ten initial years of repayment and are transferred monthly, directly to the bank.

A variety of detailed conditions apply regarding the property's usage, loan repayment, and the status of the borrower, the violation of which results in the cancellation of further subsidies and creates an obligation to return the amount of granted support. Along with the program's implementation in July 2023, the 2% tax on civil law transactions applicable to housing purchases made on the primary market was abolished for individuals buying their first dwelling.

### 4.2. Implications

Although the Safe Loan 2% program was shut down in the beginning of 2024, it continued to affect housing market due to the significant number of loan applications under consideration in the first months of 2024. Hence, the outcomes of the scheme cannot be summarized with a full benefit of hindsight, as it was regarding Housing Plus. It is nevertheless possible to make several tentative observations concerning the achieved results and the implications for the domestic housing situation.

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[98] Article 4(1) of the Act on Family Loan and Safe Loan 2%.
[99] In the Housing for Young Adults program, the thresholds regarding the property's price and size constituted an element of the eligibility criteria; M. Majorek, 'Rządowy program "Rodzina na Swoim". Społeczne, ekonomiczne i medialne reperkusje wdrażania', 3 *Państwo i Społeczeństwo* (2013) p. 22.
[100] Article 3(3)1 of the Act on Family Loan and Safe Loan 2%.
[101] *Ibidem*.

To begin with, it is worth addressing how the scheme operated in practice. Compared to any other previous housing policy, the interest in the program was unprecedently high already in the first months following the implementation. Individuals were especially encouraged to participate when the government announced that no limits would apply in 2023, regarding the number of granted loans, so that all individuals who apply and meet the eligibility criteria, would receive support. The number of applications peaked after the parliamentary elections which took place in October 2023, when it became clear that the government would change, and the program might be discontinued.

Six months since the program's implementation, 100,000 loan applications have been lodged, out of which nearly 57,000 had already culminated in a loan agreement.[102] These numbers of lodged applications should be considered in the broader context of the annual mortgage lending data. In 2023, a total number of 162,000 mortgage loans were granted which represents an increase by 28,6% relative to the preceding year.[103] This scale of success was unexpected. The initial estimations assumed that around 50,000 loans will be subsidized from mid-2023 by the end of 2024. The funding secured in the state budget for this whole period depleted already in December 2023. Since January 2024, no more loan applications were accepted and soon afterwards, the program was discontinued and will not return in its original framing.

Aware of the program's success in boosting housing demand, we can move on to consider its implications for housing availability and affordability. The starting point would be to address whether the adoption of the program was accurate against the backdrop of the necessities of the domestic housing market. It was mentioned earlier in this chapter that the creditworthiness of Poles dropped significantly in the past few years due to the soaring inflation and the tightened lending policies which followed the COVID-19 pandemic. Currently, it is only the households which are financially well-off that qualify for mortgage loans. This by itself means that interest rate subsidies are not a universal housing policy. It is irrelevant in this context that the program design itself, by providing very little restrictions with regard to the potential beneficiaries and the acquired property, definitely has a universal scope. But given that the beneficiaries must meet the general

[102] M. Siudaj, '„Bezpieczny kredyt 2 proc." Liczba wniosków przebiła 100 tysięcy', *Bankier.pl*, 3 January 2024, https://www.bankier.pl/wiadomosc/Bezpieczny-kredyt-2-proc-Liczba-wnioskow-przebila-100-tysiecy-8672851.html, visited 2 July 2024.

[103] Puls Biznesu, 'ZBP: w 2023 r. banki sprzedały 162 tys. kredytów hipotecznych', 28 February 2024, https://www.pb.pl/zbp-w-2023-r-banki-sprzedaly-162-tys-kredytow-hipotecznych-1209440, visited 2 July 2024.

money lending criteria, the scheme only favors individuals with at least moderate income who can afford the loan even without public support.[104] The problem is thus not the specific design of the scheme offered domestically, but as such the idea to implement this kind of aid in a moment when such difficult conditions prevail on the mortgage market. This creates a situation where the state's policy only gives a certain group of individuals access to public support.

Sticking to the implications for affordability, the prior domestic experience with mortgage subsidies has also illustrated that the impact of direct interest rate subsidies is not limited to improving mortgage affordability for the program beneficiaries.[105] The schemes tend to have a lasting negative outcome on the housing market dynamics.[106] It is well-known that mortgage subsidies correlate with the increase of property prices. Economic research on the effects of mortgage loan subsidies on housing markets confirms that any change in interest rates is bound to influence the demand for the dwellings, and consequently, their price.[107] Safe Loan 2% had the same effect. The scheme's design, providing that the maximum loan amounts, has caused value increases within the indicated price range of PLN 700,000 to PLN 800,000. The scheme exerted an upward pressure on housing prices and the housing stock shrank significantly.[108] On the domestic housing market where social housing remains a minority tenure and private developers operate without any competition, this has led to arbitrary real estate prices increases. Consequently, the cost of middle-sized apartments in the biggest cities within the price range set in the program increased by 20%.[109] This impact must also be considered as mitigating the initial financial gain from the subsidies.[110]

Before concluding, one negative aspect of the scheme must be addressed, being that it amplifies inequalities within society. More precisely, the program leads to a differentiation between the size of state support offered to different groups of money borrowers. While generous

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[104] Przymeński, *supra* n. 31, p. 370.
[105] Radzimski, *supra* n. 58, p. 470.
[106] D. Kunovac and I. Zilic, 'The effect of housing loan subsidies on affordability: Evidence from Croatia', 55 *Journal of Housing Economics* (2022).
[107] T. Berger et al., 'The capitalization of interest subsidies: Evidence from Sweden, 2 *Journal of Money, Credit and Banking* (2000) p. 199 et seq.; W. Rappoport, 'Do Mortgage Subsidies Help or Hurt Borrowers?', 2016-81 *FEDS Working Paper*, p. 2.
[108] Aalbers, *supra* n. 37.
[109] A. Popiołek, 'Kredyt 2 proc. miał wesprzeć rodziny, a wzięli go single. Rządowy program skończył się chaosem, drożyzną i podobną perspektywą na 2024 rok', *Gazeta Wyborcza*, 30 January 2024, https://wyborcza.biz/biznes/7,147582,30648157,szalenstwo-na-rynku-kredytow-hipotecznych-i-wzrost-cen-mieszkan.html?disableRedirects=true, visited 2 July 2024.
[110] Rappoport, *supra* n. 107, p. 3.

mortgage subsidies were granted to the new borrowers, those who signed the loans agreement earlier were left without support. This is especially striking considering that over the last years, record-high inflation and interest rates increases contributed to the rising mortgage costs. It has been extremely rare for the government to offer support for the existing borrowers. Consequently, while state ignores the problems of over-indebted households, it promotes homeownership and pushes young adults into long-term financial commitment.[111]

It is undeniable that the program has benefited many households by making the money lending costs more bearable. On the other hand, however, it has produced a lasting negative impact on housing prices, worsening the situation of prospective buyers who were ineligible for Safe Loan 2%.[112] Consequently, given the lack of positive effect for the low-income population, the program must be considered as resorting to merely selective homeownership promotion, providing support benefiting chosen sections of society. In light of the above, Safe Loan 2% must be considered ill-equipped to solve the domestic issue of housing unaffordability.

## 5. Conclusion

The analysis undertaken in this chapter confirmed that housing policy belongs to the government's highest priorities and that attempts were made to transform it to address the current necessities of the domestic housing market. Despite these efforts, the government's two flagship housing programs proved unable to deliver on the promise of improved housing affordability and availability.

First, the state turned out unable to commit to long-term social housing development. Even though Housing Plus was running for two parliamentary terms, it failed to deliver expected outcomes. The scheme was based on an ill-conceived premise that the central state is able to directly engage and lead social housing construction. Moreover, the scheme was deficient in legislative terms, which hindered its implementation from the outset. This led to unforeseen elongation of the construction processes, and consequently, small housing output even though numerous legislative amendments have been introduced over the years. Eventually, the number of

[111] Radzimski, *supra* n. 58, p. 469.
[112] Rappoport, *supra* n. 107, p. 6.

affordable dwellings increased only slightly and even this modest outcome was disproportionately benefiting the wealthier sections of the population.

As Housing Plus failed to boost the social housing supply, public funds were reallocated to the homeownership promoting schemes pursuing exactly opposite objectives. While the Safe Loan 2% scheme did help an enormous number of 100,000 households in acquiring their first dwelling, it has also generated long-term negative impact on housing affordability for the future aspiring homeowners by driving up the real estate prices. At the same time, the program has radically transformed the housing policy's targeting, rendering it highly selective, aimed at wealthy households satisfying the money lending criteria applicable on the private market, while leaving low-income families with unsatisfied housing needs.[113] The scheme thus also failed to respond to the most acute housing market necessities.

[113] B. Bengtsson, 'Housing as a Social Right: Implications for Welfare State Theory', 4 *Scandinavian Political Studies* (2001) p. 262 et seq.; Przymeński, *supra* n. 31, p. 357.

## Chapter 7
## Social rights implications of the local autonomy reforms

Since the current political majority came to power, the degree of local autonomy granted to subnational governments has visibly lowered. This change must be considered in the broader context of the domestic political situation. Central government perceives the local authority as an imminent threat to strong, centralized state power. This sense of distrust followed the 2018 local elections which handed over the power in the majority of voivodeships to the opposition parties. In response, central state implemented a spate of legal reforms designed to limit the local authorities' financial and functional capabilities, and thus, reduce their role as independent power holders. These changing central-local relations must therefore be seen as efforts to hinder the diminishing of the authority of the central state claimed to result from progressive decentralization. Scholars evaluating the scale of the domestic reforms tend to consider them as amounting to a full-blown backlash against the subnational autonomy.[1]

This chapter explores the transformation of the central-local dynamics to determine the implications for the local authorities' duty of social rights provision. It thus examines the recent reforms of the local government to discern its declining capacity to effectively provide social rights to the local populations. Following the classification of the constitutional guarantees of local autonomy, the reforms are depicted as targeting either the autonomy's financial or functional aspects. With regard to each of the changes, spanning essential social infrastructure, healthcare financing, family benefits, housing, and reproductive healthcare, the analysis comments on how they affected either one of the social rights indicators of availability, access, or quality. Crucially, to varying extents, the reforms limited the autonomy of all three tiers of the local government. Nevertheless, as the majority of subnational social duties are discharged by municipalities, the latter hold central place in the following investigation.[2]

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[1] D. Sześciło, 'Is There a Room for Local and Regional Self-Government in the Illiberal Democracy? Struggle Over Recentralization Attempts in Poland', 79 *Studia Iuridica* (2019) p. 166.

[2] In Polish, the term *administracja świadcząca* was coined to cover this phenomenon. It corresponds to the German notion of *(kommunale) Leistungsverwaltung*; *see* I. Lipowicz, 'Samorząd terytorialny jako podmiot administracji świadczącej', 3 *Ruch Prawniczy Ekonomiczny i Społeczny* (2015) p. 115 et seq; I. Lipowicz, 'Pojęcie administracji świadczącej w doktrynie zachodnioniemieckiej' in K. Podgórski (ed.), *Regulacja prawna administracji świadczącej* (Wydawnictwo Uniwersytetu Śląskiego 1985) p. 130–155; I. Sierpowska, *Pomoc społeczna jako administracja świadcząca. Studium administracyjnoprawne* (Wolters Kluwer 2012); S. Sikorski, *Administracja ochrony zdrowia w Polsce – między świadczeniem a reglamentacją. Studium administracyjno-prawne* (Wolters Kluwer 2021); W. Schenk, *Strukturen und Rechtsfragen der gemeinschaftlichen Leistungsverwaltung* (Mohr Siebeck 2006).

It is thus notable that the present analysis differs from the preceding inquiry in that, instead of exploring the legislative articulation of social rights or the effectiveness of their implementation, it pays attention to the prerequisites for social rights delivery which are financial and functional in nature and dependent on the practice of administrative decentralization. This chapter's underlying premise is that effective local provision of social rights demands autonomy. Consequently, scrutinizing the extent of financial and functional local independence is equally as important in assessing social rights protection as dissecting the rights' immediate substance.

This chapter is structured as follows. First, the analysis turns to the declining guarantees of financial autonomy. It explores the changes to the local government financing, including those of systemic nature, adopted in statutory form, as well as those occuring in the practice of concrete resource allocation mechanisms. The following section tackles the changes introduced to the scope of municipal responsibilities, distinguishing between those limiting municipal duties and the opposite ones, forcing the local authorities to take up new obligations. The last section concludes on the reforms' implications for the local delivery of social welfare.

## 1. Limitations to financial autonomy

Domestically, the constitutionally protected local autonomy was designed to involve two fundamental aspects. First, municipalities enjoy financial autonomy, meaning sufficient resources to carry out the assigned duties. Second, functional autonomy vests them with authority to carry out a specific range of duties. However, as demonstrated by the recent domestic practice, the constitutional framing of the central-local relations has not hindered the dramatic change to the relationship between the central state and the local government. For it is notable that the broad constitutional guarantees notwithstanding, the lawmaker enjoys substantial discretion when deciding on the particularities of the subnational financing and power range. Consequently, from the moment the government decided to withdraw from the previous decentralizing practices, both aspects of local autonomy found themselves under constant pressure.

Following the above financial-functional dichotomy, this section scrutinizes the changes to intergovernmental transfers negatively impacting the subnational government's financial independence. First, the changes to tax law are outlined to illustrate the general pattern of intentional cuts on the subnational revenues. Next, within the social realm, healthcare financing

reform is discussed as jeopardizing the local provision of healthcare. Finally, the analysis focuses on a concrete domestic competitive grant procedure as an example of a resource allocation mechanism that applied unlawful award criteria when distributing funding in the field of social infrastructure. Crucially, this analysis does not assert that the problem of underfunding of municipalities has occurred recently because, to the contrary, it has been a longstanding domestic issue. The objective is rather to claim that the current government has undertaken measures to exacerbate this negative trend by further worsening the financial standing of municipalities.

To begin with, the constitutional guarantees of financial autonomy should be outlined for context. Article 167(1) of the Constitution stipulates that the "units of local government shall be assured public funds adequate for the performance of the duties assigned to them." This requirement of adequacy of funding is interpreted as demanding that the allocated resources are commensurate with the subnational responsibilities. On the other hand, Article 167(2) of the Constitution proclaims that the local government's revenues consist of its own revenues as well as general subsidies and specific grants from the central state budget.[3] It counts as both a good practice and a broadly accepted standard that the general subsidies which are not transferred for specific tasks and on which the local government can freely decide, account for the majority of the subnational revenues.[4] This requirement was not articulated in the Constitution, but its high moral authority can be interpreted from the wording of Article 9(7) of the European Charter of Local Self-Government stipulating that "as far as possible, grants to local authorities shall not be earmarked for the financing of specific projects." The second type of transfers, to which the Constitution refers as specific grants, provides activity-based financing in the amount determined by the costs of the assigned task. Furthermore, Article 167(4) of the Constitution contains a crucial requirement that any shifts in the scope of competence vested with the local authorities must be followed by adequate changes in intergovernmental financing.[5] Finally, central in determining the scope of financial autonomy is the extent of fiscal decentralization enjoyed by a given local government unit, meaning its exclusive decision-making power regarding the base and rate of the

[3] "The revenues of units of local government shall consist of their own revenues as well as general subsidies and specific grants from the State Budget."
[4] A. Ladner et al. (eds.), *Patterns of Local Autonomy in Europe* (Palgrave Macmillan 2019) p. 132.
[5] "Alterations to the scope of duties and authorities of units of local government shall be made in conjunction with appropriate alterations to their share of public revenues."

local taxes.[6] The level of revenues from the local taxes in the total revenues is indicative of the local government's so-called financial self-reliance.

In accordance with the above specific constitutional indications, the municipal budgets were designed as comprising three main types of revenues. First, municipalities are the only unit of local government with the right to collect the local taxes, such as the property tax, agricultural tax, forest tax, the tax from the means of transport, as well as other local fees and charges.[7] Second, municipalities are entitled to a share in central state taxes, meaning PIT and CIT. The municipal share in PIT provides for the highest contribution to the local budget.[8] Finally, municipalities receive financial transfers from the state budget which are both conditional and unconditional in nature. The analysis below demonstrates that the government has been attempting to meddle with the scope of financial autonomy designed in such terms.

### 1.1. Systemic underfunding of municipalities

In 2019, through statutory law amendment, PIT rate was reduced from 18% to 17%. Moreover, individuals below the age of 26 were fully exempt from PIT taxation.[9] Although the consequences were far-reaching for the financial standing of all local government units, considering that the municipal share in the overall state's revenues from PIT was nearly 38%, compared to 10% for counties and 1,6% for voivodships, it was the municipal budgets that suffered most significantly. Overall, a visible decrease in real income of the local governments occurred between 2019 and

[6] Fiscal decentralization is effective when the tax raising power is shared between the central and local governments; W.E. Oates, *Fiscal Federalism* (Edward Elgar 1972) p. 150; W.E. Oates, 'An Essay on Fiscal Federalism', 3 *Journal of Economic Literature* (1999) p. 1120 et seq; OECD, *Decentralisation and performance measurement systems in healthcare*, No. 28, April 2019, https://www.oecd-ilibrary.org/docserver/6f34dc12-en.pdf?expires=1720009468&id=id&accname=guest&checksum=B40819C98BC2F745B5D4C75DCA78F317, visited 3 July 2024, p. 7; R. Bahl, 'Conditional vs. unconditional grants: The case of developing countries' in J. Kim, J. Lotz and N. Jørgen Mau (eds.), *General Grants versus Earmarked Grants. Theory and Practice* (The Korea Institute of Public Finance 2010) p. 126.

[7] J. Bober, and A. Kozina, 'Local government in the V4 countries. Heyday, stability, or retreat? in S. Mazur (ed.), *Public Administration in Central Europe. Ideas as Causes of Reforms* (Routledge 2020) p. 218; Congress of Local and Regional Authorities, *Local and Regional Democracy in Poland*, No. CG36(2019)13final, 2 April 2019, https://rm.coe.int/local-and-regional-democracy-in-poland-monitoring-committee-rapporteur/1680939003, visited 3 July 2024, at 77 et seq.

[8] Supreme Audit Office, *Analysis of the implementation of the state budget and monetary policy assumptions in 2022*, Nos 68/2023/P/23/001/KBF, 69/2023/P/23/002/KBF, 7 June 2023, https://www.nik.gov.pl/plik/id,27852.pdf, visited 3 July 2024, p. 386.

[9] D. Sześciło, *Samorząd-centrum. Bilans po trzydziestu latach od odrodzenia się samorządu i pięciu latach nowego centralizmu,* Report of Stefan Batory Foundation, 2020, https://www.batory.org.pl/wp-content/uploads/2020/06/Rzad_Samorzad_analiza.pdf, visited 3 July 2024, p. 8.

2022.[10] According to the Supreme Audit Office's 2022 control of the budget execution, the local government's revenues from PIT dropped by 3,1% relative to their level from before the pandemic, and no compensation was provided for these cuts on the budget.

Another reason for the growing funding gap, which was also invoked by the representatives of the subnational governments during a monitoring visit of the Council of Europe's Congress of Local and Regional Authorities in 2019, is the central government's practice of imposing ever higher standards regarding the provision of social services without securing additional resources to this end. This leads to the situation where the increased costs must be covered by the local authorities alone.[11] The Explanatory Memorandum to Recommendation 431(2019) of the Congress of Local and Regional Authorities regarding the state of local and regional democracy in Poland, from which no binding obligations can be derived but which nevertheless includes reliable information on the condition of the local government, considered these practices as unjustified in light of Poland's steady economic growth.[12]

It bears addressing the issue of municipalities' fiscal policy discretion as offering a potential solution to the problem of underfunding. In this context, it must be clarified that the level of fiscal decentralization is too low to enable the local government to make up for the growing funding shortage. Discretion enjoyed by the subnational authorities with respect to the regulation of rates of local tax and their bases can be exercised within the limits stemming from the statutory law and the executive regulations of the Ministry of Finance. It is additionally curbed in practice by the interpretative ambiguities stemming from the according tax provisions.[13] Consequently, the local taxing powers remain insufficient to bridge the funding gaps in municipal budgets.[14]

Resulting from the above structural changes has been a continuous decline in the amounts of resources at the local government's disposal which become insufficient to cover basic local expenses. There is a deepening mismatch between the functions conferred upon the subnational

[10] Supreme Audit Office, *supra* n. 8, p. 386.
[11] Congress of Local and Regional Authorities, *supra* n. 7, at 224.
[12] Recommendation 431(2019) of the Congress of Local and Regional Authorities of 2 April 2019 on local and regional democracy in Poland, https://rm.coe.int/local-and-regional-democracy-in-poland-congress-session-rapporteurs-da/168093c47e, visited 3 July 2024, at 222.
[13] E. Kornberger-Sokołowska, 'Rola jednostek samorządu terytorialnego w kształtowaniu i poborze podatków stanowiących ich dochody' in H. Dzwonkowski and J. Kulicki (eds.), *Dylematy reformy systemu podatkowego w Polsce* (Wydawnictwo Sejmowe 2016) p. 193 et seq.
[14] Congress of Local and Regional Authorities, *supra* n. 7, at 232; Z. Niewiadomski, 'Samorząd terytorialny RP w świetle 30 lat doświadczeń (spojrzenie z perspektywy regulacji prawnej)', 4 *Samorząd Terytorialny* (2020) p. 24.

authorities and the funds allocated to perform them.[15] These tendencies run contrary to the basic constitutional requirements of funding adequacy and progressive adjustment.[16] For this reason, the negative practices are often considered as part of the broader phenomenon of intentional "financial draining".[17]

Crucially, the funding shortage exacerbates despite the presence of legal tools allowing the local government to protect its financial interests.[18] Such remedies are rarely in use because of the substantial burdens of proof they entail. It bears mentioning that in cases where the amount of allocated resources does not allow for a "full and timely" discharge of subnational duties, Article 49(6) of the Act on revenues of local government units[19] delivers a legal basis for the local governments to claim due amount in front of ordinary courts. Beyond that, the local government units can seek confirmation of the insufficiency, and thus, unconstitutionality of received transfers directly before the Constitutional Tribunal, but especially in these cases, the extremely low procedural success rate discourages the local authorities from filing constitutional complaints.[20]

Having said that, although the government's practices indeed raise serious concerns against the backdrop of the constitutional guarantees of local autonomy, this aspect will not be investigated below. The goal of the remaining analysis is limited to demonstrating that the attacks on the local autonomy jeopardize effective protection of social rights.

### 1.2. Politically driven allocation of resources from the off-budget funds

[15] Niewiadomski, *supra* n. 14, p. 24; S. Mazur, 'Public Administration in Poland in the Times of Populist Drift' in M.W. Bauer et al. (eds.), *Democratic Backsliding and Public Administration. How Populists in Government Transform State Bureaucracies* (Cambridge University Press 2021) p. 113.
[16] J. Korczak, 'Wyzwania stojące przed samorządem terytorialnym' in I. Lipowicz (ed.), *System Prawa Samorządu Terytorialnego. Samodzielność Samorządu Terytorialnego – Granice i Perspektywy* (Wolters Kluwer 2023) p. 770; E. Feret, 'Regulacje Konstytucyjne Wystarczającą Gwarancją Zabezpieczenia Środków Publicznych na Realizację Zadań Publicznych Przez Jednostki Samorządu Terytorialnego?' in K. Małysa-Sulińska and M. Stec (eds.), *Konstytucyjne Umocowanie Samorządu Terytorialnego* (Wolters Kluwer 2018) p. 307.
[17] W. Aksztejn et al., 'The multiple faces of recentralization: A typology of central-local interactions', *Journal of Urban Affairs* (2022) p. 10.
[18] M. Stec and A. Krzywoń, 'Zasada adekwatności finansowanie samorządu terytorialnego w świetle orzecznictwa Trybunału Konstytucyjnego' in P.R. Krawczyk and M. Stec (eds.), *Samorząd – Finanse – Nadzór i Kontrola* (Wolters Kluwer 2013) p. 77 et seq.
[19] The Act of 13 November 2003 on Revenues of Local Government Units (Journal of Laws 2003, No. 203, item 1966).
[20] Stec and Krzywoń, *supra* n. 18, p. 77 et seq.

Another notable rearrangement in the intergovernmental financing has been the declining significance of the general subsidies among all types of transfers received by the municipalities from the state budget.[21] Since the pandemic, general subsidies have been gradually supplanted by the off-budget funds that proliferated as mechanisms of recourse allocation in the government's post-pandemic economic recovery agenda.[22]

The main characteristic of the resources allocated from the off-budget funds is their distribution in the form of conditional grants whereas the process of application for the off-budget funding requires taking part in a competitive procedure. Traditionally, the off-budget funds have offered flexible financial instruments in extraordinary circumstances.[23] Consequently, their increased domestic employment in the dire post-pandemic reality could, in principle, be considered justified. However, the problem with off-budget spending is that its role has not diminished even well after the pandemic. Quite to the contrary, they have become the go-to financial instruments allowing the central government to redistribute public resources with lesser formal constraints.[24] The Supreme Audit Office reported that the highest share of the state's overall off-budget expenditure is transferred to subnational governments. This means that mainly the local government has been affected by the increased popularity of the competitive resource allocation.[25] The government, to the contrary, has benefited from relying on this form of public spending. That is because, as the name itself suggests, the off-budget funds are not included in the annual state budget. Consequently, when resorting to off-budget spending, the government does not visibly expand public debt. In 2022, the difference between the amount of domestic debt announced by the government and that estimated by the EU authorities which took account of the off-budget spending, corresponded to PLN 302 billion.

Having said that, it is one thing to introduce off-budget funds at the expense of unconditional general subsidies, but quite another to make the competitive procedure nontransparent and its outcomes politically driven. This is what happened domestically, and the consequences of these financial practices for social rights provision were palpable. We will now consider the operation of one particular domestic off-budget grant in-depth, zooming in on its

[21] Supreme Audit Office, *supra* n. 8, p. 385.
[22] This was an anti-COVID-19 Fund (*Fundusz przecwidziałania COVID-19*).
[23] M. Smart and R. Bird, 'Earmarked grants and accountability in government' in Kim, Lotz and Jørgen Mau, *supra* n. 6, p. 41.
[24] Supreme Audit Office, *supra* n. 8, p. 384.
[25] *Ibidem*, p. 385.

politicized and uncontrolled allocation mechanisms, to demonstrate that in the domestic context, the off-budget spending has been used as a tool of arbitrary financial decision making.

The Local Investment Fund (*Rządowy Fundusz Inwestycji Lokalnych*)[26] was designed to boost local investments in infrastructure when the country was still experiencing the economic consequences of the COVID-19 pandemic. Followed by a competitive application procedure, RFIL offered funding for specific purposes. Municipalities and counties were invited to submit the infrastructure-related projects proposals. The scheme was relevant in the social rights context as offering support for the development of essential technical infrastructure enabling effective local provision of social services.[27] Most commonly, municipalities applied for funding to develop and renovate hospitals and health centers, long-term care facilities, institutions of day care, social assistance centers as well as homeless shelters.[28] The Local Investment Fund offered the total amount of PLN 13 billion allocated through three consecutive grant procedures which run between 2020 and 2021. During the first edition, PLN 6 billion was allocated to municipalities and counties based on an algorithm which redistributed the resources according to the given unit's financial standing, level of expenditure and population size. In the remaining two procedures, the subnational governments had to compete against each other for the available funding.[29]

In 2022, when controlling the execution of the state's budget, the Supreme Audit Office scrutinized the competitive procedures employed by RFIL.[30] It has found the procedure of applications' assessment nontransparent. Especially, there were no clear, predefined and publicly accessible award criteria or any other rules guiding the evaluation procedures. No protocols,

[26] RFIL was established through Resolution no. 102 of the Council of Ministers of 23 July 2020 concerning support for the investment projects of the local self-government; Article 65(28) of the Act of 31 March 2020 on Special Solutions for Preventing, Countering and Combating COVID-19, Other Infectious Diseases and Emergencies Caused by Them and Certain Other Laws (Journal of Laws 2020, item 374) allowed the Council of Ministers to set the rules for the distribution and transfer of support for the local government investments in the form of a resolution; *see* also J. Dorosz-Kruczyński, 'Rządowe fundusze celowe a samodzielność jednostek samorządu terytorialnego w latach 2018-2021', 11 *Samorząd Terytorialny* (2022) p. 45.

[27] Article 15(3) of the Act on Social Assistance (Journal of Laws 2024, item 743) stipulates that the provision of social assistance consists among others in the maintenance and development of essential social infrastructure.

[28] Beyond the social infrastructure, the funds were offered for roads, transit, education infrastructure including schools, kindergartens and nurseries, as well as sports facilities, water and sewage infrastructure etc.; *see* Council of Ministers, Report on the implementation of the state budget for the period from January 1 to 31 December 2020. Information on the implementation of the budgets of local government units, 2021, https://www.gov.pl/web/finanse/sprawozdanie-roczne-za-2020-rok, visited 3 July 2024, p. 12; A. Szymichowski, 'Wpływ pandemii COVID-19 na dochody gmin i powiatów województwa pomorskiego', 6 *Finanse Komunalne* (2021) p. 38.

[29] For an overview of the program, see the respective government website https://www.gov.pl/web/premier/rzadowy-fundusz-inwestycji-lokalnych.

[30] Supreme Audit Office, *supra* n. 8, p. 352-353.

whether in written or electronic form, were drafted from the meetings of the expert commission. Hence, there was no documentation allowing to scrutinize the commission's decisions on grant expenditure.[31] No justification or substantive rationales were provided for neither the negative or positive granting decisions. A feature which the Supreme Audit Office considered to be the most striking violation of the granting procedure was the allocation of funding despite the applicants' failure to meet formal criteria. This leads to the conclusion that the expert commission was granted full discretion and, in its decisions, resorted to arbitrary criteria.[32] Primarily, however, the Supreme Audit Office paid attention to the fact that no legal remedies were provided to challenge the granting decisions[33] which meant that even the obviously unlawful recourse allocation violating the formal procedural rules could not be legally questioned.

To illustrate the concrete allocation patterns employed in RFIL, the following outline will rely on the outcomes of an in-depth quantitative analysis of the granting decisions of the expert committee.[34] The study's authors assumed from the outset that the allocation has likely followed political criteria. Accordingly, they elaborated a model enabling them to analyze the distribution through the lens of the political affiliation of the municipal authorities competing for the funding. This affiliation was attached according to the declarations made before the previous local elections. Although the authors considered using other variables to trace the allocation mechanisms, including such factors as the size or geographical location of the municipality, neither of these categories proved capable of explaining the stark inter-municipal disproportions with respect to the received amounts of funding. The "for or against the government" distinction was the only one which permitted to explain the allocation as it had unfolded on the ground.

In essence, the study evidenced that the municipalities run by the authorities actively supporting the government were allocated considerably more funds than those governed by the representatives of the political opposition.[35] The study thus confirmed the assumed hypothesis that

[31] Dorosz-Kruczyński, *supra* n. 26, p. 45-46.
[32] D. Sześciło et al., *Rządowy Fundusz Inwestycji Lokalnych: każdemu według potrzeb czy według barw politycznych?*, Report of Stefan Batory Foundation, 2020, https://www.batory.org.pl/wp-content/uploads/2021/01/Raport_RFIL_ka%C5%BCdemy-wed%C5%82ug-potrzeb-czy-wed%C5%82ug-barw-politycznych.pdf, visited 3 July 2024, p. 4.
[33] Supreme Audit Office, *supra* n. 8, p. 352-353.
[34] The study was carried out by experts in the fields of sociology and economy; see J. Flis and P. Swianiewicz, *Rządowy Fundusz Inwestycji Lokalnych – reguły podziału*, Report of Stefan Batory Foundation, https://www.batory.org.pl/wp-content/uploads/2021/01/Rzadowy-Fundusz-Inwestycji-Lokalnych-regu%C5%82y-podzia%C5%82u.pdf, visited 3 July 2024.
[35] Flis and Swianiewicz, *supra* n. 34, p. 5.

municipalities run by the opposition parties experienced a significant disadvantage during the competitive grant procedures.

Several more detailed conclusions have been drawn out as well. First, although in geographical terms, the municipal authorities affiliated with the ruling party govern only 9% of the country's territory, they received 28% of the total funding. An adverse trend was visible with respect to municipalities run by politicians associated with the opposition which received only 10% of the total allocated amount, despite being responsible for almost one-third of the country's area.[36] Next, the data on the level of per capita transfers revealed that while an average sum allocated to every citizen was PLN 83, in municipalities run by the government-affiliated politicians, it was PLN 250, whereas only one-tenth of this sum was granted to the units run by the opposition.[37] Finally, the authors have also analyzed which municipalities received at least one positive granting decision. Among those run by the opposition, only 19% received support, compared to 86% of the government-affiliated units.[38]

Furthermore, data on the geographical distribution of funds is instructive regarding the RFIL's allocation mechanisms. It shows that the highest support was granted to the local authorities in *podkarpackie* voivodeship where the amount of received grants accounted for 6% of the local authorities' total revenues. At the same time, *Podkarpackie* is known to be the most government-supportive region of Poland. Similarly, local authorities in other voivodeships in the eastern part of the country such as *lubelskie*, *podlaskie*, *świętokrzyskie*, were also granted sizeable aid corresponding to 5,7%, 5,2%, 5,2% of their overall revenues accordingly.[39] On the other side of the spectrum, the smallest contribution to the local budgets was noted to have been directed to the local authorities in *mazowieckie* voivodeship, where the capital city is located. It received the amount accounting for 2,8% of the total revenues.[40] What is more, all the largest cities, including Warsaw, Łódź, Gdańsk, Sopot, Gdynia, and Poznań were discriminated against and completely denied financial support.[41] Deprived of the funding opportunities were also smaller opposition-governed urban areas such as Płock, Opole, Świdnica, Elblag, Ełk.

[36] *Ibidem*.
[37] *Ibidem*.
[38] *Ibidem*, p. 9.
[39] A. Czudec, 'Finanse jednostek samorządu terytorialnego w okresie pandemii', 5 *Finanse Komunalne* (2021), p. 14.
[40] *Ibidem*, p. 14.
[41] D. Sześciło et al., *supra* n. 32, p. 8.

There is clear evidence that the above patterns of biased and politically driven decision-making have a direct negative influence on the local government's capacity to deliver social rights. These links can be discerned when looking at concrete social infrastructure proposals considered within RFIL's competitive procedure. It is unfeasible to trace all examples of rejected social development projects as the municipal grant applications are not publicly accessible. Nevertheless, in some cases, local authorities themselves informed the public about the negative RFIL granting decisions. For instance, among the development projects put forth by the city of Sopot but turned down by the RFIL expert commission, was the construction of supportive housing for persons with disabilities as well as a rehabilitation center for children. Warsaw applied for funds for multiple projects, including for the renovations of health centers and hospitals. Likewise, its applications for the renovation of the infrastructure providing early education and care services were rejected, including for an educational facility for children with disabilities as well the nurseries and kindergartens.[42]

Despite the lack of an explicit legal avenue to challenge the decisions taken within RFIL, municipalities have sought to instigate the review process in front of administrative courts. However, because the received declines did not take the form of administrative decisions, they remained outside the judicial purview. Consequently, all initiated cases were declared inadmissible.[43] The Supreme Administrative Court found that the rejections of applications amounted to quasi-decisions of purely informative, and not decisive, nature.[44] Hence, by excluding the possibility to seek redress in court, the competitive procedure designed for the purposes of resource allocation through RFIL has deprived the local authorities of a standard mechanism of protection of their financial interests.[45]

The present analysis of the domestic practice of the off-budget spending illustrated that the latter afforded a tool of arbitrary and politically driven funding allocation. The investigation asserted that in the absence of clear award criteria, the expert evaluation of the applications lodged within RFIL was specifically tailored to benefit handpicked municipalities. An in-depth study

[42] Information taken from the official website of Warsaw, https://um.warszawa.pl/-/warszawa-nie-otrzyma-wsparcia-z-rzadowego-funduszu-inwestycji-lokalnych, visited 3 July 2024.
[43] Dorosz-Kruczyński, *supra* n. 26, p. 46.
[44] *See*, for instance, the decision of the Supreme Administrative Court of Poland of 3 June 2022, I GSK 965/22; Decision of the Supreme Administrative Court of Poland of 27 April 2022, I GSK 730/22.
[45] M. Bogucka-Felczak, 'Sądowa ochrona praw jednostek samorządu terytorialnego do dochodów', 3 *Finanse Komunalne* (2012) p. 5 et seq.

confirmed that these beneficiaries were, at the same time, the most fierce supporters of the government. Primarily, however, while the analysis made clear that biased and politically driven decision-making has become a part of the domestic intergovernmental resource allocation, it has also shown that this practice adversely impacts social rights provision, and in the case at hand, hindered the realization of at least several crucial infrastructure projects.

### 1.3. The financing of healthcare provision

In 2016, the Act on Medical Activity[46] was amended and the rules on the financing of healthcare have changed fundamentally. The responsibility for the net loss of public health care facilities was shifted from the central state to the local authorities.[47] Considered in the context of severe healthcare system indebtedness, the reform provides yet another illustrative example of an intentional worsening of the financial standing of subnational governments.

To begin with, it bears reiterating that healthcare is mainly provided by the local government. Within their respective geographical jurisdictions, municipalities, counties and voivodeships found and manage the so-called Independent Public Healthcare Facilities (*Samodzielny Publiczny Zakład Opieki Zdrowotnej*).[48] There are several institutional forms in which the SPZOZs can operate and provide both inpatient and outpatient care.[49] They can be roughly divided between hospitals and healthcare centers.[50] Currently, around 82% of public hospitals are run by the local authorities.[51]

And yet, despite the subnational governments' central role in the domestic provision of healthcare, they have no influence whatsoever on the mechanisms and processes guiding the

[46] The Act of 15 April 2011 on Medical Activity (Journal of Law 2011, No. 112, item 654).
[47] The Act of 10 June 2016 amending the The Act on Medical Activity and Some Other Acts (Journal of Laws 2016, item 960).
[48] Article 6(2) of the Act on Medical Activity.
[49] Article 8 of the Act on Medical Activity.
[50] R. Budzisz, 'Podmioty administrujące' in E. Zielińska (ed.), *System Prawa Medycznego. Tom I* (Wolters Kluwer 2018) p. 727; K. Kulińska, 'Recentralizacja systemu opieki zdrowotnej w Polsce. Zarys problemu' in B. Jaworska-Dębska and E. Olejniczak-Szałowska (eds.), *Decentralizacja i centralizacja administracji publicznej. Współczesny wymiar w teorii i praktyce* (Wolters Kluwer 2019) p. 433.
[51] Kulińska, *supra* n. 50, 435; I. Lipowicz and S. Sikorski, 'Ochrona zdrowia jako zadanie własne samorządu terytorialnego na tle rozwiązań zawartych w projekcie ustawy o modernizacji i poprawie efektywności szpitalnictwa' in K. Małysa-Sulińska and M. Stec (eds.), *Odpowiedzialność samorządu terytorialnego w sferze socjalnej* (Wolters Kluwer 2023) p. 47.

allocation of public resources for healthcare duties.[52] The main national authority responsible for the management of healthcare financing is the National Health Fund (*Narodowy Fundusz Zdrowia*). It provides the SPZOZs with resources of the amount calculated based on the official healthcare services costs estimations of the Ministry of Health.[53] As such, the financial decision-making remains an exclusive task of the central government realized through the National Health Fund, which was expressly stipulated in Article 14 of the Act on Healthcare Services Financed from Public Funds.[54]

The new provisions of the Act on Medical Activity modified the mechanisms for proceeding with a financial loss reported by the SPZOZs. Beforehand, in case of a net loss, the unit of local government, which had acted as the founder of the given SPZOZ, could either cover the loss within three months since the approval of the health care facility's financial statement or, alternatively, within 12 months since that moment, had to change the legal-organizational form of this healthcare facility or shut it down.[55] Since the reform, local government units which had acted as founders were obliged to cover the financial loss within nine months from the approval of the financial statement or they must have closed down the facility within 12 months.[56]

The implemented solution can only be scrutinized against the backdrop of the overall financial standing of public healthcare facilities. In this context, it is notable that healthcare facilities' underfunding and indebtedness have been the long-standing domestic issues. The costs of healthcare services have been steadily and unceasingly rising. The additional factors driving up the services' prices are the repeated legal amendments improving the quality of delivered services, tightening patient safety requirements, increasing the salaries of health care workers, or enhancing standards for medical infrastructure. While all these modifications are much needed, either no or insufficient adjustments in resource allocation accompany their adoption. Moreover, new healthcare duties are repeatedly imposed on healthcare facilities and additional unforeseen responsibilities might occur in relation to the statutory obligation to provide services in cases of

[52] Lipowicz and Sikorski, *supra* n. 51, p. 44.
[53] To be precise, the valuations are made by the Agency for Health Technology Assessment and Tariff System (*Agencja Oceny Technologii Medycznych i Taryfikacji*) subordinate to the Ministry of Health; Sikorski, *supra* n. 2, p. 425.
[54] The Act of 27 August 2004 on Healthcare Services Financed from Public Funds (Journal of Laws 2024, item 146).
[55] Article 59 (2) and (4) of the Act on Medical Activity (Journal of Laws 2015, item 618).
[56] Article 59 (2)(1) and (2) of the Act on Medical Activity (Journal of Laws 2016, item 1638).

emergency.[57] This leads to outcomes which are contrary to the amendments' articulated objectives. Instead of improving, the quality of delivered healthcare services decreases.

Notwithstanding the funding shortage and the lack of influence on behalf of the local authorities on the amount of funding allocated for healthcare services, the new provisions of the Act on medical activity have made the local government units entirely responsible for the financial loss reported by healthcare facilities within their authority. It must also be noted that the alternative mechanism of dealing with the loss is only illusory, given that to close down the facility is, in most cases, not a viable solution.[58] First, it does not solve the issue of the facility's indebtedness[59], and second, it affects individual rights by depriving the local population of healthcare institution near their place of residence, resulting in a restriction on access to healthcare.

Regional Council of the Mazowieckie voivodship decided to question the new legal *status quo* and has lodged a complaint with the Constitutional Tribunal. It alleged that the provisions of the Act on Medical Activity were contrary to the constitutional obligation that public duties aimed at satisfying the needs of the local community shall be performed by the local government as its direct responsibility in conjunction with the principle of the rule of law and the right to equal access to healthcare.[60] The second allegation asserted that the regulations were also in breach of the constitutional obligation that any changes to the scope of local government duties must be followed by financial adjustments.[61]

The core legal issue analyzed by the Constitutional Tribunal[62] concerned the character of healthcare duties and their according division between the central state and the local government. More precisely, the question was whether the responsibility in the realm of healthcare constituted the local government's direct or delegated task. Solving this issue was crucial to decide on the

[57] This obligation derives from Article 19 of the Act on Healthcare Services Financed from Public Funds; *see* A. Gęsiarz-Krasucka and M. Wielogaski, 'Wybrane zagadnienia dotyczące miejsca i roli jednostek samorządu terytorialnego w obszarze ochrony zdrowia w świetle wyroku Trybunału Konstytucyjnego z 20 listopada 2019 r. (K 4/17)', 1-2 *Samorząd Terytorialny* (2020) p. 33.
[58] *Ibidem*, p. 33.
[59] C. Sowada, I. Kowalska-Bobko and A. Sagan, 'What next after the 'commercialization' of public hospitals? Searching for effective solutions to achieve financial stability of the hospital sector in Poland', 10 *Health Policy* (2020) p. 1050; for a comprehensive overview of the issue of healthcare system indebtedness, *see* Supreme Audit Office, *Functioning of the system of basic hospital provision of health care services*, No. P/18/059, 19 August 2019, https://www.nik.gov.pl/kontrole/P/18/059/, visited 3 July 2024, p. 9 et seq.
[60] Article 166(1) and (2) in conjunction with Article 2 and Article 68(2) of the Constitution.
[61] Article 167 (4) of the Constitution.
[62] Judgment of the Constitutional Tribunal of 20 November 2019, K 4/17.

sources of healthcare financing, including whether, as suggested by the provisions of the Act on Medical Activity, they can be sought in the subnational revenues.

In this context, the Constitutional Tribunal recalled that, according to the law, the responsibilities of the local government with respect to healthcare provision consist in securing equal access to healthcare.[63] To the contrary, they do not encompass healthcare financing. Consequently, the units of local government are not legally constrained to finance the operation of healthcare facilities within their authority.[64] This finds an explicit confirmation in the reading of Article 131(c) of the Act on Healthcare Services Financed from Public Funds which contains an exhaustive list of sources of healthcare financing, on which the local government budget was not mentioned.[65]

In light of the above, the Constitutional Tribunal found that the obligation to cover the loss is not a direct responsibility of the local government but one that that was delegated by the central state within the meaning of Article 166(2) of the Constitution.[66] Primarily, however, the above conclusion regarding the absence of a financial duty on the part of the local authorities means that Article 167(4) in conjunction with Article 166(2) of the Constitution apply, requiring that adequate resources are transferred to cover the loss. The Constitutional Tribunal underscored that the applicability of the above provisions should not be limited to the delegation of new duties. Quite to the opposite, they remain relevant in cases, such as that at hand, where the already existing responsibilities are being broadened or become more costly.[67]

In the following part of the reasoning, the Constitutional Tribunal analyzed the nature of the reported financial loss in order to allocate the responsibility for its occurrence either to the central government or to the local authority. This, in fact, was related to the broader question of whether sufficient resources had been allocated for the financing of healthcare services. In case of an affirmative answer, the net loss had to be considered as resulting from the local government's mismanagement and its responsibility to cover it could be deemed in line with the Constitution. However, the Constitutional Tribunal has found that the domestic system of healthcare financing

[63] Articles 7, 8, 9 of the Act on Healthcare Services Financed from Public Funds.
[64] Judgment of the Constitutional Tribunal of 20 November 2019, K 4/17, at 124.
[65] Gęsiarz-Krasucka and Wielogaski, *supra* n. 57, p. 35.
[66] Judgment of the Constitutional Tribunal of 20 November 2019, K 4/17, at 176.
[67] *Ibidem*, at 177.

managed by the National Health Fund, was deficient in quantitative and qualitative terms.[68] First, the total amount of allocated resources was continuously insufficient when considered against the number of provided services. In qualitative terms, the cost estimations made by the Ministry of Health, based on which the amounts of resources were calculated, were heavily undervalued.[69] Hence, the Constitutional Tribunal stated that the financial loss incurred results from a deficient financing system managed on the central level whereas the resources allocated to the SPZOZs are not commensurate with the actual costs.[70] Consequently, the responsibility for the financial loss cannot be attached to the local government as its causes are systemic and on account with the government. The judgment's overarching conclusion was that the provisions obliging the local authorities to cover the financial loss reported by the public healthcare facilities were in breach of the Constitution.

The ruling K 4/17 was implemented in 2021 through a legislative amendment nullifying the obligation on the part of the local authorities to cover the net loss incurred by the health care facilities. The possibility to cover the loss remained, but only as an option to be considered by the local government.[71] It bears noting that no further changes were undertaken. Hence, although the enclosed reasoning was cross-cutting, confirming the far-reaching deficiency of the system of healthcare financing, no major reform was undertaken. This means that while the unconstitutional obligation to cover the healthcare-related debt was overturned, the root cause of its emergence prevails.

## 2. Limitations to functional autonomy

Along with the reforms impacting the local government's financial autonomy, notable changes have been made to the scope of subnational functions. The nature of these reforms is twofold. First, the authority of municipalities has been limited in that some of their duties were reallocated to the central government. On the other hand, several tasks which had previously been discharged by the central state, and which the government discontinued, were taken over by the municipalities. The

[68] *Ibidem*, at 4.5; *see* also M. Stec, 'Trybunał Konstytucyjny. Odpowiedzialność finansowa jednostek samorządu terytorialnego za stratę netto samodzielnych publicznych zakładów opieki zdrowotnej', 1 *Orzecznictwo w Sprawach Samorządowych* (2020) p. 28-29.
[69] Lipowicz and Sikorski, *supra* n. 51, p. 54-55; Sikorski, *supra* n. 2, p. 427.
[70] Stec, *supra* n. 68, p. 31; with this regard, *see* also Supreme Audit Office, *supra* n. 59, p. 14.
[71] Article 59 (2) and (4) of the Act on Medical Activity.

latter practice relates to the public tasks which the local governments recognize as relevant to their communities, and which would have been made unavailable or less accessible if not taken over by the local government. Consequently, municipalities feel obliged to include these duties among their responsibilities. This has a negative impact on the already insufficient municipal budgets as, given that the takeovers are voluntary, they are not followed by resource allocation. Below, we will examine several examples of social responsibilities that have been either taken away from municipalities or *de facto* forced upon them.

Before moving on to concrete illustrations, the scope of the functional autonomy of the local government, as entrenched in the Constitution, should be outlined. The Constitution provides a general competence clause indicating that the local government discharges all public tasks which the law has not expressly vested with other public authorities.[72] A similar constitutional regulation was addressed specifically to municipalities, stating that they carry out all subnational responsibilities unless delegated to other units of local government.[73] Underlying the constitutional framing of functional autonomy of the local government is the idea that the duties are allocated to the lowest unit capable of discharging them, in line with the principle of subsidiarity.[74] Only when a given responsibility cannot be delivered by municipalities, it must be assigned to the higher tier of government.[75] Hence, the Constitution assumes that the municipal authority is extensive. The above indications mean as well that only when neither tier of the local government is capable of discharging a given duty, it can be reallocated to the central state. The analysis below considers how these guarantees are applied in practice.

### 2.1. Social duties taken away from municipalities

The first case of the municipal authority being limited by the government concerned the 500+ family allowance. In 2022, the duty of allocating this flagship government benefit was taken away from municipalities and passed over to the Social Insurance Institution (*Zakład Ubezpieczeń*

[72] Article 163 of the Constitution.

[73] Article 164(3) of the Constitution.

[74] Oates, *supra* n. 6 (1999), p. 1122.

[75] P. Smoke, 'Accountability and service delivery in decentralising environments: Understanding context and strategically advancing reform' in OECD (ed.), *A Governance Practitioner's Notebook. Alternative Ideas and Approaches* (OECD 2015) p. 220; R. Boadway and A. Shah, *Fiscal federalism: Principles and practice of multiorder governance* (Cambridge University Press 2009) p. 245.

*Społecznych*), supervised by the Ministry of Family and Social Policy, tasked with managing public social security system.[76]

The consequences of this decision encompass primarily the financial standing of municipalities but also the case of individual accessibility of the benefit. First, it is crucial to note that the resources previously allocated to municipalities for the purposes of the 500+ provision made up a large part of the overall municipal revenues. What follows, the sudden reduction of the subnational transfers ensuing from the changes to the 500+ management, equaled limitation of the local authorities' borrowing capacity and negative impact on their financial liquidity.[77] Second, it bears noting that since the program's launch in 2016, when its administration was conferred upon the municipalities, significant investments have been made to educate civil servants on the legal and organizational matters with respect to the benefit's provision. Therefore, the decision to transfer the duties to the Social Insurance Institution after such a long time of benefit's successful provision by municipalities, and despite the previous significant financial outlay, is questionable against the backdrop of financial management. Finally, the reallocation corresponded with digitalization of the entire application procedure which led to reduction of administrative costs. This, on the other hand, can potentially threaten the effective right provision for a number of eligible families. It was estimated in 2021 that around 200,000 individuals still resort to traditional written forms when applying for the program.[78] Full digitalization may therefore, at least for some families, constitute a significant procedural obstacle.

Another example of the central government's limitations upon the functional autonomy of municipalities was the introduction of a new organizational structure for the local delivery of social rights, called Social Services Center (*Centrum Usług Społecznych*, CUS). Since the 1990s, the duties within the realm of social assistance have been discharged by the Social Assistance Centers (*Ośrodek Pomocy Społecznej*).[79] This *status quo* changed in 2019, with the adoption of a new

[76] Article 10(1) of the Law of 11 February 2016 on State Aid for the Upbringing of Children (Journal of Laws 2016, item 195).
[77] Supreme Audit Office, *supra* n. 8, p. 165; Sześciło, *supra* n. 1, p. 170; I. Kowalska, 'Finansowanie przez jednostki samorządu terytorialnego zadań w zakresie pomocy uchodźcom z Ukrainy na przykładzie wybranych miast', 6 *Finanse Komunalne* (2022) p. 12;
[78] J. Jaśkowiak, *Interpelacja poselska do Ministra Rodziny i Polityki Społecznej w sprawie przejęcia przez ZUS programów "Dobry start" i "Rodzina 500 plus"*, No. 25836, 1 August 2021, https://www.sejm.gov.pl/sejm9.nsf/InterpelacjaTresc.xsp?key=C5REW7&view=null, visited 4 July 2024.
[79] A. Szafranek, 'Finansowanie pomocy społecznej przez jednostki samorządu terytorialnego. Analiza w wybranych województwach', 4 *Finanse Komunalne* (2018) p. 26.

institutional framework.[80] As articulated by the lawmaker, the idea behind the creation of the CUSs was to secure a more coherent and harmonized provision of social services on the local level as well as improve cooperation between the neighboring municipalities.[81] Another objective was also to facilitate the proper identification of the local needs with a view to offering more tailored services.[82] Domestic implementation of the CUSs follows the internationally common approach of the so-called single window service, also referred to as the one-stop-shop, according to which services within the various social policy fields are managed by one institution.[83]

The Social Services Centers can be created from the previous Social Assistance Centers or set up from scratch. Importantly, whereas the arrangement of the CUSs within a municipality is not mandatory, a decision to set up one is followed by several obligations. To be more precise, the municipality is constrained to follow specific regulations with respect to the CUS's organizational arrangement. For instance, the law imposes that the units for social services organization and for the local community management are created within the structure of the CUS. No such solutions applied previously regarding the functioning of the Social Assistance Centers. This demand reflects an increased interference by the central government with the internal organizational structure of a local body run by municipalities, vested with social rights provision.[84] It is also ambiguous in the context of the political discretion and organizational autonomy[85] enjoyed by municipalities when carrying out their direct responsibility of social assistance provision.

Further problems occurred in practice. First, contrary to the initial assumption, the CUSs have not been assigned social tasks outside the field of social assistance. Consequently, the CUSs

[80] The Act of 19 July 2019 on Carrying Out Social Services Through Social Services Centers (Journal of Laws 2019, item 1818).
[81] Draft law No. 3040 of 16 November 2018 on Carrying Out Social Services Through Social Services Centers; *see* M. Miemiec, 'Centrum Usług Społecznych jako forma organizacyjna administracji świadczącej', *Acta Universitatis Wratislaviensis* (2020) p. 507.
[82] I. Sierpowska, *Pomoc społeczna. Komentarz* (Wolters Kluwer 2023) p. 72.
[83] C. Ebken, Single Window Services in Social Protection: Rationale and Design Features in Developing Country Contexts, Discussion Papers on Social Protection, Deutsche Gesellschaft für Internationale Zusammenarbeit (2014), February 2014, https://socialprotection-humanrights.org/wp-content/uploads/2017/01/giz2014-en-single-window-services-in-social-protection.pdf, visited 4 July 2024; Sierpowska, *supra* n. 82, p. 72.
[84] R. Szarfenberg, *Centra usług społecznych – czy poprawią dostęp do usług społecznych i ich jakość?*, Report of Stefan Batory Foundation, 2021, https://www.batory.org.pl/wp-content/uploads/2021/12/R.Szarfneberg_Centra.uslug_.spolecznych.pdf, visited 3 July 2024, p. 15; Miemiec, *supra* n. 81, p. 512.
[85] Szarfenberg, *supra* n. 84, p. 21; for the dimensions of the municipal autonomy, *see* Ladner *supra* n. 4, p. 333-334.

merely duplicate the functions of the Social Assistance Centers.[86] No change in the quality of social services provision followed either. In most cases, the new institutions operate within the exact same environments as their forerunners, with management functions oftentimes conferred upon the same individuals. Further allegations formulated against the new structures assert that the CUSs reinforce institutionalization of the domestic social services provision, contrary to the deinstitutionalizing efforts, but also require both financial and organizational effort which is disproportionate to the output.

Hence, this change turned out not to be as far-reaching as initially promised. Especially, no adequate mechanisms were implemented to pursue the declared objectives of harmonization of welfare provision or the broadening of the range of the social services offered.[87] Altogether, the CUSs seem not to have been implemented to transform social assistance but rather to impose a new organizational structure upon municipalities. The general conclusion must therefore be that, while failing to improve social assistance delivery, the introduction of the CUSs amounted to an interference with the organizational autonomy of the municipalities.

### 2.2. Municipal takeover of the government programs

Finally, an opposite mechanism altering the scope of the municipal responsibilities occurred whereby the municipalities take over the tasks previously carried out by the central government. Two leading examples of this strategy are named below and concern the municipal alternatives to government subsidies for IVF as well as the municipal engagement in housing development following the failure of centralized housing construction.

To begin with, it must be mentioned that domestically, the issue of assisted reproductive technology, similarly to that of abortion, has been highly contested. Its most fierce opponents have been demanding a complete ban on the domestic use of IVF. And while the political consensus allowing to comprehensively regulate access to IVF was unreachable for years since the first use of the procedure[88], the increasing demand caused a proliferation of medical centers specializing in

[86] R. Horbaczewski, 'Centra usług społecznych – instytucja do poprawy', *Prawo.pl*, 15 July 2021, https://www.prawo.pl/samorzad/centra-uslug-spolecznych-beda-zmiany-w-przepisach,509465.html, visited 3 July 2024.
[87] Article 2(2) of the Act on Carrying Out Social Services Through Social Services Centers.
[88] M. Domańska and M. Rojszczak, 'Wspieranie rodziny jako cel krajowej ustawy o leczeniu niepłodności a indywidualne prawa podstawowe', 8 *Państwo i Prawo* (2021) p. 132; Motion of the Polish Ombudsman of 29 October

assisted reproductive technology. The absence of the pertinent legal framework on the one hand, and the growing popularity of IVF on the other, culminated in a liberal framing of the access to the procedure.

Notwithstanding the growing availability of commercial IVF services, effective access to the procedure was severely limited in practice because of high costs. This has long constituted a major obstacle for couples from the lower levels of income distribution intending to use IVF. In this context, the adoption in 2013 of a government program co-funding IVF procedure afforded a critical juncture by significantly advancing the struggles to make IVF widely accessible.[89] The scheme was initially scheduled to run until 2016, but because of its high effectiveness measured by the number of children born with the program's help, which reached approximately 21,000, the government committed to prolong the scheme for another three years.

Following the parliamentary elections of 2015, the state's approach to IVF changed radically. It has taken the new political majority three months to withdraw from the IVF initiative and announce a discontinuation of the central state's funding. The scheme was phased out in June 2016. The incumbent put forth an alternative approach to infertility treatment which does not encompass the IVF procedure.[90] Rather, naprotechnology (Natural Procreative Technology) uses natural solutions to treat infertility that remain consistent with the teaching of the Catholic Church.[91] Scientific experts argue that naprotechnology cannot be considered as a viable alternative to medically assisted reproduction.[92] By withdrawing public funding for IVF, the government has re-introduced a significant barrier of economic nature for the families with low income wishing to access IVF.

In response, the local government mobilized to enhance access to reproductive healthcare even despite the absence of central state aid. Multiple IVF schemes were implemented locally as alternatives to the previous government program.[93] For instance, from among the biggest cities, Warsaw, Cracow, Gdańsk, Łódź, Poznań, and Wrocław provide funding for IVF out of their own

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2015 to the Constitutional Tribunal, https://ipo.trybunal.gov.pl/ipo/dok?dok=F-574301171%2FK_50_16_rpo_2015_10_29_ADO.pdf, visited 3 July 2024, p. 1

[89] The scheme was called: Program - Infertility treatment through in vitro fertilization for the years 2013-2016 (*Program - Leczenie niepłodności metodą zapłodnienia pozaustrojowego na lata 2013-2016*).

[90] Ministry of Health, *Health Policy Program. Program of comprehensive protection of reproductive health in Poland for the years 2016-2020*, https://www.gov.pl/web/zdrowie/program-kompleksowej-ochrony-zdrowia-prokreacyjnego-w-polsce, visited 3 July 2024.

[91] B. Dolińska, 'Naprotechnologia – przekłamanie czy nieporozumienie?', 1 *Nauka* (2011) p. 118 et seq.

[92] *Ibidem*, p. 132.

[93] Aksztejn et al., *supra* n. 17, p. 13.

budgets. However, precisely because the municipalities must fund the schemes, not all are capable of offering them. This is especially true given all the remaining cuts to the local budgets. Hence, although the local schemes palpably improved the situation of many couples struggling to have children, due to the discontinuation of the government funding, access to publicly funded IVF remains geographically uneven and depends on the place of residence.

The second example of responsibilities taken over by municipalities is linked to Housing Plus, the government's flagship program for social housing construction. The program's core idea to directly engage the central state apparatus in social housing development was at odds with the previous domestic practice in the field. Consistently since the 1990s, the assumption was that social housing construction and allocation constituted an exclusive municipal duty. Housing Plus was thus a major paradigm shift creating competition for municipal development. Several years of the program's implementation made clear that the previous, deep-seated *status quo* of municipal construction was accurate. Housing Plus failed in both organizational, qualitative, and quantitative terms. Hence, back when the Housing Plus was still operating, the responsibility for social housing development has been gradually shifted back to the municipalities. Eventually, after the program was discontinued in 2023, the responsibility for housing development returned to municipalities which were additionally allowed to use the legal structures elaborated within the program as well as to build on the land previously gathered for the purpose of centralized construction. Nevertheless, financial support directed to municipalities for housing development remains considerably lower than the previous investment in the government's centralized housing initiative.

## 3. Conclusion

Minding the fundamental role of subnational government in social rights delivery, this chapter analyzed the recent interferences with the local autonomy to discern implications for the local welfare provision.

The investigation made clear that the challenges to local finances have been systemic and concerned major fields of tax law and healthcare financing. Especially, however, the politically driven and legally uncontrolled allocation of funds from RFIL delivered a striking example of unlawful practices in intergovernmental financing. Overall, financial pressures had immediate

negative consequences for the local provision of social rights by threatening access to quality healthcare and impeding development of social infrastructure projects.[94]

The analysis has also demonstrated that the central government has been affecting social rights' local provision through multiple interferences with the scope of municipal duties. First, it has deprived municipalities of their administrative functions with respect to the provision of a family benefit with potential impact on the allowance's accessibility and violated municipalities' organizational autonomy by imposing a new institutional structure for social assistance provision. From an opposite angle, the government has *de facto* forced municipalities to take on new responsibilities, discontinued on the central level, to prevent their complete (IVF) or progressive (housing) unavailability.

A general conclusion can be drawn from the present analysis. There was one overarching aim attached to the top-down pressures on financial and functional local autonomy. By limiting the local revenues and interfering with exclusive local powers, the central state was in fact aiming to disrupt the subnational government's operational capacity to hinder the proper discharge of assigned public tasks. This, in turn, was done to prove that public responsibilities are better handled on the central level. The collateral implications for social rights have been far-reaching, creating profound obstacles to effective local allocation of welfare.

[94] Mazur, *supra* n. 15, p. 105.

# PART 3

## Chapter 8
## Social rights transformation as an outcome of illiberalism

The main objective of the present chapter is to assert that the emergence of illiberalism, previously defined as a legal, political, and social phenomenon assuming institutional[1] and normative[2] change of the preexisting liberal constitutional system, explains the transformation of social law in Poland.

Consequently, to make the linkages between social rights and illiberalism, the following investigation applies the theoretical assumptions from Chapters 1 and 2, where illiberalism was defined and was demonstrated to have been present in the domestic welfare structures, to the core social rights reforms discussed in Chapters 3-7. Considered from an opposite angle, the investigation tests the empirical findings regarding the social rights practice in the post-2015 legal, political, and social reality against the assumptions about illiberalism.

Such an arrangement was prompted by an observation that social laws adopted from 2015 onwards cannot be claimed to reflect illiberalism simply because they were introduced at a particular juncture. This would confuse the fact of timely coincidence between social law changes and illiberalism with the reforms' substantive connection to the illiberal phenomenon. Consequently, it must be underscored that, to assert the interconnectedness, it is the substance of social legislation that must be tested against the normative and institutional illiberal premises.

Accordingly, the argument is that, through an in-depth analysis of social laws, illiberalism can be discerned as part of the social rights transformation even if not mentioned explicitly in the legal texts or as part of legislative history. To make this case, the analysis must demonstrate that illiberalism is implicitly rooted in the way the law was formulated, implemented, and adjudicated. To this end, the following investigation makes extensive use of the analytical insights from the process-tracing approach, being a social science qualitative within-case method employed to

[1] D. Landau, 'Populist Constitutions', 2 *University of Chicago Law Review* (2018); K.L. Scheppele, 'The Opportunism of Populists and the Defense of Constitutional Liberalism', 3 *German Law Journal* (2019) p. 315 et seq.; K.L. Scheppele, 'Autocratic Legalism', 2 *The University of Chicago Law Review* (2018) p. 557 et seq.; R. Dixon and D. Landau, *Abusive Constitutional Borrowing* (Oxford University Press 2021) p. 14 et seq.

[2] T. Drinóczi and A. Bień-Kacała, *Illiberal Constitutionalism in Poland and Hungary. The Deterioration of Democracy, Misuse of Human Rights and Abuse of the Rule of Law* (Routledge 2022) p. 96-149.

establish causality between distinct phenomena.[3] For various reasons related to the nature of legal research, process-tracing understood in the strict sense cannot be applied to this study. The concrete arguments excluding the possibility of straightforward employment of the process-tracing method together with those which nevertheless encourage to follow its structure and formal rigor very closely when discerning the links, were stated in the part of the Introduction devoted to the explanation of the research's methodological approaches.

That said, it bears reiterating that relevant to the present analytical endeavor are the process tracing-derived rigorous and systematic mechanisms serving to observe change as well as the practice of theory-testing, permitting to set the individual reforms indicative of the transformation against the underlying liberal constitutional theory. This, in essence, is the present approach to establishing a substantive connection between the phenomena studied in the present investigation.

Finally, it bears clarifying that the analysis was divided into five parts dealing with the individual social law changes whereas each of these sections involves two analytical steps. Chapters 3-7 explored the content, implementation, and adjudication of social rights rather than how these processes contravened the underlying liberal constitutional tenets. Accordingly, instead of testing the changes straightforwardly against illiberalism, their incongruence with liberal constitutionalism must be determined first. For it is only the conclusion they are in breach of the liberal democratic standard that allows to further test their alignment with illiberal premises. Hence, a two-fold analysis assumes that after the opposition to liberal constitutionalism is asserted, the reforms must all be linked to the distinctively illiberal features, epitomizing the phenomenon's inherent opposition to the constitutional arrangements.

## 1. The rights of persons with disabilities

The recent political practice with respect to the judgments of the Constitutional Tribunal sets out that the government freely decides which of them would be implemented. This strategy was employed with regard to the constitutional judgments on the rights of persons with disabilities and had a negative impact on the provision of the nursing benefit by creating a barrier to the right's effective realization. Such a selective law-making process interferes with the rule of law-derived

[3] D. Collier, 'Understanding Process Tracing', 4 *Political Science and Politics* (2011) p. 823.

requirements of formal nature, thereby leading to an overarching conclusion that domestically, the rule of law has already been substituted by "illiberal legality".

### 1.1. Disability rights implications of the non-implementation of constitutional judgments

It is notable that in the case at hand, we are not scrutinizing a statutory change, but to the contrary, the lack of change which was deemed necessary. More precisely, social rights transformation which culminated in a worsened protection of individual rights was a result of legislative inaction. Below, this mechanism is explained in more detail.

An in-depth analysis of the rights of persons with disabilities conducted in Chapter 3 discussed several constitutional judgments which found the respective provisions guiding the allocation of the nursing benefit to be in breach of the Constitution. Ensuing from this statement of unconstitutionality was a demand for an immediate legislative intervention aiming to bring the legal *status quo* in line with the Constitution. These binding legal stipulations notwithstanding, the government has not implemented the constitutional rulings, to the detriment of the rights of the nursing benefit recipients. More precisely, the lack of implementation of the constitutional rulings K 38/13[4] and SK 2/17[5] meant that the statutory eligibility criteria for the nursing benefit, which had been declared unconstitutional, remained effective and continued to have a direct bearing on the individual entitlement to the benefit. From a different angle, the practice of cherry-picking of the constitutional rulings considered "worthy" of implementation, is an illustration of the power-aggrandizing activities of the executive undertaken at the expense of the judiciary.

Usually, in the absence of the rulings' implementation, the courts adjudicate by omitting the provisions deemed unconstitutional. In the case at stake, however, this strategy was not followed by the courts due to the prior considerable adjudicative inconsistencies as well as significant doubts regarding the legal status of provisions declared unconstitutional. These circumstances exacerbated uncertainty regarding the correct application of the pertinent statutory provisions which, on the other hand, culminated in the rise of further jurisprudential inconsistencies and differences between and within courts as well as between courts and the state's administration.

[4] Judgment of the Constitutional Tribunal of 21 October 2014, K 38/13.
[5] Judgment of the Constitutional Tribunal of 26 June 2019, SK 2/17.

Another far-reaching consequence of the lack of legislative intervention, contrary to the indications formulated in the constitutional rulings as well as the Constitutional Tribunal's express calls for a systemic re-regulation of the entire nursing benefit framework[6], was the jurisprudential shift towards an activist adjudication. Due to the following sequence of events encompassing, first, the lack of legislative amendments, second, sustained unconstitutionality of the provisions stipulating eligibility requirements, and third, the mounting adjudicative inconsistencies and the overall significant disadvantage that was following from this legal *status quo* for the benefit's recipients, the courts started to create alternative legal norms or refused to apply those directly binding, by relying on the constitutional values of social justice or equality.[7] Accordingly, they have engaged in straightforward *contra legem* interpretation.[8]

While inadmissibility of activist adjudication of administrative courts is obvious in the context of the domestic judicial framework, it nevertheless bears recalling the major dangers associated therewith. Primarily, activist adjudication paves the way for potential abuses in the application of the law by the courts.[9] While in the analyzed rulings, the activist reasoning has been beneficial for the social rights recipients, amounting to positive activism, this will not always be the case. Judicial views concerning the meaning of value-laden concepts, such as social justice, differ, while the position of individual judges might change over time. The domestic legal system is ill-equipped to secure consistency of such adjudication. Hence, the legal framework is ill-prepared to accommodate the legal consequences of activist judgments.

Beyond that, systemic implications of judicial activism must be noted. By resorting to activist decision-making, the courts aim to "fill the vacuum that exists owing to the failure of the legislature and the executive to vindicate"[10] certain social rights. Prompted by legislative inaction,

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[6] Judgment of the Constitutional Tribunal of 21 October 2014, K 38/13.

[7] This issue occurred in the jurisprudence on the entitlement to the nursing benefit of further relatives as well as in the case of entitlements' collision.

[8] A strategy discernible for instance in the following previously cited judgments: Judgment of the Supreme Administrative Court of 10 December 2021, I OSK 817/21; Judgment of the Supreme Administrative Court of 7 May 2020, I OSK 2831/19; *see* also S. Nitecki, 'Przyznanie świadczenia pielęgnacyjnego w części stanowiącej różnicę pomiędzy uzyskiwaną emeryturą a kwotą tego świadczenia – glosa krytyczna do wyroku NSA z 8 stycznia 2020 r. (I OSK 2392/19)', 7-8 *Samorząd Terytorialny* (2020), p. 174 et seq.

[9] Z. Duniewska, 'Wykładnia prawa administracyjnego' in M. Stahl (ed.), *Prawo administracyjne – pojęcia, instytucje, zasady w teorii i orzecznictwie* (Wolters Kluwer 2021) p. 304; B. Selejan-Guțan, 'When activism takes the wrong turn. The case of the Romanian Constitutional Court' in M. Belov (ed.), *Courts and Judicial Activism under Crisis Conditions. Policy Making in a Time of Illiberalism and Emergency Constitutionalism* (Routledge 2022) p. 127.

[10] A. Nolan, 'Ireland: The Separation of Powers vs. Socio-Economic Rights' in M. Langford (ed.), *Social Rights Jurisprudence: Emerging Trends in International and Comparative Law* (Cambridge University Press 2009) p. 315.

the courts substitute for the lawmaker by applying norms which do not ensue directly from the legal text.[11] This is a canonical example of a distortion of the principle of separation of powers which, in the case at hand, emerges as a direct consequence of the legislative passivity in the field of disability rights.[12]

Irrespective of whether the court resorts to activism, the sustained legal ambiguity resulting from the lack of judgments' implementation considerably limits the scope of protection accorded to individuals. The legal standing of the nursing benefit recipients is marked by insecurity as the outcome of judicial proceedings is increasingly dependent not on the legal text but on the model of legal interpretation applied by a given judge as well as their views regarding the effectiveness of the constitutional judgment.[13]

### 1.2. Illiberal legality

The above mechanism of the non-implementation of the constitutional rulings is linked to illiberalism and can be traced back to its domestic emergence. Below, the aim is to show that both phenomena are related through the notion of the rule of law.

The starting point is to note that the government's refusal to implement the constitutional judgments is in clear breach of Article 190(2) of the Constitution, and therefore, contrary to the principle of the rule of law of Article 2 of the Constitution. It was explained in the earlier parts of the analysis that the domestic constitutional practice has led to the reinterpretation from the principle of the rule of law of a wide range of formal requirements. These formal stipulations were analyzed in detail in Chapter 2 which explained that one of the requirements demanded that the government's actions uphold public trust in the state and the law.[14] This particular rule of law-derived obligation of formal nature constraints the government to respect and implement the final

[11] P. Ruczkowski, 'Wykładnia prawa a bezpieczeństwo prawne jednostki i podmiotu administrującego' in Z. Duniewska, M. Karcz-Kaczmarek and P. Wilczyński (eds.), *Prawo administracyjne w służbie jednostki i wspólnoty* (Wolters Kluwer 2022) p. 53.

[12] Nitecki, *supra* n. 8, p. 183.

[13] Selejan-Guțan, *supra* n. 9, p. 127.

[14] L. Garlicki, *Polskie prawo konstytucyjne. Zarys wykładu* (Wolters Kluwer 2019) p. 76; Resolution of the Supreme Administrative Court of 12 March 2001, OPS 14/00 that contains an overview of all formal principles.

decisions of the courts[15] including those of the Constitutional Tribunal.[16] The current political practice ignores these long-standing and explicit constitutional requirements, thereby perpetuating the erroneous legal *status quo* which translates into deteriorated protection of individual rights. It is therefore undisputable that the government's intentional withholding from correcting such unfavorable circumstances remains in opposition to the rule of law.[17]

To conclude that the above diminished protection of the rights of persons with disabilities ensues directly from the government's repudiation of the rule of law principle, requires considering this negative change through the lens of "illiberal legality". For the latter illiberal alternative to the rule of law assumes rejection of both substantive and formal requirements reinterpreted from the notion.[18]

The formal facet of "illiberal legality", encompassing the illiberal government's opportunism when undertaking the law-making process[19], explains the political majority's willingness to only adopt the laws subjectively considered necessary. Additionally, the illiberal leadership's reluctance to amend the law on the nursing benefit can be aptly explained with reference to another term used in comparative constitutional studies, albeit not only in the context of illiberalism, denoting the passivity of the parliament towards the enactment of law, called "legislative burden of inertia".[20] Indeed, in the domestic legal system wherein the rule of law was substituted by "illiberal legality", the lack of pertinent legislative action to correct for the erroneous legal *status quo* is marked by an intentional and politically driven inertia.

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[15] Judgment of the Constitutional Tribunal of 8 May 2000, SK 22/99.

[16] I. Wróblewska, *Zasada państwa prawnego w orzecznictwie Trybunału Konstytucyjnego* (Towarzystwo Naukowe Organizacji i Kierownictwa 2010) p. 258.

[17] This conclusion finds an explicit confirmation in the statements of the CoE bodies which declare that "no democratic government that respects the rule of law can selectively ignore court decisions it does not like, especially those of the Constitutional Court"; *see* Resolution 2316(2020) of the Parliamentary Assembly of the Council of Europe of 28 January 2020 on the functioning of democratic institutions in Poland, https://assembly.coe.int/nw/xml/XRef/Xref-XML2HTML-en.asp?fileid=28504&lang=en, visited 4 July 2024, at 6.

[18] T. Drinóczi and A. Bień-Kacała, 'Illiberal Legality' in T. Drinóczi and A. Bień-Kacała (eds.), *Rule of Law, Common Values, and Illiberal Constitutionalism* (Routledge 2021) p. 224; see also M. Krygier, 'Illiberalism and the Rule of Law' in A. Sajó, R. Uitz and S. Holmes (eds.), *Routledge Handbook of Illiberalism* (Routledge 2022) p. 543 et seq.

[19] T. Drinóczi and R. Cormacain, 'Introduction: illiberal tendencies in law-making', 3 *The Theory and Practice of Legislation* (2021) p. 271; A. Bień-Kacała, 'Legislation in Illiberal Poland', 3 *The Theory and Practice of Legislation* (2021) p. 279; P. Bárd and V.Z. Kazai, 'Enforcement of a Formal Conception of the Rule of Law as a Potential Way Forward to Address Backsliding: Hungary as a Case Study', 14 *Hague Journal on the Rule of Law* (2022).

[20] R. Dixon and S. Verdugo, 'Social Rights and Constitutional Reform in Chile: Towards Hybrid Legislative and Judicial Enforcement', 162 *Estudios Públicos* (2021) p. 14; R. Dixon, *Responsive Judicial Review. Democracy and Dysfunction in the Modern Age* (Oxford University Press 2023) p. 80-87.

In essence, the diminished protection of the right to the nursing benefit must be viewed as an element of the broader illiberal strategy of sustained assaults on the liberal constitutional values. In the case at hand, the illiberal version of the rule of law, called "illiberal legality", explains the pernicious domestic practice of the constitutional judgments' non-implementation as a root cause of the weakened protection of disability rights.

## 2. Gender-based differentiation in retirement age

Another social policy reform with far-reaching implications of constitutional nature was the introduction of a lower universal retirement age along with a differentiation between the pensionable age of men and women. The argument advanced here is that this law rejected and simultaneously redefined the embedded understanding of the constitutional notion of gender equality.[21] Regarding the reform's inherently illiberal logic, the analysis asserts that the law's implementation resorted to the illiberal strategy of infusing a constitutional notion with conservative, familialist views on gender roles[22], in an effort to uphold the illiberal moral values and bolster a concrete social arrangement.

### 2.1. Redefinition of gender equality

When scrutinizing the domestic old-age provisions through the lens of gender equality, it is evident that by re-implementing gender-based differentiation in the regulation of pensionable age, the lawmaker has essentially hindered the achievement of equal rights for men and women in the field of old-age pensions. In the domestic system of benefit's calculation, lower pensionable age translates into reduced pension payments which has far-reaching consequences for the economic standing of women and exacerbates *de facto* economic inequalities between genders. Consequently, this seemingly corrective and equality-enhancing policy solution remains at odds with the longstanding legal approaches to bridging the gender income gaps appearing in the

[21] For a similar argument in the Hungarian context, illustrating how the public struggles for gender equality were substituted by reference to femininity and re-sentiment for women's care work, *see* E. Fodor, *The Gender Regime of Anti-Liberal Hungary* (Springer 2022) p. 54 et seq.

[22] B. Gaweda, 'The Gendered Discourses of Illiberal Demographic Policy in Poland and in Russia', 4 *Politics and Governance* (2022) p. 50; W. Grzebalska and A. Pető, 'The gendered modus operandi of the illiberal transformation in Hungary and Poland', *Women's Studies International Forum* (2018) p. 164.

context of pensions.[23] Precisely because the reform amounted to a policy reversal and withdrew the previous regulations striving to root out the gendered differences by increasing the pensionable age and making it equal for both genders, it must be regarded in terms of an intentional decrease of individual rights protection.

Having asserted that the legal solution contradicts the prior approaches, its broader objectives must be indicated. We must begin by noting that the current political majority is bound by the constitutionally entrenched goal of gender equality. This means that when reforming the law, in order to keep the façade of liberal constitutionalism, the government was constrained to argue that the reforms advance gender equality. It therefore has routinely pretended that the new pensionable provisions are compliant with the overarching constitutional stipulations. While doing so, the ruling majority has, in fact, redefined the underlying concept of gender equality in ways that contradict the prior constitutional value commitments. Consequently, the government has not only rejected the embedded notion of gender equality but has also been putting forth an alternative reading of the principle, interfering with the settled liberal constitutional notion.

This process of gender equality redefinition was initiated when the first draft of pensionable law amendment was submitted to the parliament. The new meaning of gender equality unfolds when reading the justification attached to the bill which discerns the equality-enhancing dimension of the reform in women's potential re-engagement in familial caring obligations.[24] Re-engagement which is to be made possible by the earlier retirement. This premise, enumerated among the chief arguments presented in favor of the policy change, is embedded in the notion of familialism, emphasizing the role of informal care provided by family members over that of state-funded professional services. The law also epitomizes conservative views on gender roles by assuming that exclusively women must be granted "preferential" treatment in the field of pensions to perform caring duties.

Likewise, this shift away from regulating pensionable age in accordance with the demands of substantive equality to instead advance a family-centered visions, underpins the second argument phrased out in the justification to the draft law, claiming that women's re-engagement

[23] The view that the lower female pensionable age constitutes a special temporary measure leading to *de facto* equality was refuted in Chapter III.

[24] Draft Law No. 62 of 29 November 2015 on Old-age and Disability Pensions from the Social Insurance Fund, p. 25-26.

with family life outweighs the financial disadvantage suffered due to earlier retirement.[25] This claim represents the government's ignorance of the severe female economic vulnerability ensuing from the reform. It also affords an illustration of the prevailing political views prioritizing the protection of an abstract concept of family over the rights of the actual family members.[26]

In a nutshell, the reform of the law on pensionable age has sanctioned a new reading of gender equality emphasizing family as a central value and upholding a predefined view of the desired female duties. It thereby repudiated the ongoing social progress in terms of family models and gender roles.[27] The new regulation of pensionable age has also rejected the previous domestic achievements in the realm of gender equality to instead forcefully re-entrench the outdated views on the meaning of equality between genders.[28]

### 2.2. Gender equality in the age of illiberalism

The pensionable age reform is an illustration of the illiberal practice consisting in the implementation, by means of statutory law, of predefined, anti-liberal, normative assumptions about gender equality. This strategy serves to manifest public commitment to conservative values as well as to entrench a concrete social arrangement.

We must first briefly recall illiberal views on gender equality and women's rights more broadly. It was explained earlier in the analysis that, by definition, illiberalism is against substantive gender equality as a constitutional value.[29] The political agenda of illiberalism reflects

[25] *Ibidem*, p. 26.

[26] H. Charlesworth and C. Chinkin, 'Between the Margins and the Mainstream: The Case of Women's Rights' in B. Fassbender and K. Traisbach (eds.), *The Limits of Human Rights* (Oxford University Press 2019) p. 212; W. Grzebalska, *supra* n. 32, p. 62; M. Szczygielska, 'Good Change and Better Activism: Feminist Responses to Backsliding Gender Policies in Poland' in A. Krizsán and C. Roggeband (eds.), *Gendering democratic backsliding in Central and Eastern Europe. A comparative agenda* (Central European University 2019) 129; A. Pető, 'Gender and Illiberalism' in Sajó, Uitz and Holmes, *supra* n. 18, p. 315.

[27] C. Chinkin, 'Gender and Economic, Social and Cultural Rights' in E. Riedel, G. Giacca and C. Golay (eds.), *Economic, Social and Cultural Rights in International Law* (Oxford University Press 2014) p. 142.

[28] In gender studies, this sense of insecurity ensuing from the liberal understanding of gender equality is referred to as gendered nationalism; *see* A. Graff and E. Korolczuk*, Anti-Gender Politics in the Populist Moment* (Routledge 2021); *see* also D. Szczepańska et al., 'Dedicated to Nation but Against Women? National Narcissism Predicts Support for Anti-Abortion Laws in Poland', 5 *Sex Roles* (2022) p. 100.

[29] E. Holzleithner, 'Reactionary Gender Constructions in Illiberal Political Thinking', 4 *Politics and Governance* (2022) p. 7; Pető, *supra* n. 26, p. 317; M. Bogaards and A. Pető, 'Gendering De-Democratization: Gender and Illiberalism in Post-Communist Europe', 4 *Politics and Governance* (2022) p. 1.

this hostility in that illiberal policy solutions tend to be deeply gendered.[30] Moreover, illiberalism undertakes full-frontal assaults on women's rights to reproductive healthcare, labor participation and economic equality.[31]

Consequently, it does not come as a surprise that redefinition of gender equality, underpinned by the resurgence of traditional family values, occurred as part of social rights reforms implemented under illiberalism.[32] The domestic pattern of change followed a canonical illiberal trajectory. According to research on gendered implications of illiberalism, the statutory law change with adverse impacts on gender equality amounts to the so-called "gender policy decay".[33] More precisely, illiberalism undertakes a "policy reframing" by amending the law so that the new regulation contradicts gender equality or allows for such a contradicting interpretation.[34] By the same token, the new law on pensionable age of a seemingly corrective, equality-enhancing nature, hinders the progress towards gender equality in that it profoundly affects the economic standing of women. In technical terms, the lack of respect for gender-neutral legal solutions, which inspired the government to reintroduce the pensionable age differentiation, is characteristic of the illiberal lawmaking.[35]

Beyond its deeply ingrained anti-gender attitude, illiberalism marks close links to familialism and is known to implement a particular arrangement of gender relations.[36] Traditional family and gender patterns inform illiberal legislative choices. In the case at hand, as evidenced by the justification enclosed to the draft law, the pensionable age reform was instrumental to entrenching these conservative familialist views constituting the ideational core of illiberal governance.

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[30] Grzebalska, Pető, *supra* n. 22, p. 164.

[31] *Ibidem*, p. 165; P. Guastia and L. Bustikova, 'Varieties of Illiberal Backlash in Central Europe', 2 *Problems of Post-Communism* (2023) p. 130 et seq.

[32] Grzebalska, *supra* n. 32, p. 61.

[33] As elaborated by A. Krizsán and C. Roggeband, 'Introduction: Mapping the gendered implications of democratic backsliding in the countries of the CEE region' in Krizsán and Roggeband, *supra* n. 26, p. 12 et seq.

[34] *Ibidem*; see also A. Krizsán and C. Roggeband, *Democratic backsliding and backlash against women's rights: Understanding the current challenges for feminist politics*, Discussion Paper No. 35, June 2020, https://www.unwomen.org/sites/default/files/Headquarters/Attachments/Sections/Library/Publications/2020/Discussion-paper-Democratic-backsliding-and-the-backlash-against-womens-rights-en.pdf, visited 4 July 2024, p. 30.

[35] Drinóczi and Cormacain, *supra* n. 19, p. 271.

[36] S. Mancini and N. Palazzo, 'The body of the nation: Illiberalism and gender' in Sajó, Uitz and Holmes, *supra* n. 18, p. 410.

To conclude, the government's objective of redefining gender equality aligns with the usual illiberal trajectories in both procedural and substantive terms. When implementing the reform, the political majority has resorted to illiberal techniques of subverting the liberal values consisting in their rejection and redefinition. Likewise, the reform's content follows the substantive illiberal anti-gender and familialist agenda.

## 3. Limitations to abortion availability

The domestic introduction of a near-total ban on abortion resulted from a constitutional review performed by a captured Constitutional Tribunal. This renders the change directly traceable to the dismantling of this particular liberal democratic institution. At the same time, distorting the proper functioning of a constitutional court exemplifies a classic illiberal institutional change. Accordingly, the analysis below maintains that the restriction of the right to abortion constitutes a direct consequence of illiberal assaults on the independence of the constitutional judiciary.

### 3.1. Distorted constitutional adjudication

The limitation of the already restrictive law on abortion is the single most well-known human rights violation committed by the ruling majority.[37] Similarly, the subversive impact of the court-packing, as a strategy that led to the appointment of the constitutional judges showing extreme deference towards the government and paving the way to the production of political judgments, has been thoroughly studied in the literature.[38] And yet, these phenomena are rarely considered together. The argument here is that, although limiting abortion availability has long been on the

[37] Multiple popular news outlets reported on the consequences of abortion limitations; *see* K. Bennhold and M. Pronczuk, 'Poland shows the risks for women when abortion is banned', *New York Times*, 12 June 2022, https://www.nytimes.com/2022/06/12/world/europe/poland-abortion-ban.html, visited 4 July 2024; A. Włodarczak-Semczuk and K. Pempel, 'Death of Pregnant Woman Ignites Debate about Abortion Ban in Poland', *Reuters*, 6 November 2021, https://www.reuters.com/world/europe/death-pregnant-woman-ignites-debate-about-abortion-ban-poland-2021-11-05/, visited 4 July 2024; W. Strzyżyńska, 'Polish state has 'blood on its hands' after death of woman refused an abortion', *The Guardian,* 26 January 2022, https://www.theguardian.com/global-development/2022/jan/26/poland-death-of-woman-refused-abortion, visited 4 July 2024.

[38] D. Kosař and K. Šipulová, 'Comparative court-packing', 1 *International Journal of Constitutional Law* (2023); R.J. Sweeney, 'Constitutional conflicts in the European Union: Court Packing in Poland versus the United States', 4 *Economics and Business Review* (2018); L. Garlicki, 'Disabling the Constitutional Court in Poland' in A. Szmyt and B. Banaszak (eds.), *Transformation of Law Systems in Central, Eastern and Southeastern Europe in 1989–2015* (Wydawnictwo Uniwersytetu Gdańskiego 2016).

government's political agenda, the change was possible only due to the institutional mechanism of the constitutional court capture.[39] To explore this institutional tactic is equally as important as studying the substance of the amendment, because it helps us gain new insights on the mechanisms behind the domestic social rights transformation.

It must be recalled at the outset that practically since coming to power, the government has consistently pursued its goal of amending the abortion law. Several bills proposing severe restrictions were proceeded between 2016 and 2018.[40] Another attempt was made in 2020, seeking to abolish the FFA exception. For several reasons, including the considerable role of public protests organized all over the country, none of the bills has made it through the legislative process. This illustrates that, had the government relied exclusively on the legislative avenue, the modification of abortion law would likely have remained impossible.

Unable to change the law, the political majority initiated a constitutional review process. In 2019, a motion was lodged with the Constitutional Tribunal, alleging the unconstitutionality of one of the abortion exceptions. Crucially, the conformity of the three statutory exceptions to the general ban on abortion has previously never been questioned, which by itself illustrates that the motion went against the long-established legal and public moral *status quo*. Additionally, it seems justified to claim that, in the standard circumstances, the fetal disability exception would likely have been found in line with the Constitution, given that the law providing for the FFA exception was adopted in 1997[41], in a starkly different social reality, followed by over two decades of social progress with significant implications on the popular views on abortion admissibility.

Therefore, to achieve the desired outcome of further limitations to the law on abortion, the constitutional review process required an additional element of a distorted, abusive constitutional interpretation.[42] Indeed, the reasoning in the K 1/20 ruling was only seemingly referring to the substance of the previous constitutional case law on abortion, when in fact purporting its main rationales. This strategy employed by the constitutional court allowed to justify the nullification of one of the legal grounds for performing abortion.

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[39] Judgment of the Constitutional Tribunal of 22 October 2020, K 1/20.

[40] A. Gliszczyńska-Grabias and W. Sadurski, 'The Judgment That Wasn't (But Which Nearly Brough Poland to a Standstill). 'Judgment' of the Polish Constitutional Tribunal of 22 October 2020, K1/20', 1 *European Constitutional Law Review* (2021) p. 134.

[41] Judgment of the Constitutional Tribunal of 28 May 1997, K 26/96.

[42] Dixon and Landau, *supra* n. 1, p. 82 et seq. where the authors speak of an "abusive judicial review".

We shall now track the underlying institutional changes that enabled such purported interpretation of the Constitution. In this context, decisive were the changes to the composition of the Constitutional Tribunal and the modifications of the court's decision-making patterns, both dating back to late 2015.[43] The precise sequence of events relevant for the discussed mechanism involved: the invalidation of the correct election of constitutional judges, election of judges for the occupied seats (both in 2015), unlawful appointment of the President of the Constitutional Tribunal (2016), validation of the improper appointment of the constitutional judges[44] (2017) followed by an appointment of the politicized judges with a deeply religious and conservative bent (2019).[45] These efforts of the government to install loyal judges guaranteed that their future positions, on such a value-laden and deeply contested issue as abortion, would align with the views of the political majority. The reforms enabled political control over the Constitutional Tribunal's composition in concrete cases and allowed to block the so-called "old" justices from adjudicating.[46] Prior to the K 1/20 ruling, the constitutional court's deference towards the government was confirmed in a series of judgments handed down in other cases, which excluded potential disobedience.[47]

In light of the above, all elements making up the institutional mechanism pursued to restrict abortion rights go back to the reform of the constitutional court which jumpstarted the domestic legal-political crisis. The court's prior dismantling was key for the success of the abortion reform.[48] The outcome would not have been achieved had the Constitutional Tribunal not been packed with subservient judges.

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[43] In 2016 alone, six statutes on the functioning of the Constitutional Tribunal were adopted which included amendments paralyzing the decision-making process and rendering it more difficult to adopt a judgment; for a comprehensive overview of the reforms, *see* W. Sadurski, 'Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralysed Tribunal, to a Governmental Enabler', 11 *Hague Journal on the Rule of Law* (2019) p. 71.

[44] Judgment of the Constitutional Tribunal of 24 October 2017, K 34/15.

[45] Prior to their appointment as constitutional judges, Krystyna Pawłowicz and Stanisław Piotrowicz were Members of Parliament representing the Law and Justice party; for the details regarding the appointment, see Gliszczyńska-Grabias and Sadurski, *supra* n. 40, p. 136 et seq.

[46] For instance, judge Stanisław Biernat was forced by the President of the Constitutional Tribunal to take the holidays which blocked him from adjudicating for several months until his term of office ended in June 2017; see Sadurski, *supra* n. 43, p. 70.

[47] See, for instance, Judgment of the Constitutional Tribunal of 14 July 2021, P 7/20; Judgment of the Constitutional Tribunal of 20 June 2017, K 5/17; Judgment of the Constitutional Tribunal of 24 November 2021, K 6/21.

[48] A. Krajewska, 'Connecting Reproductive Rights, Democracy, and the Rule of Law: Lessons from Poland in Times of COVID-19', 6 *German Law Journal* (2021) p. 1074.

Finally, it is implicit in what was already said but must be stated separately, that the distinctively pernicious character of this case lays in its straightforward impact on the individual social rights.[49] It bears noting, that the domestic institutional rearrangements are routinely studied through the lens of their adverse implications for the broad constitutional notions of the rule of law, checks and balances, separation of powers, or judicial independence.[50] Even when the human rights dimension comes to light, the argument is usually superficial, that the institutional guarantees of human rights protection have diminished, or that the reforms have produced systemic limitations to individual freedom or equality.[51] Rarely is the dismantling of the institutions linked directly to the limitations of concrete human rights. Against this backdrop, the discussed K 1/20 abortion ruling sheds new light on the domestic human rights assaults by depicting the immediate impact on the protection of a particular social right.

### 3.2. Illiberal institutions

To say that the capture of the constitutional court aligns with illiberal institutional tactics would be an understatement. Dismantling and repurposing liberal structures with an aim of altering the preexisting constitutional arrangement counts as a fundamental strategy employed by the illiberal governing majorities.

The institutional mechanisms pursued under illiberalism were explained in-depth earlier, but it bears reiterating that the primary institutional targets have been the independent courts.[52] In this context, illiberalism pays special attention to the deconstruction of the constitutional courts.[53] It targets the latter as sources of considerable legal constraints on the executive and legislative powers, threatening the illiberal processes of consolidation and centralization.[54] To achieve its end

[49] This was aptly put by Gliszczyńska-Grabias and Sadurski, *supra* n. 40 who asserted that "With the judgment of the Tribunal, public opinion realised that there is a direct, inseparable link between the capturing of the rule of law and violation of rights and freedoms of millions of Polish women".

[50] G. Halmai, 'Illiberalism in East-Central Europe' in Sajó, Uitz and Holmes, *supra* n. 18, p. 813-814

[51] A rare exception is the comprehensive account of the violations provided by Drinóczi and Bień-Kacała, *supra* n. 2, p. 124 et seq.

[52] Scheppele, *supra* n. 1, p. 553, 563.

[53] H. Alviar García and G. Frankenberg, 'Authoritarian Structures and Trends in Consolidates Democracies' in Sajó, Uitz and Holmes, *supra* n. 18, p. 171-172; P. Castillo-Ortiz, 'The Illiberal Abuse of Constitutional Courts in Europe', 15 *European Constitutional Law Review* (2019) p. 49; T. Drinóczi and A. Bień-Kacała, 'Illiberal Constitutionalism: The Case of Hungary and Poland', 20 *German Law Journal* (2019) p. 1146.

[54] Castillo-Ortiz, *supra* n. 53, p. 67.

of rendering the constitutional courts powerless, illiberalism deploys sophisticated strategies and adopts manifold reforms gradually hollowing out the courts' constitutionally conferred functions.

The recent domestic experiences indicate that illiberalism is able to go a step further than to paralyze the highest judicial body, and uses the authority of the constitutional court to issue politicized judgments allowing to achieve its political objectives.[55] Illiberalism is known to resort to the captured institutions where the standard law-making processes fail to deliver the desired outcomes. A transformed constitutional body packed with subservient appointees is willing to implement the political will of the incumbent. It invalidates laws opposing the illiberal agenda and, to the contrary, legitimizes illiberal governance by mandating the adopted reforms.

Consequently, the infamous abortion ruling illustrates that the court-packing must be understood as an illiberal institutional mechanism preparing the ground for social rights restrictions. The K 1/20 judgment aptly captures the illiberal constitutional court's instrumental role in restricting the right to abortion.

## 4. State's increased involvement in the provision of housing

As previously explained, the greatest influence of the principle of social market economy on social rights is through the patterns of production and allocation of social goods as well as market regulation. The analysis below seeks to argue that two housing policies recently implemented in Poland interfered with these model arrangements. At the same time, the state's increased presence in the housing sector and the new patterns of housing provision are indicative of an illiberal approach to the economy.

### 4.1. Housing policy reforms in the social market economy

To be able to scrutinize the two government housing programs implemented by the current political majority against the basic assumptions derived from the social market economy, we must first reiterate the schemes' targeting patterns.

[55] Sadurski, *supra* n. 43, p. 65.

The analysis of the post-2015 social housing provision illustrated that the state aid has mostly been addressed to the middle- and high-income households. First, the design of the government's flagship Housing Plus scheme providing for centralized social housing construction was tailored to meet the housing needs of middle-earning individuals. Within the market-based part of the scheme, which delivered the majority of the housing output, the apartments were offered at market prices and addressed to middle-income households. In practice, especially in rural areas, the rent prices were even higher than the market-based rental costs. Whereas housing unaffordability is becoming an issue for the middle-earning families, justifying the creation of a market-driven chunk of the program next to the one addressed to households in economic hardship, the emphasis on this feature was disproportionate. Accordingly, the scheme did not sufficiently address the housing needs of the individuals in the lower spectrum of income distribution.

The inaccurate targeting of housing programs exacerbated after Housing Plus had been shut down in 2023. The subsequent housing policy agenda which diverted its focus to support the aspiring homeowners, provided direct financial assistance without any means-testing mechanisms. Considering that the scheme at stake, called the Safe Loan 2%, was addressed to individuals who qualified for money lending on the market, it excluded the low-income households by design. More precisely, beyond the limitations regarding the beneficiaries' age, the maximum amount of the loan and the exclusion on grounds of an existing or prior homeownership, no income thresholds or floor space limitations were foreseen. Accordingly, the scheme was designed to help individuals with middle and high incomes.

The above targeting patterns are at odds with the equality- and subsidiarity-related indications applicable to the allocation of housing under the social market economy model. It bears recalling that the latter subscribes to the notion of equality of opportunity. "More equality"[56] can be achieved within society through redistribution which primarily mitigates poverty and secures the minimum of dignified existence. Subsidiarity, on the other hand, means that the state can never allocate social welfare as broadly as to substitute for the individual efforts.[57] It shall merely provide assistance to those in need by introducing means-testing and addressing assistance to the most

[56] The objective of social policy under social market economy is to provide 'more equality' *("mehr Gleichheit")*; *see* H.F. Zacher, 'Das soziale Staatsziel' in J. Isensee and P. Kirchhof (eds.), *Handbuch des Staatsrechts der Bundesrepublik Deutschland*. *Volume I. Grundlagen von Staat und Verfassung* (C.F. Müller 1987) p. 1082, 1084, 1091.

[57] A. Przymeński, 'Mieszkalnictwo socjalne w Polsce w procesie zmian', 3 *Ruch Prawniczy Ekonomiczny i Socjologiczny* (2021) p. 357.

vulnerable groups.[58] Crucially, welfare provision should never have the effect of discouraging individuals from developing their capabilities. These requirements remain especially accurate in the field of housing in which individuals usually satisfy their needs privately, on the market, and wherein the state's far-reaching intervention is considered an exception that must follow a particular design.

Against the backdrop of equality-related stipulations, the fact that both flagship governmental programs have largely omitted the needs of the most disadvantaged individuals, runs contrary to the goal of equal minimum standards. Especially the second initiative, shifting the focus completely away from the marginalized families, emerges as fundamentally ill-equipped to meet the basic tenets of the domestic housing policy. Even assuming that, given the ongoing global economic transformations driving the housing unaffordability and unavailability crises housing policy must address increasingly broader sections of society, it ought to nevertheless be targeted at the non-wealthy[59], meaning low- and middle-earning, individuals. Consequently, the reach of the Safe Loan 2% program does not stand up to scrutiny.

Through the lens of subsidiarity, it is notable that since the introduction of the Safe Loan 2%, individuals are discouraged from satisfying housing needs within their own capacity. By abstaining from means-testing, the state disincentivizes self-reliance and encourages vast parts of society to seek public support. This is in breach of the subsidiarity's basic tenet forbidding the state to substitute for the citizens.

Finally, the scope of social intervention in the housing market afforded by the programs, must be viewed against the backdrop of the principle of market conformity allowing the state to engage in direct production of goods only to the extent that such an interference will distort neither the competition nor the price mechanisms.[60] This stipulation is relevant in the context of the Safe Loan 2% program. It should be recalled that the major disadvantage tied to the scheme was

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[58] Specifically in the context of housing, *see* B. Greve, *The Role of the Public Sector. Economics and Society* (Edward Elgar 2022) p. 83; *see* also M. Wörsdörfer, 'On the Economic Ethics of Walter Eucken' in C.L. Glossner and D. Gregosz (eds.), *60 Years of Social Market Economy* (Konrad-Adenauer-Stiftung e.V. 2010) p. 27; H. Sautter, '"Social Justice" in a Market Economy. Some Results of the Discussion' in H. Sautter and R. Schinke (eds.), *Social Justice in a Market Economy* (Peter Lang 2001) p. 192; D. Nientiedt, 'Success factors of the social market economy', *Friedrich Neumann Stiftung* (2020), p. 9.

[59] Z. Rataj, 'Główne problemy mieszkalnictwa dla niezamożnych gospodarstw domowych w Polsce i perspektywy zmian', 5 *Studia Oeconomica Posnaniensia* (2017) p. 89.

[60] Zacher, *supra* n. 56, p. 1081; C. Watrin, 'The Principles of the Social Market Economy — its Origins and Early History', 3 *Zeitschrift für die gesamte Staatswissenschaft* (1979) p. 421; H.J. Rösner, 'The Institutional Framework of a Social Market Economy' in Sautter and Schinke, *supra* n. 58, p. 63; Wörsdörfer, *supra* n. 58, p. 28.

precisely that it impacted upon the market mechanisms. Direct subsidization of mortgage loans inevitably leads to housing prices increases. Crucially, however, such an interference can be deemed admissible when the intervention cannot be designed in a market conforming way and the pursued social objectives cannot be achieved by other means.

In this regard, it suffices to recall that the state has previously tackled housing unaffordability by means other than direct financial transfers to aspiring homeowners. Especially notable in this context are the various public programs supporting social housing construction.[61] However, even in the realm of homeownership-supporting schemes, some alternatives to direct subsidization exist, such as tax policies or privatization of the public housing stock, both already present on the domestic housing policy agenda. Likewise, liberalization of money lending criteria affords an instrument which has proved to boost homeownership rates.[62] Overall, the universality of Safe Loan 2%, driving the demand and leading to significant price distortions, speaks against the program's compliance with the market conformity principle.

The overarching conclusion to be drawn is that, from 2015 onwards, the domestic provision of social housing has followed patterns which remain in clear contradiction to the fundamental tenets of equality and subsidiarity, guiding redistribution in the social market economy. On the other hand, increased intervention in the housing market has been in breach of the market conformity standard. Overall, housing policy has been repudiating the underlying model of social market economy.

### 4.2. Illiberal economic intervention

The above patterns of housing provision through social housing construction and homeownership promotion are based on an intervention in the private market. Consequently, the state's rising activity in the field of housing comes at the expense of the mechanisms of free economy. This tendency of growing public involvement in the housing sector lines up with how illiberal governments operate in the economic realm. Especially, the domestic dynamics matches the theme

[61] A. Radzimski, 'Subsidized mortgage loans and housing affordability in Poland', *Geo Journal* (2014) p. 469.
[62] *Ibidem*, p. 470.

of increased state interventionism which is said to constitute a major characteristic of illiberal governance.[63]

What is crucial, the government's enhanced involvement in the economy, typical for illiberalism, manifests itself in a myriad of other sectors.[64] From 2015 onwards, the central state has been expanding public ownership by nationalizing privately owned entities with foreign capital. The government has been increasingly present in the domestic energy[65] and banking markets[66], and has also launched several major infrastructure projects in the areas of shipbuilding[67], aviation[68], and railway. A specific term has been coined to denote this process. The concept of "repolonization"[69] stands for the practice whereby the state-controlled companies buy up strategic private entities active in the crucial segments of economy and wield complete influence over their operation by installing politicized and government-friendly management.

The above outline of the housing policy reforms and their targeting mechanisms made clear that through recent developments in the housing sector, these patterns of overbroad public intervention extend to the social realm. The discussed government initiatives, leading to centralized housing production and universal allocation of direct financial support to aspiring homeowners, both addressed to the middle- and high-earning households, follow the classic illiberal economic strategy of increased public presence as well in those sectors of economy which previously had been almost entirely left to the free market forces. Consequently, a new housing policy arrangement has been unfolding domestically, whereby the role of the citizen's self-

[63] P. Ganga, 'Economic consequences of illiberalism in Eastern Europe' in Sajó et al., *supra* n. 26, p. 691.

[64] S. Mazur, 'Public Administration in Poland in the Times of Populist Drift' in M.W. Bauer et al. (eds.) *Democratic Backsliding and Public Administration. How Populists in Government Transform State Bureaucracies* (2021), p. 103 et seq.

[65] J. Wiech, 'Can Polish energy giant Orlen be a future global champion?', *Notes From Poland*, 28 July 2020, https://notesfrompoland.com/2020/07/28/can-polish-energy-giant-orlen-be-a-future-global-champion/, visited 4 July 2024.

[66] Ganga, *supra* n. 63, p. 697-699; *see* also Financial Times, 'Poland's rush to banking sector socialism', 30 June 2017, https://www.ft.com/content/f7283548-5cd1-11e7-b553-e2df1b0c3220, visited 4 July 2024.

[67] A. Woźniak, 'Słynna stępka trafi na złom. Porażka stoczniowej inwestycji PiS', *Rzeczpospolita*, 4 February 2022, https://www.rp.pl/transport/art35646541-slynna-stepka-trafi-na-zlom-porazka-stoczniowej-inwestycji-pis, visited 4 July 2024.

[68] W. Kość and M. Eccles, 'Poland's dream of massive air hub hits political crosswinds', *Politico*, 21 November 2023, https://www.politico.eu/article/fight-huge-poland-airport-project-turn-political/, visited 4 July 2024.

[69] Ganga, *supra* n. 66, p. 693; see also The Economist, 'Poland's government wants to take control of banking', 9 August 2018, https://www.economist.com/europe/2018/08/09/polands-government-wants-to-take-control-of-banking, visited 4 July 2024.

responsibility and the leading position of the free-market mechanisms decrease at the expense of the central state's progressive duty assumption.

## 5. Interferences with the local provision of welfare

Chapter 7 dissected the central government's recent attempts to limit the scope of financial and functional local autonomy. These reforms were illustrated to have adverse impact on the municipal capacity to discharge social rights. The line of argument presented below asserts that the broader goal of these practices has been to impede the constitutionally embedded progressive decentralization of state power.

### 5.1. Backlash against decentralization

To substantiate the above claim, the central domestic reforms affecting the degree of local autonomy must be briefly summarized. First, considerable changes were made to the intergovernmental financing mechanisms. From 2015 onwards, the conditional earmarked grants from the central budget have been gradually pushing out the previously dominating unconditional transfers on which the municipalities could freely decide. Moreover, the municipal share in the revenues from state taxes was lowered following the 2019 tax law reform. Finally, the new mechanisms of competitive resource allocation, the role of which increased after the COVID-19 pandemic, rely on an arbitrary and politically driven, unlawful decision-making processes.[70]

At the same time, the functional dimension of the local autonomy has been under significant pressure of twofold nature. First, the central government has interfered with the organizational autonomy of the local government by imposing a predefined arrangement of a new institutional structure for the local provision of social assistance. The government has also taken away the municipal responsibility for the allocation of the flagship domestic family benefit 500+. From an opposite angle, the central state's IVF funding withdrawal and the failure of a centralized social housing construction program, forced the municipalities to take over these duties, without additional transfers being made to secure their proper realization.

[70] S. Mazur, *supra* n. 64 p. 114.

To demonstrate the above reforms' inherent opposition to the principle of decentralization, they must be scrutinized against the backdrop of the fundamental constitutional demands relating to the vertical division of power. Several detailed constitutional provisions delineating the scope of the local government's financial and functional autonomy must be considered as well.[71]

With respect to intergovernmental finances, the Constitution foremost demands that the allocated resources remain commensurate with the assigned duties.[72] Next, it requires that any shifts in the scope of competence vested with the local authorities are followed by an adequate change in the amount of intergovernmental transfers.[73] Against this backdrop, the domestic system of healthcare financing in the shape following from the government's recent reforms, was found deficient by the Constitutional Tribunal for continuously failing to allocate sufficient resources to the public healthcare facilities founded and managed by the local authorities.[74] This was deemed contrary to the constitutional demand for adequate funding. The provisions were also found incompatible with the rule of law's deep-seated understanding which states that a continuous adoption of the so-called symbolic laws, providing for mere illusory legal solutions, remains in breach of the rule of law-derived demand for upholding public trust in the state and the law.[75] The domestic framework for healthcare financing was found to amount to such an illusory regulation.[76]

However, beyond healthcare, the remaining systemic reforms of the intergovernmental financing should also be considered against the backdrop of the constitutional provisions stipulating the scope of the local financial independence. Crucially, even if a reform seems to be straightforwardly unlawful because of the financial pressure it imposes, to assert that the level of intergovernmental funding it provides is so low as to entail a breach of the Constitution, is not an easy task. The lawmaker enjoys wide discretion concerning both the legal forms and levels of subnational revenues. This latitude, however, applies as long as the legislature does not impede

[71] Article 15 of the Constitution stipulates in a general manner that public power is decentralized while the detailed provisions regarding the arrangement of the subnational powers were provided in Articles 163-172 of the Constitution.

[72] Article 167(1) of the Constitution; *see* also E. Feret, 'Regulacje Konstytucyjne Wystarczającą Gwarancją Zabezpieczenia Środków Publicznych na Realizację Zadań Publicznych Przez Jednostki Samorządu Terytorialnego?' in K. Małysa-Sulińska and M. Stec (eds.), *Konstytucyjne Umocowanie Samorządu Terytorialnego* (Wolters Kluwer 2018) p. 305.

[73] Article 167(4) of the Constitution.

[74] Judgment of the Constitutional Tribunal of 20 November 2019, K 4/17.

[75] More precisely, it is contrary to obligation of maintaining public trust in the law and the state deriving from the rule of law; *see* judgment of the Constitutional Tribunal of 2 March 1993, K 9/92.

[76] Judgment of the Constitutional Tribunal of 20 November 2019, K 4/17, at 5.2.2.

upon the core of financial local autonomy.[77] Considering the structural nature of the cuts on the subnational budgets intentionally lowering the municipal share in state taxes[78], and the extensive use of the off-budget funding that was proved to resort to unlawful, politically driven forms of resource allocation to deprive handpicked municipalities of state funding, the argument that the level of financial autonomy has been reduced below the constitutional standards of adequacy, seems justified.

Turning to the reforms affecting the scope of the local government's functional autonomy, these should primarily be viewed against the backdrop of the principle of subsidiarity as the main rationale for central-local division of power.[79] In this context, the Constitution stipulates a general competence clause indicating that the subnational governments discharge all public tasks which the Constitution does not explicitly confer upon other public authorities.[80] Similarly, municipalities discharge all subnational responsibilities other than those delegated to other units of local government.[81] These stipulations are an embodiment of the principle of subsidiarity implying that public functions are decentralized where necessary.[82] Subsidiarity also assumes that public duties must be allocated to the lowest unit of government capable of discharging them.[83] A given task can be assigned to the higher tier of government only if the lower unit cannot discharge it in an efficient manner.[84]

Against this backdrop, the two cases analyzed under the functional heading, involving social housing construction and the provision of social assistance through Social Assistance

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[77] Judgment of the Constitutional Tribunal of 31 January 2013, K 14/11, at 5.3.4; *see* also E. Kornberger-Sokołowska, 'Finanse publiczne w Konstytucji (refleksje po 25 latach obowiązywania regulacji dotyczących budżetów publicznych)', 10 *Państwo i Prawo* (2022) p. 314.

[78] E. Kornberger-Sokołowska, 'Ewolucja systemu dochodów jednostek samorządu terytorialnego a zasada adekwatności środków do zadań' in K. Małysa-Sulińska, M. Spyra and A. Szumański (eds.), *W poszukiwaniu dobrego prawa. Księga jubileuszowa Profesora Mirosława Steca. Tom I. Perspektywa publicznoprawna* (Wolters Kluwer 2022) p. 640-641.

[79] The principle of subsidiarity demanding decentralization of state power ensues from the adopted constitutional economic model of social market economy; *see* Rösner, *supra* n. 60, p. 68-69.

[80] Article 163 of the Constitution; see Kornberger-Sokołowska, *supra* n. 77, p. 312.

[81] Article 164(3) of the Constitution.

[82] T. Besley and S. Coate, 'Centralized versus Decentralized Provision of Public Goods: A Political Economy Approach', 12 *Journal of Public Economics* (2003), p. 2611.

[83] ; W.E. Oates, 'An Essay on Fiscal Federalism', 3 *Journal of Economic Literature* (1999) p. 1122.

[84] P. Smoke, 'Accountability and service delivery in decentralising environments: Understanding context and strategically advancing reform' in OECD (ed.), *A Governance Practitioner's Notebook. Alternative Ideas and Approaches* (OECD 2015) p. 220; R. Boadway and A. Shah, *Fiscal federalism: Principles and practice of multiorder governance* (Cambridge University Press 2009) p. 245.

Centers, have been the long-standing municipal duties. Their centralization through, first, direct centralizing practices of Housing Plus, and second, the central state's interference with the organizational arrangement of the Social Services Centers, contradict the principle of subsidiarity. Even assuming that the demand for subsidiarity implies not only a decentralized, but primarily an adequate allocation of tasks, allowing thus for an upward allocation where necessary, the long-established practice in the above realms has by far refuted the premise that these duties are better tackled on the central level.

To conclude, the above analysis made clear that the recent assaults on financial and functional local autonomy, undertaken by the central state, are in breach of the constitutional fundamentals of decentralization.

### 5.2. Illiberal strategy of recentralization

The top-down financial and functional assaults on the autonomy of municipalities are not only in breach of the constitutional principle of decentralization, but are straightforwardly indicative of an illiberal strategy of recentralization.[85] It encompasses the whole spectrum of illiberal governments' activities aimed at curbing the authority of the local government, including incremental reallocation of competences to the central state bodies and financial maneuvers at the expense of subcentral bodies' economic standing.[86]

The domestic backlash against the local government has been described in the literature as amounting to illiberal recentralization.[87] To be more precise, these practices are referred to as the "creeping recentralization". The main characteristic of the latter is, as the name itself suggests, the incremental nature which hinders the process of reforms' classification under the recentralizing heading, rendering them extremely hard counter.[88] The purpose of recentralization is to secure a

[85] W. Aksztejn et al., 'The multiple faces of recentralization: A typology of central-local interactions', *Journal of Urban Affairs* (2022) p. 15.

[86] Definition taken from D. Sześciło, 'Is There a Room for Local and Regional Self-Government in the Illiberal Democracy? Struggle Over Recentralization Attempts in Poland', 79 *Studia Iuridica* (2019) p. 167; *see* also Aksztejn et al., *supra* n. 85, p. 4.

[87] *Ibidem*; Sześciło, *supra* n. 86.

[88] *Ibidem*, p. 176; D. Sześciło, *Samorząd-centrum. Bilans po trzydziestu latach od odrodzenia się samorządu i pięciu latach nowego centralizmu,* Report of Stefan Batory Foundation, 2020, https://www.batory.org.pl/wp-content/uploads/2020/06/Rzad_Samorzad_analiza.pdf, visited 3 July 2024, p. 3; I. Lipowicz and J.H. Szlachetko, 'Rozmowy administratywistów o sprawach samorządowych', 7-8 *Samorząd Terytorialny* (2023) p. 7, 12.

controlled local implementation of governmental policies[89] and remove the obstacles to the expansion of the central state power coming from "alternative sources of authority and influence".[90]

It is notable that the recentralizing tendencies with respect to the local government have been complementing similar practices in other fields of statehood. For instance, recentralization occurred as an element of the executive's power-maximizing activity undertaken at the expense of the remaining branches of government, depicted under the notion of "executive aggrandizement".[91] Similarly, in the sphere of economy, the domestic facet of nationalization, called "repolonization", was aimed at consolidating and centralizing state power at the cost of foreign-owned and private entities.[92]

Central government's illiberal recentralizing activity has far-reaching implications for the domestic constitutional framework. Systematic and purposeful reforms altering the constitutionally embedded scope of local autonomy, and thus, targeting the principle of decentralization, result in an informal constitutional change. Overall, ensuing from subnational government's reforms is an unprecedented distortion of the vertical separation of powers. This *de facto* modification of the constitutional framework was feasible due to the absence of an independent constitutional court able to confirm the unconstitutionality of the discussed activity.

This leads to the main conclusion that recentralization as a paradigmatic illiberal strategy applied to revisit the constitutional demands regarding the vertical power sharing[93], explains the shift in the domestic central-local dynamics.[94] This argument is additionally reinforced by the fact that domestic recentralizing practices resort to the neighboring illiberal strategies of "executive aggrandizement" and informal constitutional change.

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[89] Aksztejn et al., *supra* n. 85, p. 5.

[90] C. Harlow and R. Rawlings, 'Populism and Administrative Law', London School of Economics and Political Science Law School Society and Economy Working Paper No. 12/2023, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=4414379, visited 4 July 2024, p. 7.

[91] T. Khaitan, 'Executive aggrandizement in established democracies: A crisis of liberal democratic constitutionalism', 1 *International Journal of Constitutional Law* (2019) p. 343.

[92] Ganga, *supra* n. 66, p. 694.

[93] F. Zakaria, 'The rise of illiberal democracy', 6 *Foreign Affairs* (1997) p. 30.

[94] J. Jakubek-Lalik, 'Decentralizacja czy Recentralizacja? Kilka Uwag o Regulacji Konstytucyjnej i Praktyce Funkcjonowania Samorządu Terytorialnego w Polsce' in B. Jaworska-Dębska, E. Olejniczak-Szałowska and R. Budzisz (eds.), *Decentralizacja i Centralizacja Administracji Publicznej. Współczesny wymiar w teorii i praktyce* (Wolters Kluwer 2019) p. 115; Mazur, 'Ideas and Ideational Disruption' in S. Mazur (ed.), *Public Administration in Central Europe. Ideas as Causes of Reforms* (Routledge 2020) p. 65 et seq; Mazur, *supra* n. 70, p. 113.

## 6. Conclusion

The present investigation asserted that the social rights transformation was determined by illiberalism, and thereby, confirmed the main hypothesis of this dissertation.

The analysis demonstrated the changes' opposition to the liberal constitutional institutions and normative values. It has systematically and with respect to each of the social law changes, illustrated the presence of substantive links to illiberalism. To be more precise, elucidated were the concrete illiberal features explaining the reforms' adoption under illiberal governance. Those aspects include "illiberal legality", backlash against gender equality, capture of the constitutional court, overbroad and market-constraining economic intervention, and recentralization. These elements explained social rights transformation in the context of illiberalism's broader objectives and practices.

Crucially, the examination made clear that the concept of illiberalism explains both the reforms' substance and the mechanisms used to implement them. Contentwise, the laws turned out to be in direct contradiction to the domestic constitutional principles of the rule of law, gender equality and social market economy. However, the government has also employed liberal-democratic procedures and institutional structures to amend the law. First, it has disregarded the liberal-democratic process of constitutional review to change the abortion law. Second, it violated the constitutional arrangements for decentralization of public power. This illustrates that for the purpose of qualifying the transformation as illiberal in nature, the mechanisms leading to the amendments are equally crucial as the substance of law.

It is further notable that the patterns of illiberal interference with the domestic framework for welfare provision turned out to be far more complex than initially foreseen in Chapter 2. Primarily, the mechanisms employed to change the law were multilayered and often involved multiple illiberal mechanisms. For instance, the non-implementation of the constitutional judgments was depicted as being characteristic of "illiberal legality", but it also remains linked to the executive-aggrandizing illiberal practices employed to sideline the judiciary. Similarly, the abortion case has evidenced that the Constitutional Tribunal targeted by illiberal institutional capture was itself engaged in the implementation of an illiberal moral agenda concerning reproductive healthcare. These examples show that the classification of illiberal actions as

targeting either the institutions or the normative values, while being accurate, does not exclude these patterns' joint application. Consequently, illiberal transformation of social law is complex and ill-apt for clear-cut categorizations.

Finally, although the examination confirmed that a set of illiberal features determined the social law change, two overarching themes stood out in terms of their prominence. First, social rights change ensued from the illiberal dismantling of the separation of powers principle. This was visible in the abortion case wherein the constitutional ruling restricting the law was a direct consequence of the prior subordination of the Constitutional Tribunal to the executive. Likewise, the constraints upon welfare provision by municipalities followed the illiberal interference with the constitutional provisions assuming progressive decentralization as a cornerstone of the vertical separation of powers. Finally, in the context of the right to the nursing benefit, the government's disregard for the obligation to implement the constitutional rulings was a strategy aimed at sidelining the judiciary. The second pattern guiding the illiberal social rights transformation was a consistent opposition to the substantive notion of equality. This notion underlied the transformation of women's rights in the fields of old-age pensions and reproductive healthcare. Similarly, the redefinition of equality of opportunity, as a fundamental rationale for welfare provision in a social state, was visible as part of the illiberal housing policies. Consequently, when implementing the social rights reforms, the illiberal majority has mainly been focused on subverting the separation of powers and appropriating the liberal egalitarian structures.

# Conclusion

This dissertation has sought to explain the relationship between the social rights transformation and illiberalism in Poland. It hypothesized that the far-reaching social law reforms have been triggered by illiberalism understood as a legal, political, and social phenomenon undermining the fundamentals of liberal constitutionalism. The present research endeavor seemed especially relevant given that the premise regarding the link between social rights and illiberalism has not yet found confirmation in substantive legal research. Despite the broad scholarly interest in illiberalism's interferences with civil and political rights and its propensity for certain patterns of welfare provision, the precise trajectory of illiberal social law remains unknown and calls for greater attention of legal scholarship. The present dissertation addressed this research gap.

The process of verification of the above principal hypothesis was spread across three parts of the dissertation devoted to defining illiberalism, with a specific emphasis on its manifestations in the domestic welfare system, exploring social rights changes in selectively chosen policy fields, and systematically discerning the links between these phenomena. The validation of the hypothesis culminated in Chapter 8 where the main theory-driven explanatory argument, assuming that the social rights transformation was prompted by illiberalism, was tested by using the previously gathered legal empirical data on the substance of the social law changes.

The investigation seeking to establish a connection between the studied phenomena was two-step. First, it confirmed that the social rights reforms, altogether encompassing a diminished protection of the nursing benefit's recipients, the introduction of a gender-based pensionable age, abortion law restrictions, the implementation of the housing programs as well as the financial and functional constraints on the local government, are substantively and institutionally at odds with the basic tenets of liberal constitutionalism. The nature of this incongruence varied depending on the scrutinized change. In substantive terms, the non-implementation of the constitutional judgments leading to a less effective provision of the nursing benefit was at variance with the principle of the rule of law, introduction of a gender-based pensionable age differentiation amounted to a redefinition of gender equality principle, whereas the targeting of both hosing programs was contrary to the social market economy-derived requirements for production and allocation of social goods. In institutional terms, the backlash against the local autonomy consisting in the financial and functional top-down pressures on municipalities was against the

principle of decentralization as a vertical dimension of the separation of powers. By the same token, the restrictions on the abortion law were successfully adopted due to the prior dismantling and packing of the Constitutional Tribunal.

Consequently, given that the reforms went beyond the conceptual boundaries of liberal constitutionalism, the second part of the analysis tested them against the illiberal institutional and normative assumptions. The process of linking the individual reforms to illiberalism was successful. Each social change observable on the ground was traced back to one of the distinctively illiberal features encompassing "illiberal legality", backlash against gender equality, constitutional court's capture, market-constraining interventionism, and recentralization. Consequently, the hypothesized explanation of the domestic social rights transformation has found support in the normative analysis tracing the process of change back to illiberalism by using empirical data gathered throughout the examination of the respective policy fields. The conclusion follows that illiberalism proved essential in explaining the transformation of social rights.

However, the observations made throughout this dissertation not only lead to the verification of the hypothesis, but also encourage several overarching conclusions. First, the domestic transformation has led to the emergence of a coherent set of illiberal social rights. It was demonstrated that the amendments rejected the substance of the constitutional social commitment by reinterpreting the principles of the rule of law, gender equality, and social market economy, and by subverting the liberal democratic institutions of decentralization and constitutional adjudication. They essentially stripped these pertinent fundamentals of their liberal essence. What makes these developments illiberal is not the fact that none of them could ever occur in jurisdictions upholding liberal constitutionalism, but rather that their intimate links to illiberalism were asserted in the specific legal, political, and social domestic context. Consequently, individually, they all ensue from an illiberal mindset.

From a different angle, the cumulative adoption of several reforms allowed for a mutual reinforcement of their legal implications, especially that the changes affected different yet interconnected social policy fields. Hence, not one, but a variety of features that must be considered jointly, render social rights illiberal. This, on the other hand, makes the illiberal social agenda inapt for straightforward and upfront, simplistic categorizations. Depicting the illiberal nature of any given transformation is only possible in hindsight and with reference to a concrete array of legal changes.

Next, the conducted empirical analysis allows us to evaluate the social rights transformation driven by illiberalism and leads to the conclusion that the overall impact of social rights reforms on the domestic level of protection was negative. The factors causing the diminished social rights protection include: constitutional review of inferior quality performed by a captured constitutional court, uncertainty with respect to the constitutional ruling's effectiveness due to their selective implementation, sustained unconstitutionality of the eligibility criteria for social benefits ensuing from legislative inaction, restricted availability of social rights, lesser financial and functional capacity of the local government to deliver quality social goods and services, a worsened economic standing of women leading to the widening of the existing gender gaps, and the deepening of the housing affordability and availability crises. Crucially, the claim regarding the worsened protection is based on the above representative, albeit not exhaustive, sample of legal amendments. Accordingly, this dissertation does not assert that the modifications in the social realm were exclusively detrimental, but only that the ones subject to the present study were.

Moreover, it is feasible to elucidate several defining characteristics of illiberal social rights. It is noteworthy that, from among all the investigated policy rearrangements, two concerned the social rights of women. The analysis demonstrated that the illiberal majority has been actively engaged in countering the achievement of equal rights for men and women. Consequently, the present research has furthered the usual argument that illiberalism is gender-hostile by elucidating the **gendered** nature of the domestic social transformation. The outcomes of the latter have been disproportionately affecting the legal standing of women. Another general trait emerging from the above-mentioned reforms of women's rights is the **conservative** character of social law under illiberalism. The trajectory has been contrary to the nearly ubiquitous progressive tendencies to liberalize abortion availability and increase women's labor market participation. Instead of advancing such ends, the reforms were centered on entrenching the opposite familialist *status quo*. Likewise, the illiberal transformation of women's rights was of a deeply **symbolic** character which is evident when noting that these changes concerned highly contested social issues and were adopted despite significant obstacles. The illiberal majority was motivated to deliver on its prior moral commitments and has implemented the changes to abortion and pensionable age even though the former reform has caused weekslong public protests while the latter produced detrimental economic outcome.

Furthermore, contrary to the common perception regarding the universality of the recent domestic approach to welfare, social rights under illiberalism proved to be **exclusionary** towards women, persons with disabilities and their carers, and low-income aspiring renters and homeowners. The targeting of illiberal social policies allows us to draw a line between those "deserving" and "undeserving" of the state's social aid.

Finally, the theme of **centralization** underlies illiberal social rights. The central state's progressive assumption of power is visible in the sphere of welfare provision. Under illiberal governance, centralization occurs primarily in the economic realm, leading to increased interference with the housing sector. It is likewise notable in the state's institutional arrangement characterized by a vertical assumption of the previously decentralized public duties and a horizontal subordination of the law-making and judicial powers to the executive.

Before drawing this overview to a close, the overall significance of the present dissertation's substantive findings must be addressed. Although this research was rooted in the specific domestic context, and therefore investigated only one of the many possible trajectories of social rights protection in illiberal democracies, it makes a universal contribution to comparative constitutional studies on non-liberal regimes and to the field of comparative social law. It deepens our understanding of the phenomenon of illiberalism and social rights importance thereto.

Primarily, by demonstrating that alongside the broader concepts of constitutionalism, human rights, and the rule of law, social law is yet another field in which illiberalism is manifestly present, this dissertation delivers new insights on the theoretical core of illiberalism. It makes clear that illiberalism, regardless of where it emerges, could likely be followed by a transformation of the national approach to welfare provision. The analysis elucidates that, to pursue its substantive goals, illiberalism remains inclined to employ the avenues furnished by social law. On the other hand, studying social rights through the lens of illiberalism has allowed us to capture their contingency on a well-functioning, institutional and normative, liberal democratic environment.

Finally, it is essential that the present study's analytical framework remains applicable to foreign illiberal contexts. The investigation has prepared the ground for undertaking comparable inquiries in different jurisdictions grappling with constitutional crises. This approach might prove helpful for conducting comparative studies on the operation of welfare systems under illiberalism as well as related regimes of populism and authoritarianism. Especially, the present research is

likely to prove relevant for the study of the domestic contexts of other CEE countries struggling with illiberal leadership, such as Hungary, Romania, and increasingly, Slovakia.

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