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The Rule of Law Crisis in Poland and “Normative Power EU” Thesis: Challenges and Implications

Abstract

Against the backdrop of the “normative power Europe” (Manners, 2002) thesis, this paper investigates the rule of law crisis in Poland and its implications on private companies’ performance and investment decisions. The rule of law plays a crucial role in companies’ investment activity, while at the same time is also a central category in the EU’s legal and political edifice. These two problems are rarely analysed together as inter-linked realities, which, in fact, they are. The central question of this paper is how the rule of law’s deterioration in Poland influences the private investment level in the country’s economy and what it might mean for the further political integration of the EU. Among the theories applied were those linked to the institutional approach, i.e., new institutional economics, while among the methods themselves, it was qualitative methods which were used over quantitative methods. It is argued that the political and legal crisis, which has placed Poland in an adversarial position towards the EU, may result in a long-term deterioration of the investment climate in Poland. It may also induce political instability and legal disintegration in the EU.

Keywords: Poland, European Union, Normative Power, Europe, Rule of Law, Investment

Introduction

The rule of law crisis in Poland can be considered in many dimensions and, in the hitherto debate, most voices have been articulated by scientists dealing mainly with the legal aspects of the crisis (Wyrzykowski, 2019;

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Kelemen, Pech, 2019; Wiącek, 2021). While this perspective is necessary and valuable, it is equally important to focus on the broader context of the interlinkage between the legal and the political factors underlying the crisis as well as its economic aspects. To outline the universal meaning of the rule of law in this context, it ought to be mentioned that the principle is not only the institutional cornerstone of the EU and the subject of current legal and political dispute between EU and Poland, but is also an essential factor in determining the private investment level in the economy. All these dimensions have been taken under consideration in this paper.

Although the principles of democracy, the rule of law, social justice, and respect for human rights were first made explicit in the 1973 Copenhagen declaration on European identity (Declaration on European Identity, 1973), the centrality of many of these norms was only institutionalised in the Treaty on European Union signed in 1992 (Consolidated Version of Treaty on European Union, 2012). In political reality, the challenge of creating the legal framework encompassing the diverse institutional systems of 28 countries (in the apogee) emerged during the accession process of the post-Soviet states of Central and Eastern Europe (CEE). It is crucial to note that, although the criteria outlined in Copenhagen in 1993 specifying what a given state wishing to join the EU must fulfil were created mainly to pave the way for the CEE states' inclusion, one of the most intensive conflicts on the scope of the EU's institutions' competences in recent years is the one involving the biggest of the CEE states.

This dispute is of particular importance in terms of the long-term integrity of the bloc, socioeconomic convergence, and the EU's ability to be regarded as normative power. To this end, it is to define where the legal dispute between the European Commission, the European Court of Justice, and the Polish government supported by the Constitutional Tribunal's judgements can be placed regarding the rule of law principle at the EU level. Secondly, an attempt to investigate what the current state of development of the rule of law principle may mean to the private sector and investment level is undertaken. Finally, the author tries to present what political and economic consequences the continuation of Poland's dispute with European institutions regarding the rule of law may have.

The argument is structured as follows; after providing the theoretical foundations of the institutional approach in the second section, a review of the literature and the historical and conceptual framework for the role of the rule of law as defined in the 1993 Copenhagen criteria and treaties in the context of the "normative power EU debate" (Manners, 2002) are presented in the third section, while in the fourth section, the issue of how the rule of law crisis in Poland – caused in the first place by

a constitutional crisis – may affect the investment activity of companies is raised. Conclusions follow.

The Theoretical Foundations: Institutionalism

To provide a concrete and as concise a description as possible of new institutional economics and new economic sociology as the main theoretical engines of this paper, it should be noted that the institutional approach has basically been shaped since the dawn of the social sciences. One can firstly make mention here of an analysis that considers historical and institutional aspects, as proposed by representatives of classical economics led by Adam Smith. Although during the development of the economy itself there has been a shift towards methods and tools aimed at the mathematisation and universalisation of this discipline, John Stuart Mill and Alfred Marshall used not only formal methods based on deduction, but also on historical analysis (Landreth, Colander, 2002).

To narrow down the considerations, it is worth recalling two subtypes of the institutional approach, which, although sometimes used in economic reflection, are much more often located on the periphery of the economic mainstream, in which, if institutionalism appears, is primarily the institutionalism of rational choice. Meanwhile, as proposed by Hall and Taylor (1996), apart from the institutionalism of rational choice, there is also the institutionalism of history and sociology. Historical institutionalism refers to classical institutional trends, including the concept of *path dependence* and defining institutions in the category of formal and informal procedures, norms, and conventions rooted in the entire structure of the political and economic system (Arrow, 2000).

On the other hand, in the case of the sociological institutionalism that underlies new economic sociology, there is a belief that the *homo economicus* paradigm is burdened with certain fundamental shortcomings. It is mainly about the limited rationality of individuals and economic entities, in addition to the fact that the behaviour of market participants is determined not only by the search for maximum utility in economic terms, but also by the presence of social and cultural factors and the resulting character of a given individual. In this approach, institutions are rules, norms, and symbols that shape the image of society at the macro level, and the identity of individuals at the micro level. Importantly, sociological institutionalism argues that institutions are a more active factor in influencing the social order than individuals (Hall, Taylor, 1996). The authors of the publication on patchwork capitalism, as represented by Poland, argue about the importance of the institutional order in the

context of economic development. Patchwork capitalism is a unique type of institutional architecture found in the countries of Central and Eastern Europe, characterised by an incoherent coexistence of institutions from different institutional orders, partly inherited and partly taken over. The result is, among others, a deficit of institutional complementarity and an insufficient social rooting of formal institutions (Rapacki et al., 2019).

It can be said that the new institutionalism is closer to the economic approach and the old institutionalism to the sociological approach. The same differentiation goes for the new economic sociology and new institutional economics. The former has been shaped mainly thanks to the works of Karl Polanyi. This approach grew out of a criticism of utilitarianism as the basis for explaining the functioning of the individual in the economic system (Polanyi, 2010). In turn, at the meeting point of economics and economic history, a new institutional economy and a new political economy emerged, also referred to as analytical institutionalism (in some opposition to historical institutionalism). The revival of institutionalism also resulted in the reappearance of economic sociology which, from the mid-1980s, was close to considerations based on the new institutional economy, and both disciplines began to interact with each other (Nee, Swedberg, 2005).

As regards the new institutional economy, Oliver Williamson is considered its father, and the emergence of this trend dates back to the mid-1970s. The research program of new institutional economics (NIE) at the macro-level primarily includes the interaction of state institutions, legal order, and institutions regulating and influencing the shape of the market and the behaviour of companies. NIE also deals with the micro level, especially state-business relations, contract economics, and organisation theory (Williamson, 1985). An important problem for NIE is also the emergence, evolution, and disappearance of institutions. Representatives of the new institutional economy accept the assumption of limited rationality, which, moreover, implies the need to create institutions as vehicles reducing the risk and transaction costs of functioning on the market (Nee, Swedberg, 2005). At the same time, NIE is highly internally diversified in terms of detailed research topics. While Williamson and Coase are pioneers in the economy of transaction costs, and Demsetz a pioneer in the economics of property rights, with Posner that of the legal system, Olson focused on the study of collective aspects, and North has already become famous for the practical use of NIE methods to study the impact of institutions on development and economic growth and studied institutional change, and, additionally, while Schotter applied the theory of games to analyse the evolution

of institutions and their functioning, some researchers also include Hayek and his achievements as well as Schumpeter in the sphere of new institutional economics (Rutherford, 1996).

However, North provided evidence on the role of institutions in economic development in his work, and it seems that it is this perspective that can be termed the “missing link” of neoclassical economics. At this point, it is important to distinguish between organisations and institutions. The former are divided into that of the political, economic, social, and educational. But it is institutions that structure reality and set the rules of the game. To use the popular sports metaphor, the organisations are the players, and the institutions are the rules of the game (North, 1990). In other words, how organisations arise and evolve depends on the institutional framework. This can be translated into an informal rooting of formal institutions and adapting them to how society functions.

Where are the problems with the rule of law rooted in the case of Poland, using the institutional analytical matrix? Establishing a democratic state and market economy was a challenge for several reasons. Visvizi and Tokarski (2014) mention here: 1) a command-rule economy and the non-existence of private property with no stress on the effective usage of resources; 2) the need for reinstating democracy and a market economy at the same time, and; 3) the lack of reference points regarding how the transition from a totalitarian dictatorship to a market economy and democracy should be made. In this context, the usefulness of historical institutionalism is quite easy to present, as “institutional choices taken in the past can persist, or become ‘locked in’, thereby shaping and constraining actors later in time” (Pollack, 2004, p. 139). If this is the case, it would be useful to look at how deeply embedded the rule of law is in the EU’s formal structure, and how long the evolution shaping the role of the principle had been ongoing before Poland joined the European family.

Conceptual Framework of the Rule of Law as a Principle Constituting the European Union’s Normative Power: A Selected Literature Review

As was presented in the second chapter, so as to streamline the analytical process conducted for the needs of this paper, institutionalism has been selected. It is important to refer to the basic definition of institutionalism, which, as the key element to analyse, sees institutions understood as values and norms serving as a reflection of social thinking, customs, and behaviour sanctioned by legal or moral norms respected in each society

(North, 1990). As new institutionalists underline, it is crucial to capitalise also on other theories' legacy (i.e., behaviouralism, rational choice theory) and to revise institutional analysis in a way to make a methodological shift allowing researchers to discover what is happening in the relationship between institutions and individuals (Lowndes, 2002). To this end, the rule of law should be seen as an essential institution and structural factor enabling the European Union to function as an internally-integrated and externally-credible political and economic bloc, and its presence or lack thereof might also serve as a useful indicator of economic actors' preferences and propensities.

Moreover, considering the EU in terms of which approach enables one to set the stage for both political and economic analyses of the rule of law's place within the whole construction, one of the most interesting and accurate effort has been provided by a normative-power Europe discussion (Manners, 2002). It is precisely within this discussion that the problem of the EU as a third kind of power (civilian and military power aside), namely a normative power, is a central issue. Being a normative power requires one to set a common catalogue of norms and to be able to execute them, while at the same time spreading them effectively in the outer political sphere (Rosecrance, 1998). In this context, the rule of law is on the list of values and norms as well as institutions constituting the normative power of the EU.

The very first step in investigating the issue of the rule of law's place in the EU's legal edifice is to identify what the role of this principle in the legal and political evolution of today's EU is. Although the rule of law principle was not enshrined into the EEC's founding treaty signed in Rome in 1957 and did not emerge in treaties until Maastricht, it is argued that it has been an engine of European integration and, together with democracy, constituted an "organic combination" (Kochenov, 2008). One of the first pieces of evidence of the rule of law's meaning for an integrating Europe was the emergence of the term as a part of the effort to build an identity which would allow the EEC to be a more integrated and recognisable bloc:

"(...) Sharing as they do the same attitudes to life, based on a determination to build a society which measures up to the needs of the individual, they are determined to defend the principles of representative democracy, of the rule of law, of social justice – which is the ultimate goal of economic progress – and of respect for human rights" (Declaration on European Identity, 1973).

An important step in the process of incorporating the rule of law into the European Communities' legal infrastructure, especially for the economic dimension of further integration, was the Single European Act

(SEA) from 1986. This act was particularly meaningful as it was the first successful major attempt to modify the Treaty of Rome by strengthening both political and economic cooperation between Member States by introducing the single market (McCorquodale, 2010).

This process of introducing the rule of law incrementally accelerated in the 1990s. The explicit reference to the rule of law was placed into the Treaty on European Union in 1992. In the preamble of the TEU, the “attachment to the principles of liberty, democracy, and respect for human rights and fundamental freedoms and of the rule of law” (TEU, 2012, p. 3) was declared. To strengthen the Treaty provisions, the Copenhagen Criteria was adopted by the European Council (1993), a key document that can be used as an evident element of the EU’s attachment to the rule of law principle in the enlargement process (Kochenov, 2004). The Criterion of Democracy and Rule of Law was divided into five main categories: elections; the functioning of the legislature; the functioning of the judiciary; the functioning of the executive; and anti-corruption measures. Without fulfilling these criteria, a state should not be able to join the EU. Moreover, the rule of law principle was included in the EU’s legal foundations as it was enumerated as one of its core principles within Treaty of Amsterdam (1997).

The next stage of bolstering the rule of law principle as a legal and political engine of the European Union was the Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community, which can also be referred to as the Treaty of Lisbon (2007). The rule of law is enshrined in the Article 2, which reads:

“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity, and equality between women and men prevail”.

To foster the role of the rule of law and its applicability as a foundational value of the EU, there was a provision created to ensure compliance with the content of Article 2 of the TEU. It is placed in Article 7 of the TEU via preventive and sanctioning mechanisms (Magen, Pech, 2018). The former, first used against Poland in December 2017, foresees an activation in a case of a “clear risk of a serious breach” of Article 2’s values, whereas the sanctioning mechanism allows the Council of the EU to adopt sanctions (e.g., the suspension of voting rights in the Council) against any EU country breaching the rules and values mentioned in Article 2 of the TEU (Halmai, 2018).

Why is the process of the systematic strengthening of the rule of law principle within the EU so important? One of the most important reasons revolves around the debate considering the current shape, future, and the very nature of the European Union. What are (or may be) the sources of the EU's power, integrity, and economic prosperity, and how effective in the rule of law's execution could the bloc be? Among the current concepts put forward on this issue, the proposal of classifying the EU as a mainly normative power seems to, thanks to its complexity, be the most adequate (Manners, 2002).

While civilian power is being defined by factors such as the central role of economic affairs in attaining goals and favouring diplomatic tools while settling international matters including conflicts and support for multilateral institutions setting standards and overseeing socioeconomic and political progress (Twitchett, 1976; Maull, 1990), military power can be exercised not only on a real battlefield, but also via the effective deterrence of potential enemies (Duchene, 1973; Bull, 1982). However, civilian and military dimensions do not exhaust the existing power matrix, as there is at least one more which can enable organisms such as the EU not only to exist in peace, but also to exert influence on other political actors. The very roots of the concept of normative power can be traced back to Carr's claims about power over opinion or Galtung's ideological power, but in a systemic way and with reference to the EU was it formulated by Manners (2002).

Table 1. Civilian, Military, and Normative Powers – Comparison

	<i>Civilian</i>	<i>Military</i>	<i>Normative</i>
Carr	Economic	Military	Opinion
Galtung	Remunerative	Punitive	Ideological
Manners	The ability to use civilian instruments	The ability to use military instruments	The ability to shape conceptions of "normal"

Source: Manners, 2002, pp. 235–258.

In the context of the normative power concept, the distinctive nature of the EU is embedded in its transgression of legal and political hybridity as seen in post-Westphalian sovereign states which has been functioning under the umbrella of principles common to all of them as Member States (King, 1999). Among these values constituting the catalogue of the EU's common identity and feeding its normative power are democracy, the

rule of law, social justice, and respect for human rights and fundamental freedoms (TEU, art. 6, art. 11; TEC, art. 177). Based on the normative power concept, as Manners argues, the combination of historical context, hybrid polity, and legal constitution fostered the process of establishing these universal norms in the central place of relations not only within the EU, but also in its relations with other actors of world politics (Merlingen et al., 2001). Consequently, the rule of law can be used and seen as an internal regulator of the functioning of the EU and one of the main components of its external power. On the other hand, any derogation in this area weakens both the integrity of the bloc and its ability to advocate for democracy and the rule of law in international politics.

Similar considerations have been conducted by Nowak-Far (2021). He argues that the Rule of Law Framework is a tool adopted to reflect the processes of political (and legal constitutional) developments in the European Union Member States and allows one to check whether these developments are in line with the fundamental standards envisaged by the EU Treaties. In the external sphere, the rule of law is part of the promotion of the civilisational model rooted in the European Enlightenment with individual freedoms and rights inextricably tied to this model and all spheres of social life.

When trying to translate the concept of a so-called “normative power Europe” into the economic dimension, one should refer to one of the fundamental institutions of the European Union in the economic dimension, namely the common market. The aim of this part of the analysis is to answer the following question – what effects on the economic development of the EU may a potential divergence in the rule of law have, understood as a permanent questioning of the primacy of European law over national law, in the long term? Already in 2012, the OECD indicated that for the common market to be a space of progressing economic integration and for this process to continue, it is necessary to strive to create principles and regulations describing it, close to a single rule book, which would significantly reduce existing information barriers (Pelkmans, Correia de Brito, 2012).

Looking at the EU through the lens of normative power concept helps one to better understand the relation between the rule of law and economic growth in the EU. However, the rule of law is much more than just a catalogue of detailed rules that potential Member States which aspire to join the bloc have to fulfil. The principle of the rule of law is one of the most fundamental values of the EU, not only a part of its legal system. As sharing values is somehow different from being subjected to legal rules, below there is a comparison of the three main definitions of the

rule of law principle, as provided by the Council of Europe, the European Commission, and the European Parliament and Council.

Table 2. The Rule of Law Definitions

Council of Europe	European Commission	European Parliament and Council's definition
Legality, including a transparent, accountable, and democratic process for enacting law Legal certainty The prohibition of arbitrariness Access to justice before independent and impartial courts, including judicial review of administrative acts Respect for human rights Non-discrimination and equality before the law	“Under the rule of law, all public powers always act within the constraints set out by law, in accordance with the values of democracy and fundamental rights, and under the control of independent and impartial courts. The rule of law includes principles such as legality, implying a transparent, accountable, democratic, and pluralistic process for enacting laws; legal certainty; prohibiting the arbitrary exercise of executive power; effective judicial protection by independent and impartial courts; effective judicial review including respect for fundamental rights; separation of powers; and equality before the law”	The rule of law “includes the principles of legality implying a transparent, accountable, democratic, and pluralistic law-making process; legal certainty; the prohibition of arbitrariness of the executive powers; effective judicial protection, including access to justice, by independent and impartial courts, also as regards fundamental rights; separation of powers; and non-discrimination and equality before the law. The rule of law shall be understood having regard to the other Union values and principles enshrined in Article 2 TEU”

Source: European Commission, 2022, p. 61.

The rule of law principle has been at the heart of furthering the integration process. The concept of integration through law is, in many ways, similar to a normative power Europe in terms of its conclusions. The law has been the main engine of creating a functioning legal community within the EU and the basic reason for this was the role which the law played in preserving foundational European values (Voßkuhle, 2017). At the same time, it is hard to imagine any other force which will effectively streamline the integration of nearly 30 different countries in terms of history, culture, economy, and social habits. In such a diverse bloc, the law provides direction, reduces conflict, and helps to establish procedures for assigning competences between multiple institutions as well as for

political decision-making. In other words, the law enables the European idea to be fulfilled and developed.

In the same manner, the constitutive role of law for the European political community has been accentuated. As Cappelletti, Seccombe, and Weiler stated (1986, p. 4): “the law has a vital role to play in the process. It defines many of the political actors and the framework within which they operate, controlling and limiting their actions and relations... At the same time, it performs a role in ordering social life, translating the highly visible political acts into more mundane daily applications and, through this implementation, it determines the implications of political decisions.”

The fact that the rule of law is a fundamental, institutional vehicle of a political nature for the EU is also evidenced by specific examples of disputes around this principle, and there were at least a couple of them before the ongoing, long-lasting disputes between Hungary and Poland. After a provision which later became Art. 7 was entered into the Treaty of Amsterdam (1997), authorising the European Council to suspend (by qualified majority) a Member State in the event of a serious breach of fundamental EU principles including, among others, threats to the rule of law, several such cases occurred. In 2000, Austria was accused of a threat to the rule of law, due to the participation of the Austrian Freedom Party, considered to be of the far-right, in the ruling coalition. The Member States decided to limit diplomatic contact with this country, and announced that there would be no support for any candidates for EU positions put forward by Austria. It should be noted that these activities went beyond the legal framework of the EU, which strengthens the theory about the political and normative nature of the rule of law principle (Bugarić, 2014).

To summarise this part of reasoning, it should be noted that the rule of law has been built into the history of today’s European Union. Among the main challenges before which the EU as a bloc is standing is how to effectively manage the institutional, political, and socioeconomic gap between Member States for the needs of preserving the bloc’s credibility in its external manoeuvres as well as its internal cohesion. As those two are related, and because internal cohesion is the cornerstone of the EU’s clout and its perception in the outer political world and paves the way for the community’s socioeconomic prosperity, one of the most spectacular examples posing a threat to this fragile construction is the rule of law’s deterioration in Poland. In the context of economic dimension, the following section shows how the rule of law and investment are intertwined.

Institutionalism at Work: How May the Rule of Law Deficit Affect Investment Levels?

The main premise of this section is to create a link between theoretical approaches, from a legal perspective to new institutional economic efforts, to macroeconomic input and empirical cases supplying evidence that a lower level of investment activity is a more probable phenomenon to emerge under the institutional regimes where the rule of law is relatively weaker. To have this issue properly addressed, it is important to define what components may constitute the rule of law in an economic context.

Basically, the rule of law complex consists of the following categories: property rights and security of contract; private capture of the state and corruption; and the design of legal and judicial institutions (Haggard et al., 2008). There are indicators presenting the rule of law as a sum of the following elements: perceptions of the incidence of both violent and non-violent crime; the effectiveness and predictability of the judiciary; and the enforcement of contracts (Trebilcock, Daniels, 2008). There are also some broader classifications capturing the rule of law. Looking at the legal approach, Fuller's 1964 proposal consisted of the following elements: 1) generality – the general applicability of laws; 2) publicity – public accessibility of laws to ensure that citizens know what the law requires; 3) non-retroactivity – laws prospective in application; 4) clarity – law clarity and understandability; 5) non-contradictory – laws must be non-contradictory; 6) laws must not make demands that are beyond the powers of the parties affected; 7) constancy – laws must be constant and not subject to frequent changes; and 8) congruity – laws must reflect a congruence between the rules as announced and their actual administration and enforcement.

The challenge of establishing a classification of the rule of law's fundamental elements have been also taken by researchers in the field of new institutional economics. This stream of scientific interest underlined the role of the rule of law as one of the core institutions affecting economic growth. In this realm, institutions may have a positive influence on growth if they decrease transaction costs incurred by entrepreneurs. In this context, the following components of the rule of law can be presented: 1) separation and balance of powers; 2) the independent judiciary; 3) legal certainty; 4) economic freedom; 5) property rights; 6) anti-corruption regulations; 7) free media; and 8) items of general relevance, among them non-discrimination, state liability etc. (Acemoglu et al., 2005).

As regards the broader sense of the rule of law's role within the investment process and decisions undertaken by companies, it can

be inferred from various investigations conducted in the field of new institutional economics. Whereas the traditional, neoclassical growth theory accentuated the different paths of production factors (mainly capital), accumulation and exogenous technological transfer as well as savings rates (Solow, 1956), preferences (Cass, 1965; Koopmans, 1965), and newer neoclassical endogenous models included the physical and human capital (Romer, 1986; Lucas, 1988), it was not until representatives of new institutional economics appeared that the case for the role of institutions had been made.

As North (1990) claimed, the fundamental differences in comparative growth theory are placed in institutions, understood as “the rules of the game in a society or, more formally, are the humanly devised constraints that shape human interaction”. To what extent institutions may act as vehicles of long-term growth can be seen in the examples of North and South Korea, which shared the same history, the same cultural roots, as well as ethnic, linguistic, geographic, and economic homogeneity. Despite starting from the same level, by the year 2000, annual GDP PPP per capita in South Korea was \$16,100, while in North Korea it was only \$1,000, near the same amount as an average sub-Saharan African country (Acemoglu et al., 2005).

There is a cluster of economic institutions influencing long-run growth consisting mainly of the rule of law and the enforcement of property rights. However, it is nearly impossible to provide any kind of handbook pertaining to the rule of law. Indeed, it is true that if investors believe that their property rights are protected, they tend to invest more, yet it is less clear which concrete form of defending property rights should be applied to secure such results (Ramanujam et al., 2012).

Chemin (2020) argues that aspects such as the quality of, the speed of, and access to the judiciary improve productivity and economic development. Introducing reforms aimed at increasing the public service in this regard allowed for a rise of 22% in productivity in sectors requiring relationship-specific investments. As for judicial efficiency alone, the examples from emerging markets indicate that the productivity gains from a reduction in input tariffs are highest among companies in economies with the most efficient courts (Ahsan, 2013).

Voices supporting the major role of the rule of law as one of determinants of economic growth and investment were also expressed by the representatives of macroeconomics (Barro, 2000). There has been a vivid discussion on how consecutive components of the entire entity that is the rule of law affect those macroeconomic figures. We can distinguish that there are two main channels through which the rule of

law influences growth and investments, one of them being the effects of property rights on investments and, secondly, the effects of contract enforcement on trade (Haggard et al., 2008). These arguments are also shared by other researchers, who claim that the protection of property rights plays a significant role in supporting long-term growth, investment, and financial development (Acemoglu, Johnson, 2005).

Building on Barro's attempts, Haggard and Tiede (2011) constructed and aggregated an index encompassing real GDP growth data in the 1985–2004 period, consisting of a World Bank rule of law indicator, judicial independence measurements, and Transparency International's Corruption Perception Index observing that there had been a positive impact of aggregate rule of law measure on growth in the given period.

However, not all scientific efforts aimed at capturing the relation between the rule of law and investments show that the former conditions the latter. As was indicated in a study examining the relationship between the rule of law and investment in Turkey between 1984 and 2008 (Arslan, 2010), there was short-term causality from investment to the rule of law, meaning that there had been a positively significant effect of investment on the rule of law. This can be interpreted as a sign of the role which can be played by economic growth regarding the increase of law and institutional architecture quality in less developed countries. It is less applicable to the organisations such as the EU, consisted of well-developed and more similar countries.

To step back from the macro level for a moment, it is worth recalling research aimed at determining the impact of the rule of law on the decisions of companies from specific sectors. Such an undertaking was carried out by Henisz (2000), who studied the influence of the government system on the level of infrastructure investment in 100 countries between the years 1880–1998, creating an index measuring the power with which public institutions limit the power to change the rules of regulations. It turned out that the system of government is an important factor determining the development of infrastructure markets, and that includes investment decisions made by entities operating on these markets and the consumption of goods offered by them.

It is also worth evoking a comparative study in which Polish and German companies were researched. The most consequential difference might be noted in the sociological perception of the rule of law by entrepreneurs in both of those countries. It is worth underlining that while Polish companies identify the rule of law more as a formal responsibility before the state with the obedience of certain rules in the first place, German business entities are closer to picturing the rule of law as a part of a social

contract and institutional device serving the society, with economic aspects of this service such as transaction-cost-reduction included (Głowacki et al., 2018). Moreover, the authors calculated that the shift from 2020's level of the rule of law to its maximum from the 2009–2010 period in the case of Poland would bring in USD 3,216 (in 1990's constant USD) of additional income-based capital per worker. It means that the deterioration in the rule of law has not only immediate, but also substantial consequences in the form of foregone investments.

From the point of view of institutional analysis, both focused on macroeconomic modelling and more qualitative ones, the importance of the rule of law as a factor that businesses include in their investment decisions process cannot be understated.

The Rule of Law as a Building Block of the EU's Normative Power and What This Has to Do with Investments

As shown in the analysis presented in the previous sections, the rule of law has highly important implications for the political and economic dimensions of the EU. What is the applicability of the findings in Poland's case? Firstly, it needs to be underscored that the deterioration in the rule of law and democratic standards during the last couple of years has been tangible and commonly noted. Secondly, in the light of the normative power concept, it is crucial to present how the European Commission toolkit has been evolving toward incorporating the rule of law principle into economic governance. Finally, it is essential to present that the worsening institutional conditions and rule-of-law standards might be a so-called “deteriorating package” when it comes to horizons for private investment in Poland in the coming years.

Starting with the deterioration, it should be noticed that in the World Justice Project Rule of Law Index (2020), Poland scored 0.66, achieved 28th place globally (compared to 0.71 and 21st place in 2015), and has experienced a significant downturn across all indicators in recent years. The most spectacular turn of events was that the country suffered a 25% drop in the constraints on the government power indicator between 2015 and 2019, which can be translated into the largest decrease of the 126 countries in the study. Further deterioration was also observed in 2021's edition of the index, when Poland suffered a decline in the form of scoring 0.64, and achieving 36th place globally. Also, the European Commission indicates several problematic issues in the Polish justice system: “In Poland, the reforms, including new developments, continue to be a source of serious concern as referred to in 2020. In particular, the

independence of the Disciplinary Chamber of the Supreme Court cannot be guaranteed, but it continues to take decisions with a direct impact on judges and the way they exercise their function, creating a ‘chilling effect’ for judges. In addition, concerns over the independence and legitimacy of the Constitutional Tribunal have still not been resolved, as confirmed by the European Court of Human Rights finding that the composition of a bench of the Constitutional Tribunal did not meet the requirement of a tribunal established by law” (Communication from the Commission, 2021). In addition, when it comes to the economic dimension of the rule of law, another two international rankings provide data for further concern. Poland slipped from 33rd place in 2019 to 40th place globally, mostly due to a deterioration in registering property in the Doing Business ranking (2020). Also, in the Heritage Foundation’s Index of Economic Freedom (2018), after the so-called judicial reforms referring to the Constitutional Tribunal, the Supreme Court, and also to the National Council of the Judiciary as well as acts regulating the new organisation of common courts, Poland noted a massive decline of 24% in judicial effectiveness. In a recent edition of the ranking (2021), Poland’s economic freedom score was 69.7, meaning its economy is the 41st freest in world. The overall score for Poland has increased by 0.6 points. However, the country still ranked 25th among 45 European countries, while its overall score was below the regional average. Prominently, reforming and strengthening the judicial system has been indicated as a priority area to increase economic freedom in Poland.

It is also important to pay attention to societal opinion on the justice system in Poland. CBOS survey results (Dąbrowska, 2021) suggest that the public’s perception regarding the rule of law’s level has worsened. The independence of the judiciary was indicated by the largest group (56.1%) as a foundational element of the rule of law while at the same time, only 7.8% declared that this independence is the element that functions best in Poland. Moreover, other important indicators of the rule of law and trust in the state and its institutions polled similarly weakly, not to mention the “transparency of government decision-making processes” (3.5%), “accessibility of courts due to costs and time-consumption” (5%), and “compliance with the law and court judgments by the government and other authorities” at the level of 6.2%. Strikingly, while in 2014 more than half (52%) of the respondents declared their trust in the judiciary, as of 2021, it was only at 38%.

The backsliding of the rule of law as an element of democratic backsliding, or precisely, of moving away from the liberal-democratic political regime, is a central point of considerations for some researchers

(Sadurski, 2019). For the needs of this paper, it is useful to adopt such an approach as the EU’s institutional system, with its individual rights and freedoms as well as checks and balances and the rule of law, resembles the liberal-democratic vision of polity. In this thread, the rule-of-law backsliding, especially as regards judiciary reforms introduced by the ruling coalition, has been among the main reasons for the radical decline in democratic standards in Poland. In the *Liberal Democracy Index*, a ranking provided by the V-Dem Institute (2021), Poland suffered the biggest collapse between 2010 and 2020 and, throughout that decade, was the leader of the Top 10 fastest autocratising countries.

Table 3. Top 10 Autocratising Countries in the World in 2010–2020

	Change	LDI 2010	LDI 2020	Regime type 2010	Regime type 2020
Poland	-0.34	0.83	0.49	Liberal Democracy	Electoral Democracy
Hungary	-0.32	0.68	0.37	Electoral Democracy	Electoral Autocracy
Turkey	-0.29	0.40	0.11	Electoral Democracy	Electoral Autocracy
Brazil	-0.28	0.79	0.51	Electoral Democracy	Electoral Democracy
Serbia	-0.27	0.51	0.24	Electoral Democracy	Electoral Autocracy
Benin	-0.26	0.55	0.29	Electoral Democracy	Electoral Autocracy
India	-0.23	0.57	0.34	Electoral Democracy	Electoral Autocracy
Mauritius	-0.23	0.73	0.50	Liberal Democracy	Electoral Democracy
Bolivia	-0.18	0.41	0.231	Electoral Democracy	Electoral Autocracy
Thailand	-0.17	0.34	0.17	Electoral Autocracy	Closed Autocracy

Source: V-Dem Institute, 2021, p. 38.

The weak institutional ecosystem for investment activity and decline in this area has been reflected in the business perception. As can be observed in surveys which include entrepreneurs’ conclusions and postulates towards the state, as well as rankings classifying the climate for investments in Poland, the instability of the law and the lack of political neutrality of the state’s institutions are major problems from a business entity point of view (Union of Entrepreneurs and Employers, 2018). If so,

a further weakening of institutional foundations and public trust in the institutions *per se* can only contribute to a constant decline in perceived conditions for investing.

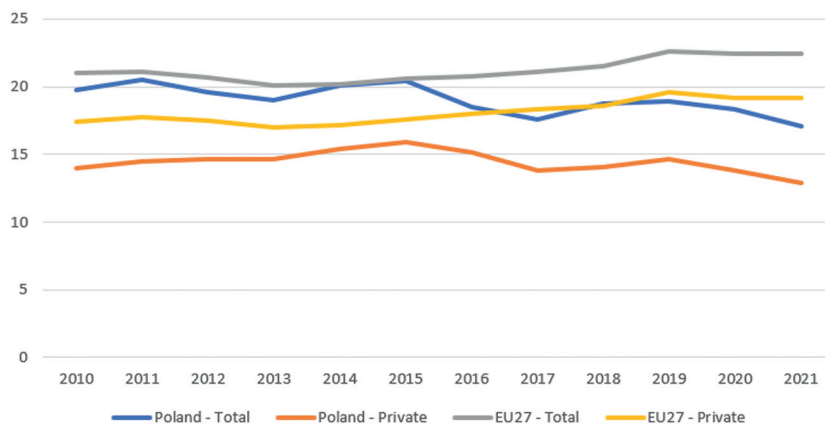
In a report issued by the TMF Group in July (2022) encompassing 77 jurisdictions which account for 92% of the world's total GDP and 95% of net global FDI flows, and which compares 292 annually tracked indicators measuring conditions for doing business, Poland is in 10th position. This means that Poland is the tenth most complex jurisdiction for setting up and running a business in the world. The level of complexity has increased month-on-month during the previous 12 months due to central government activity in terms of measures implemented during COVID-19. A similar situation has occurred in France, Italy, and Greece, if EU Member States are taken into account (TMF Group, 2022). Although COVID-19 could have contributed to the worsening, the investment climate in Poland had been perceived poorly by companies in some categories long before the pandemic struck.

In the Business Survey of the Polish-German Chamber of Commerce and Industry, in 2019, Poland ranked third in the ranking of investment attractiveness out of the CEE region countries and the Baltic states, trailing Estonia and Czechia. It meant that Poland fell from the second position held in 2016–2018 and from 1st place in the 2013–2015 period. As can be read in the conclusions of the report: “Membership in the EU and the quality of staff (qualifications of employees, their motivation and commitment) as well as good availability of local sub-suppliers has built a positive image of Poland in the last few editions of the survey (...) The lowest marks are traditionally awarded to the regulatory sphere, i.e., the level of predictability of economic policy and political and social stability, as well as the tax system and institutions and tax burdens. Economic policy predictability is estimated at 2.3 points (out of the five available), and it is in last place on the list of 21 investment factors included in the survey for the first time” (Polish-German Chamber of Industry and Commerce, 2019).

The effects of the rule of law's deterioration are seen not only in the perception of the investment climate, but also in the data. One of the most visible phenomena coinciding with the rule of law's deterioration has been the reduced amount of private investment in Poland. The investment rate in Poland is lower than the investment rate in the EU and CEE3, and has shown a downward trend in the last 5 years (Hagemejer et al., 2021). The decline in the private investment rate is the main reason for the decline in overall investment in Poland, as public investment remains relatively stable. In the chart below, 2015 seems to be the turning point in terms of

private investments. At the same time, the deterioration in terms of the rule of law in Poland began.

Chart 1. Total and Private Investment Level in EU and Poland in Years 2010–2020 as a % of GDP



Source: the author’s own study based on Eurostat data.

As the Civil Development Forum (2020) estimates, between 2015 and 2018, due to the attack on the rule of law and the package of unclear measures aimed at combating tax evasion (including high penalties), investments by Polish companies dropped by 4% and investments by foreign companies increased by 22%.

Considering now an aspect of the European institutions, i.e., the European Commission toolkit in terms of strengthening the role of the rule of law principle including with the economic governance of the EU, it is worth remembering that the EC has been under pressure to bolster the real presence of the rule of law in the EU and Member States’ everyday functioning. As a result, the European Commission in the communication “A new EU framework to strengthen the rule of law”, presented the basic assumption of the rule of law as: “legality, which means a transparent, accountable, democratic, and pluralist law-making process; legal certainty; the prohibition of arbitrariness in the actions of executive authorities; independent and impartial courts; effective judicial control, including the control of respect for fundamental rights and equality before the law” (Communication from the Commission, 2014, p. 1).

Consequently, within recent years, new tools have emerged and existing tools have been enhanced. In 2020, the European Commission launched

the Annual Rule of Law Report within the European Rule of Law Mechanism. The former plays the role of a new, preventive tool while the latter is a process for dialogue. The Annual Rule of Law Report is based on four pillars: 1) national justice systems, 2) national anti-corruption frameworks, 3) media pluralism, and 4) other institutional checks and balances (Pech, Bard, Braudel, 2022).

In the Rule of Law Report's 2022 edition, key aspects of the rule of law and its meaning for the conditions for investment activity are raised. I would like to underline three of them as follows: 1) The differences in the perception of judiciary independence. In Finland, Denmark, Austria, Luxembourg, the Netherlands, and Germany, the perceived independence among the general public is at 75%, whereas in Poland, Slovakia, and Croatia it remains at the level of 30%, 2) The main concerns on the independence of the judiciary in Poland remain intact, despite a collection of rulings of the CJEU, 3) Finally, a statement that the EC gives priority to reforms of the judiciary, anti-corruption frameworks, and public administration with financial sources coming from the Recovery and Resilience Facility as these areas are seen as essential to the investment climate (Communication from the Commission, 2022).

In the RLR 2022, it is also underlined that several elements related directly to the rule of law, among them the effectiveness of justice systems, anti-corruption policies as well as the quality of the law-making process, are a part of the Economic Semester because of the importance for macroeconomic factors including economic growth, the investment level, and the investment climate (Communication from the Commission, 2022).

Another tool which has undergone a noticeable evolution is the European Commission's annual Justice Scoreboard, introduced in 2013 as an auxiliary tool to the European Semester, which is the EU's process of economic policy coordination which has been in place since 2010. At the beginning, the Justice Scoreboard was limited to providing efficiency indicators and data about the length of judicial proceedings, clearance rates or the number of pending non-criminal cases (Pech, Bard, Braudel, 2022). However, 2021's edition of the Justice Scoreboard consisted of 64 pages (in 2013 it was 26) and included such indicators as the appointment and dismissal of national prosecutors, the independence of national Supreme Court judges, along with the autonomy of prosecution services as well as the independence of lawyers. The scope of recommendations included in the European Semester has broadened, too. Originally confined to monitor fiscal, economic, and social policies, in 2018, the first country-specific recommendations encompassing the judicial system and any

violations of its independence were adopted towards Slovakia (Pech, Bard, Braudel, 2022). A year later, in 2019's edition, Poland and Hungary received detailed criticism of the changes which had been introduced in the judicial and legal systems of both countries. The issue of judicial independence was also raised in 2020 when Poland was recommended to “enhance the investment climate, in particular by safeguarding judicial independence” (Council Recommendation, 2020).

The big reason behind the unprecedented zealotry of the European institutions with the particular role of the European Commission is that in the EU system, the law is the main vehicle of deepening the process of integration. As a consequence, the independent judicial system which functions in line with rules of EU law is a *sine qua non* condition for minimising the number of legal black holes and for making legal and institutional integration possible (Centre for European Reform, 2020).

Conclusions

What follows is a drawing upon of the previous arguments and an attempt to present the main risk which could become reality should Poland's situation in terms of the rule of law and EU policy do not improve. What may the continuation of the current trend mean for the EU's future if the legal systems of the Member States diverge and the role of the rule of law as a basic principle for all of them is weakened? Here, the author would look toward the regulation adopted along the Recovery and Resilience Facility, the financial vehicle aimed at combating the post-COVID-19 economic crisis in Europe. For the first time, the disbursement of EU funds was tied directly to rule-of-law standards, as the Regulation 2021/241 was designed specifically to block the inappropriate using of funds from the Recovery and Resilience Facility, disbursed after adopting the National Recovery Plan by the European Council (Regulation 2021/241, 2021). Although Regulation 2021/241 did not specify that the Commission should consider the recipient's rule of law record, the Commission may nonetheless interpret its mandate in the light of the Union's fundamental values set forth in Article 2 TEU (European Court of Justice, 2022). Moreover, the Commission may, under Regulation 2020/2092, withhold funds (including those from the EU's regular budget) from Member States that do not observe the rule of law (Regulation 2021/241, 2020).

As the Polish Economic Institute calculated, the approval of the National Recovery Plan (KPO) would mean an increase in public investments in 2023, as 66% of funds would be allocated directly

to investments. The emergence of these funds would also increase Polish GDP in 2023 by about 1 p.p. (Polish Economic Institute, 2022). Considering that funds from the Recovery and Resilience Fund are to be allocated, among other things, to the accelerating of the energy transition and investments in modern transport, and that the one of the aims of the funds is to mobilise additional private investment, losing access to them would mean another step back in terms of investment levels in the Polish economy.

In the light of the theoretical framework and the data presented in this paper, the conclusion is that the rule-of-law crisis and private-investment crisis in Poland are closely linked. Bolstering the political component of integration means that any rule of law/democratic backsliding in one country impacts upon other Member States as well as the EU. Moreover, as the rule of law has become not only of central value and an engine of further integration, but also one of the conditions of shared economic prosperity within the EU, the only possible way to overcome the long-term deficit of any rule-of-law/private-investment decline would be to strengthen them simultaneously, which would mean improving conditions for businesses while abiding by the EU's rules at the same time. Such a strategy could be translated into better outlooks for private companies as well as the EU's normative power status. Staying within the interpretational matrix offered by institutionalism, Polish deterioration in the area of the rule of law poses risks both for the EU's normative power as well as for the country's economic power, delineated to a large extent by the private-investment dynamic. Poland might suffer political and economic ravagings, including a decrease in the country's political weight inside the bloc, as well as a permanently worse climate for private investment, both foreign and internal. Deriving from the comparative political economics and economic sociology, this situation has more to do with the peripheral status of the Polish state in terms of institutional development in relation to the better-developed apparatus of richer, Western EU Member States (Rapacki, 2019).

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