

BATTLE FOR THE RULE OF LAW

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I wanted you to see what real courage is, instead of getting the idea that courage is a man with a gun in his hand. It's when you know you're licked before you begin anyway and you see it through no matter what. You rarely win, but sometimes you do.¹

Thank you for the invitation and the opportunity to speak with the University of North Dakota community. I especially thank Professor Sheryl Ramstad and Dean Professor Brian Pappas. Who believed that I never would have been a judge if it had not been for my experiences in North Dakota, to paraphrase the words of Theodore Roosevelt.

Delivering a lecture at the University of North Dakota—for a judge from faraway Poland—is a great honor. However, I do not treat this as a personal distinction. I believe it is a recognition of all those who have defended the rule of law in my country in recent years—standing up for democracy. Not just judges or lawyers, but above all, ordinary citizens. Were we doing something extraordinary? I do not know. Perhaps we simply remembered the words of the German writer Thomas Mann: “[T]olerance becomes crime if extended to evil.”²

I believe that today’s meeting shows that what we are doing in Poland is not only noticed but also appreciated in the U.S.A. Poland is a part of Europe; it is part of the free world. Therefore, no one can have any doubts—by defending basic values in Poland, we are also defending them in the democratic world. We all share the same values, and our community is based on them. One of those values is the rule of law.

What is the rule of law? The rule of law means that the state and its organs operate based on the applicable law and in accordance with its norms (within its boundaries). It should be emphasized that the applicable law must be consistent with widely accepted values, should be equal for everyone, and should respect the fundamental freedoms and rights of humans and citizens.³

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1. HARPER LEE, *TO KILL A MOCKINGBIRD* 128 (HarperCollins 40th Anniversary ed., 1999) (1960).

2. THOMAS MANN, *THE MAGIC MOUNTAIN* 515 (H.T. Lowe-Porter trans., 1924).

3. *The Rule of Law*, STAN. ENCYCLOPEDIA PHIL. (June 22, 2016), <https://plato.stanford.edu/entries/rule-of-law/> [<https://perma.cc/95BA-YCYX>].

The degree to which a state abides by the law, i.e., the state of the rule of law in the country, depends on many factors. The most important of these are the quality of the law, the level of civil service personnel, and the state of political democracy in the country. In the legal system of a state governed by the rule of law, there are institutions that enable the monitoring of compliance with the law by the state apparatus and the correction of its decisions in case of law violations. These are the so-called institutional (formal) guarantees of the rule of law, such as independent courts and judges, or state control bodies independent of the current government. It should be remembered that an essential role in controlling a state governed by the rule of law is also played by independent media, civil society, and independent culture.

This may sound complicated, but the rule of law is not something abstract. It is not some concocted problem invented by eggheads. The fight for the rule of law really concerns each of us because it is a fight for freedom. Why do I say it's about freedom? Because independent courts and the right to a fair trial are what make up every person's freedom. The example of Poland shows that without free courts, there are no free media, no free culture, no free elections—just no free people.

In Poland, until recently—from 2015 to 2023—the ruling politicians persecuted independent judges for rulings that were inconvenient for them and harassed independent prosecutors. They suppressed any voice of criticism and any attempts to review their actions. Even though we were the ones defending freedom and fighting for a just cause, for eight years we faced defeat after defeat. This was due to the ruling party's disregard for the constitutional order and the politicization of the entire state apparatus. The ruling party at that time demolished democracy and shaped the country according to its own ideology. Having a majority in parliament and a president from its political camp, it was able to push through any, even the most absurd ideas. The state-controlled public media deceived the public, claiming that the “reforms” were serving the citizens. Listening to the reports from Poland, it might have seemed that we—the defenders of the rule of law—were powerless. But that is not true. To quote Ernest Hemingway: “We could be destroyed, but not defeated.”⁴ History teaches us that defeat does not necessarily mean moral failure. It all depends on us. I deeply believe this, and I am certain and will repeat the theme posed by Václav Havel: Moral victory can turn into real success, but moral failure—never.⁵ Politicians, by destroying the justice system, wanted to take away the rule of law from the people, *de facto* taking away

4. ERNEST HEMINGWAY, *THE OLD MAN AND THE SEA* 114 (1952).

5. See generally Václav Havel, *The Power of the Powerless*, INT'L J. POL., Fall-Winter 1985-86, at 23 (Paul Wilson trans., 1979).

their freedom. It's worth remembering that one cannot be partially free. Either we are free, or we are slaves.

Let me tell you about the war for the rule of law in Poland. A war that broke out twenty-six years after the fall of the criminal system that was communism and lasted for eight long years. A war where both fighting sides spoke the same language and were citizens of the same country. The example of Poland—a large Central European country, the cradle of the “Solidarity” movement, and the homeland of Lech Wałęsa—proves that nothing is given to us once and for all. It turns out that both the rule of law and liberal democracy itself are very fragile. We must not only remember them, but we should take care of them every day and, if necessary, fight for them. However, please—following the French writer Alfred Jarry, author of the play “*Ubu Roi*”—do not think “in Poland, meaning nowhere.”⁶ Quite the opposite. “In Poland” today means everywhere. What happened in my country could happen in any of your countries. Let this conclusion be a memento for you.

I say this with full conviction. Why? Initially, it was believed that the constitutional crisis in Poland, simply a crisis of liberal democracy, was a disease of post-communist countries. It was assumed that the residents of the former Eastern Bloc had some *homo sovieticus* gene. What is *homo sovieticus*? His mentality can be characterized as follows:

- A person subordinated to the collective (party organization);
- His attitude is characterized by a flight from freedom and responsibility;
- Marked by opportunism, careerism;
- He chooses aggression towards the weaker and servility towards the stronger;
- He cannot think or act independently;
- He is intellectually enslaved;
- He is devoid of personality and dignity;
- He is completely subordinated to authority.⁷

Explaining the crisis of liberal democracy in this way was a mistaken diagnosis. The plague, which initially tormented only post-communist countries: Hungary, Poland, Slovakia, and Bulgaria, has spread to the countries of “old Europe.” Today, the fever is engulfing Italy, Spain, Germany, and even the Netherlands. The disease is also reaching other continents.

6. At the beginning of Alfred Jarry's introduction to the 1896 premiere of *Ubu Roi*, he said, “Quant à l'action, qui va commencer, elle se passe en Pologne, c'est-à-dire Nulle Part.” (The action which is about to begin takes place in Poland, in other words, Nowhere.) EUGENIO BARBA, THE HOUSE OF THE ORIGINS AND THE RETURN 1 (May 28, 2003), <https://odinteatret.org/wp-content/uploads/2023/03/2003-warsawa-univ-en-discurso-the-house-of-the-origins-and-the-return.pdf> [<https://perma.cc/2SLG-9UT2>].

7. ALEKSANDR ZINOVIEV, HOMO SOVIETICUS 196-200 (Charles Jansen trans., 1985).

In 2015, the Law and Justice Party (PiS) came to power in Poland. Its ideological and programmatic idol was Hungarian Prime Minister Viktor Orbán, who has been implementing hard and undemocratic rule in his country since 2010. The words of Jarosław Kaczyński—the leader of PiS—who announced at one of the rallies: “The day will come when Budapest will be in Warsaw,” initially caused only laughter among my compatriots.⁸ It seemed that introducing the changes that occurred in Hungary was absolutely impossible in Poland. After all, Orbán had a constitutional majority and could freely change the law, while PiS did not have such an advantage in the Polish parliament. Kaczyński quickly surpassed his master. Without formally changing the Constitution, he achieved much more than Orbán. How was this possible? It’s very simple: he began interpreting it in his own way, against any rules and previously accepted principles, downplaying and ignoring inconvenient facts. Authoritarianism took hold in Poland. Authoritarianism with a modern face—without tanks in the streets and labor camps. Of course, Kaczyński did not act alone. He did it with the hands of compliant, corrupt judges and prosecutors, and even law professors. It was the American historian, Yale University Professor Timothy Snyder, who rightly observed that “[i]t is hard to subvert a rule-of-law state without [obedient] lawyers”⁹ Woody Allen wrote about such people like this: “He can be very loyal . . . when Mrs. Monroe slipped on the ice, he slipped on some ice out of sympathy.”¹⁰

The courts and judges were targeted by the ruling party. Why? Courts are the safety valves that protect democracy and defend civil liberties. They are the foundation of democracy. Joe Biden remarked that “democracy survive[s] . . . because of the men and women who represent the independent judiciary in this nation.”¹¹

Furthermore, authoritarian governments do not like being controlled; they do not like being watched. That is why they do not accept any autonomy. Autocrats always first attack the judiciary, whose function is to control the executive and legislative branches; only then do they destroy the autonomy of institutions that are tasked with controlling the executive branch; they attack independent media and civil society. When there are no free courts, no one will stand up in their defense.

8. *Przyjdzie dzień, że w Warszawie będzie Budapeszt* [*The Day Will Come When Budapest Will Be in Warsaw*], TVN24 (Oct. 9, 2011, 8:57 PM), <https://tvn24.pl/polska/przyjdzie-dzien-ze-w-warszawie-bedzie-budapeszt-ra186922-ls3535336> [<https://perma.cc/75W7-BKJ9>].

9. TIMOTHY SNYDER, *ON TYRANNY: TWENTY LESSONS FROM THE TWENTIETH CENTURY* 38 (2017).

10. WOODY ALLEN, *Side Effects*, in *COMPLETE PROSE OF WOODY ALLEN* 320 (1975).

11. Gerhard Peters & John T. Woolley, *Remarks by President-elect Joe Biden Announcing Department of Justice Leadership in Wilmington, Delaware*, AM. PRESIDENCY PROJECT (Jan. 7, 2021), <https://www.presidency.ucsb.edu/node/347484> [<https://perma.cc/P7DN-RBS3>].

The subjugation of the judiciary in Poland took place in several stages. It is worth noting that in countries drifting towards authoritarianism, this happens similarly:

- The grim prelude is an attack on the judiciary. Prominent politicians of the ruling party, the institutions they control, and the subjugated media always try to discredit and ridicule judges. Billboards appeared in the streets of Polish cities, paid for with public funds, displaying absurd slogans. Judges were accused of being rapists, of stealing sausages in shops, of being corrupt. The billboard campaign, aimed at humiliating judges and weakening the judiciary, cost 2.5 million dollars. Additionally, there was a group of hate-mongers operating within the Ministry of Justice, the Minister of Justice himself among them, spreading lies about judges and their families on social media.¹²
- The next stage was taking over the Constitutional Tribunal, the court responsible for reviewing the compliance of laws enacted in Poland with the Polish Constitution and international agreements.
- Then, individuals trusted by the ruling party were appointed as presidents of all courts in Poland.
- Simultaneously, the National Council of the Judiciary (KRS) was dismantled—a constitutional body tasked with safeguarding the independence of courts and judges. The Council’s term was unlawfully shortened, and its new members were appointed by the ruling party, in violation of the Constitution. The KRS plays a crucial role in the judicial nomination process, as it is on their recommendation that the President appoints someone as a judge. Currently, about a quarter of judges in Poland have been appointed through a flawed process (the so-called “neo-judges”). Their status is contested by both Polish and European courts, and their rulings are being overturned. Additionally, the KRS has been used as a tool to undermine judicial independence. As a result of its politicization, the KRS was expelled from the European Network of Councils for the Judiciary, which—ironically—was established by KRS back in 2004.
- Later, the Supreme Court, which oversees the decisions of ordinary courts, was attacked. Its structure was expanded, thereby

12. Anne Applebaum, *The Disturbing Campaign Against Poland’s Judges*, ATLANTIC (Jan. 28, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/disturbing-campaign-against-polish-judges/605623/> [https://perma.cc/YD57-TEAC].

increasing its composition. The court was dominated by neo-judges—individuals associated with the ruling party.

- The disciplinary responsibility system for judges was subordinated to a single person: an active politician of the ruling party who simultaneously held the positions of political leader, Minister of Justice, and Prosecutor General. The Minister staffed the disciplinary courts and the positions of Disciplinary Commissioners with trusted and subservient individuals. The Minister initiated disciplinary proceedings and could appeal the decisions made in them. A special chamber was created within the Supreme Court to act as an appellate body, filled with people connected to the Minister. This disciplinary responsibility system was not intended to address actual disciplinary offenses but was used to persecute judges who issued rulings contrary to the expectations of the ruling party or criticized the changes being implemented. The Minister of Justice, who was also the Prosecutor General, used the prosecution service to harass and intimidate defiant judges. Absurd criminal charges were brought against me and several other judges, and false evidence was fabricated. The aim was to create a “chilling effect” within the judiciary. At its peak, hundreds of lawyers were being pursued by disciplinary officers and prosecutors, and ten judges were unlawfully suspended and removed from the court.

From this eight-year ordeal, the Polish judiciary emerged victorious. It was not destroyed. Until the end of his rule, the leader of the Polish populists complained that the courts are the “last bastion” standing in the way of his vision for Poland.¹³ What contributed to this success?

- Drawing from the experience of others, including Turkish judges who fled from Erdogan and shared their experiences.
- Citizens and lawyers stood together in defense of the rule of law. Demonstrations in defense of independent courts drew tens of thousands of people. Judges were supported by lawyers, prosecutors, and academics.
- Independent media and NGOs played a significant role.
- Educating the public: campaigns organized by judicial associations, the “Tour de Constitution.”
- Support from the entire civilized world (Amnesty International, the academic community, and lawyers).

13. *Prezes PiS: Sądy Są Najważniejszym Bastionem Starego Systemu [PiS Leader: Courts Are the Most Important Bastion of the Old System]*, TOK FM (July 10, 2020, 6:50 AM), <https://www.tokfm.pl/Tokfm/7,103087,26115984,prezes-pis-sady-sa-najwazniejszym-bastionem-starego-systemu.html> [<https://perma.cc/2ACM-XWVA>].

- In the final period, the involvement of European institutions and European courts (Court of Justice of the European Union and European Court of Human Rights).

Can we speak of any positives in the fight for the rule of law?

- Legal and civic education of society has developed. The legal awareness of citizens has increased.
- A model of the “citizen judge” emerged, meaning a judge who does not limit their activity solely to the courtroom and the courthouse. They go out to the citizens and talk to them. They do not lecture *ex cathedra* but rather listen: how do citizens perceive the judiciary; what would they change in it; how do they see the role of a judge in society?
- Judges not only contested the rule of PiS but also prepared for the transition of power to pro-democratic parties. Significant legal and judicial reform projects were developed, aiming to create courts suited for the 21st century.
- There was a verification of the judicial community—some judges clearly did not fulfill their role and openly violated principles and values during the populist rule.
- Today, Polish lawyers can share their experiences with others. After all, it’s better to learn from the mistakes of others.
- The constitutional crisis in Poland has allowed similar threats to be recognized in other countries: European ones, but also, for example, in Israel.

What is the state of the rule of law in Poland today? It can be said that until October 15, 2023, the day of the parliamentary elections and the victory of the democratic opposition, we were defending the rule of law, and now we are rebuilding it. The reconstruction of the rule of law requires similar determination and effort as its defense. We have various models of transitional justice, meaning justice during transitional periods. How should we approach it? Professor Jerzy Zajadło rightly points out that, contrary to appearances, this does not require a particularly creative intellectual effort.¹⁴ The problem is neither new nor unknown, but that doesn’t mean it isn’t complicated. On the contrary, contemporary legal philosophy has long provided answers to the question of what options we have when it comes to cleaning up the consequences of the excesses of an autocratic regime. Back in the 1970s, American professor Lon L. Fuller described them.¹⁵ The professor discussed how

14. Jerzy Zajadło, *Co po kryzysie konstytucyjnym? Siegnijcie do Fullera [What After the Constitutional Crisis? Reach for Fuller]*, KONSTYTUCYJNY.PL (Dec. 16, 2018), <https://konstytucyjny.pl/co-po-kryzysie-konstytucyjnym-siegnijcie-do-fullera/> [<https://perma.cc/7VR9-J4AZ>].

15. LON L. FULLER, *The Problem of the Grudge Informer*, in *THE MORALITY OF LAW* 245-53 (rev. ed. 1969).

after the fall of a certain regime, known as the Purple Shirts regime, the new Minister of Justice calls his five deputies and asks them what should be done in this situation. Five different answers are given.

1. First, there is nothing we can do. The Purple Shirts regime was legal, and despite our negative assessment of it, the order that prevailed during that time was still the law.
2. Second, the Purple Shirts regime was a lawless state, but let us draw a thick line under that dark nightmare, move forward without digging into the past, and especially without resorting to their methods.
3. Third, let us separate the wheat from the chaff. Some actions of the Purple Shirts regime were normal and lawful, but some were evident lawlessness. Let us hold them accountable only for those acts of lawlessness but do so consistently and while maintaining our standards.
4. Fourth, in the name of restoring elementary justice, let us enact new laws that will provide the basis for holding the Purple Shirts accountable for their crimes, even if these laws are retroactive.
5. Fifth, let us do nothing. Let us not involve the authority of our state in this and leave it to the people who will deal with it themselves and dispense the justice that the Purple Shirts deserve.

Can Lon Fuller's guidelines be transplanted onto Polish soil? What do we know after half a year of democratic rule in Poland? Undoubtedly, the restoration of the rule of law consists of several stages. Professor Wojciech Sadurski lists:

- Electoral victory
- The stage that leads us from the first to the third. It serves to create legal conditions for the normal functioning of democracy.
- The proper functioning of a democratic state¹⁶

Certainly, solutions are needed in the areas of:

- Eliminating the effects of the constitutional crisis; but also
- Determining the causes of its emergence;
- Finding ways to prevent such crises in the future;
- Considering the responsibility of those who caused it.

In Poland, among democrats, there are two positions:

16. Wojciech Sadurski, *PiS Używa Konstytucji Jako Pulapki na Demokratów [PiS Uses the Constitution as a Trap for Democrats]*, WYBORCZA.PL (Jan. 1, 2024, 12:41 PM), <https://wyborcza.pl/7,75968,30553768,pis-uzywa-konstytucji-jako-pulapki-na-demokratow.html> [<https://perma.cc/8V5H-U4EC>].

- On the one hand, a rigorous, meticulous adherence to all legal provisions, even those of PiS origin, as long as they still formally apply.
- On the other hand, there are those who argue that in a situation of complete destruction of the rule of law, such a policy may only entrench the pathological system or, at best, lead to apathy in reforming the state.

The first position—as Professor Wojciech Sadurski writes—only makes sense under the assumption that the constitutional order has indeed survived.¹⁷ However, after eight years of destruction of the rule of law in Poland, can we still say that the constitutional order exists?

- Is the Constitutional Tribunal functioning?
- Is the President a guardian of the Constitution?
- Has the National Council of the Judiciary (KRS) safeguarded the independence of the courts and the judges’ impartiality?

Andras Sajó, former Vice-President of the European Court of Human Rights and a lecturer at American universities, wrote an essay titled *Militant Rule of Law*.¹⁸ The professor asserts that the rule of law cannot, in the transitional period following authoritarian rule, rely on meticulous adherence to legal provisions, especially those introduced by the regime, because in such a case “the rule of law” could degenerate into “rule by law,” imposed by the authoritarians. If we had thought this way, we would still be living under communism, and the Nuremberg trials would not have taken place. “Rule by law” can be a technique of exercising undemocratic power by autocrats. Such an ideal is often self-destructive. In this case, respect for the rule of law blocks the measures adopted to restore the rule of law. I agree with Professor Sajó.

You might wonder, in the shadow of the war in Ukraine, the U.S. presidential elections, and various global unrests, whether it is appropriate to talk about human dignity, freedom, equality, democracy, respect for human rights, courts, the rule of law, especially the rule of law in Poland today. I will answer with a question: if Russia had real courts and the rule of law, would an autocrat be ruling it, and would Russia have attacked Ukraine?

Winston Smith, the protagonist of George Orwell’s *1984*, said: “Freedom is the freedom to say that two plus two make four. If that is granted, all

17. *Id.*; Wojciech Sadurski, *Polska po PiS: Szyfowa Demokracja [Poland After PiS: Sisyphean Democracy]*, WYBORCZA.PL (Mar. 3, 2024, 6:00 AM), <https://wyborcza.pl/7,75968,30849509,polska-po-pis-szyfowa-demokracja.html> [<https://perma.cc/6JP9-Q8H6>].

18. András Sajó, *Militant Rule of Law and Not-So-Bad Law* 36 (CEU Democracy Inst., Working Paper No. 2024-21), <https://democracyinstitute.ceu.edu/articles/andras-sajo-militant-rule-law-and-not-so-bad-law> [<https://perma.cc/2G72-PRF7>].

else follows.”¹⁹ Today, we might say, paraphrasing his words: the rule of law means peace and freedom. All else follows from it.

The rule of law and an independent judiciary are the foundations upon which our civilization rests. Attacking the judiciary by executive power is always an anti-state action that destroys the community. It disrupts Montesquieu’s separation of powers. Every state stands on three legs: the legislative, executive, and judiciary. If one of these legs is destroyed, the state falls.

In conclusion, I would like to emphasize once more: the honor of being able to deliver a lecture at the University of North Dakota strengthens my conviction that we must always, to the end, without looking back, fight for the things that matter to us. In this fight, we cannot be afraid, we cannot retreat, we cannot calculate. We must not practice ostrich politics. I don’t need to explain this to Americans. It is enough for us to always remember that freedom begins where fear ends. And never forget that even behind the darkest clouds, there is the sun, and after the longest night, the day always dawns. And finally, the Polish example shows that truth and love must always triumph over lies and hatred.

19. GEORGE ORWELL, NINETEEN EIGHTY-FOUR 103 (1949).