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Rule of law in Poland 2020:

A DIAGNOSIS OF THE DETERIORATION OF THE RULE OF LAW FROM A COMPARATIVE PERSPECTIVE

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LIST OF ABBREVIATIONS:

CJEU – Court of Justice of the European Union
CT – Constitutional Tribunal
ENCJ – European Network of Councils for the Judiciary
JF – Judicial Framework
NCJ – National Council of the Judiciary
SAC – Supreme Administrative Court
SC – Supreme Court

SC CHAMBERS:

the Civil Chamber
the Criminal Chamber
LLSSC – the Labour Law and Social Security Chamber
ECPAC – the Extraordinary Control and Public Affairs Chamber
DC – the Disciplinary Chamber

SAC CHAMBERS:

the Financial Chamber
the Commercial Chamber
the General Administrative Chamber

EXECUTIVE SUMMARY

— The presidential elections in Poland in 2020, which were won by the incumbent Andrzej Duda, the candidate of the ruling Law and Justice (Prawo i Sprawiedliwość, PiS) party, indicate that we may expect the further deterioration of the rule of law in Poland. During his first term President Duda supported a majority of the harmful policies labelled as 'reforms to the justice system'.

— While the conditionality of EU funds based on the rule of law was one of the issues negotiated during the EU summit in July 2020, the final decision to link funding with the rule of law has been watered down, and it is still too early to assess strength of this new instrument.

— Law and Justice has used its policies concerning the justice system to capture various judicial institutions in Poland. Although they do not possess a constitutional majority, they have succeeded in changing constitutional reality in Poland.

— The weaknesses of the justice system which existed before the 2015 parliamentary elections, including inefficiency and insufficient transparency, facilitated PiS's attack on various judicial institutions, and were used by the ruling party as justifications for their 'reforms'. Nevertheless, PiS's policies did not represent a true response to the real problems existing in the courts and the prosecution service, and in fact have worsened the situation.

— The ruling majority's first target was the Constitutional Tribunal. Its role has been marginalised since it was captured by the ruling party in an unconstitutional way, and it has gradually been converted into a rubber-stamping body.

— The National Council of the Judiciary, only 32% of whose members had been elected by politicians in the past, has come to be dominated by the ruling majority's nominees; since the changes introduced by PiS, 92% of the members of the NCJ are now political appointees.

— The above changes have facilitated the capture of the Supreme Court through the establishment of two new chambers, the appointment of a new First President, and the packing of courts thanks to nominations by the new NCJ.

— The legal amendments in the common courts have led to many changes in personnel and the politicisation of the disciplinary system. Disciplinary measures have been used against judges who have demanded respect for the rule of law, worn T-shirts with the slogan 'Constitution [Konstytucja]', or requested a preliminary ruling from the Court of Justice of the European Union.

— Moreover, the ruling majority has taken full control over the prosecution service, changing the entire system. Instead of reforming it, however, they have transferred almost all power over the prosecution into the hands of one person – Zbigniew Ziobro, the Minister of Justice and the Prosecutor General.

— These unprecedented attacks on the rule of law have been reflected in the leading international indices concerning not only the rule of law but also the quality of democracy and individual freedoms. In this respect, regardless of the methodology employed, a continuing decline in Poland's position has been observed in measures developed by the World Justice Project, the Worldwide Governance Indicators, the Freedom House and many other organisations. Moreover, these violations of the rule of law are mostly linked to the decline in the independence of the judiciary and the weakening of the separation of powers.

1. INTRODUCTION

The topic of the rule of law in the European Union frequently arises in public debate, usually as a result of developments in two member states: Hungary and Poland. It is therefore no surprise that the governments of these two countries have for years been fierce opponents of linking the EU budget with the rule of law. The conditionality of EU funds was one of the issues negotiated during the five-day EU summit which ended on 21 July 2020. On the one hand Charles Michel, president of the European Council, declared that "for the first time in the EU's history, respect for the rule of law will be a decisive criterion for budget spending". On the other hand Poland's prime minister, Mateusz Morawiecki, announced that "there is no direct link in the agreement between the rule of law and budgetary resources"[1]. While some connection with European values, including the rule of law, is part of the summit's agreement, it seems that the principle of conditionality has been watered down[2]. Nevertheless, it is still too early to assess the strength of this new instrument, and we should wait for decisions taken by other EU institutions on the matter.

The result of the 2020 presidential elections in Poland, which were won by Andrzej Duda, the candidate of the ruling Law and Justice (PiS) party, is also important for the future of the rule of law[3]. During his first term President Duda supported the majority of the policies labelled as 'reforms to the justice system'. Therefore, his re-election means that we should expect more of such 'reforms' in the future. Another wave of changes in the structure of the common courts, which could lead to the *de facto* verification of all judges by politicians, has already been announced by some members of the ruling majority. This means that we will observe a further deterioration of the rule of law in Poland. The anticipated 'reforms' will generate clashes domestically and at the EU level. Therefore, to see where Poland is today and what might be expected in the future, it is important to analyse the current state of the rule of law from domestic and comparative perspectives, which is the main aim of this report.

To better understand the legal context in which these 'reforms of the justice system' have been taking place, we will briefly discuss the key institutions of the Polish legal system in Section 2. For those who are familiar with the legal structure in Poland, we recommend moving to Section 3, in which we explain the reasons behind the key Law and Justice policies regarding the justice system. In Section 4 we analyse the main changes in the courts and prosecution service since 2015. Finally in Section 5, we describe the deterioration in the rule of law in Poland from a comparative perspective.

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1 M. Wilczek, 'Poland celebrates EU budget success but confusion remains over rule-of-law conditionality', Notes from Poland 21 July 2020; https://notesfrompoland.com/2020/07/21/poland-celebrates-eu-budget-success-but-confusion-remains-over-rule-of-law-conditionality/

2 'Funds not tied to rule of law. Poland and Hungary hail EU summit as victory', TVN24 21 July 2020, https://tvn24.pl/tvn24-news-in-english/eu-deal-set-to-embolden-hungary-and-poland-as-no-rule-of-law-condition-is-attached-4644028

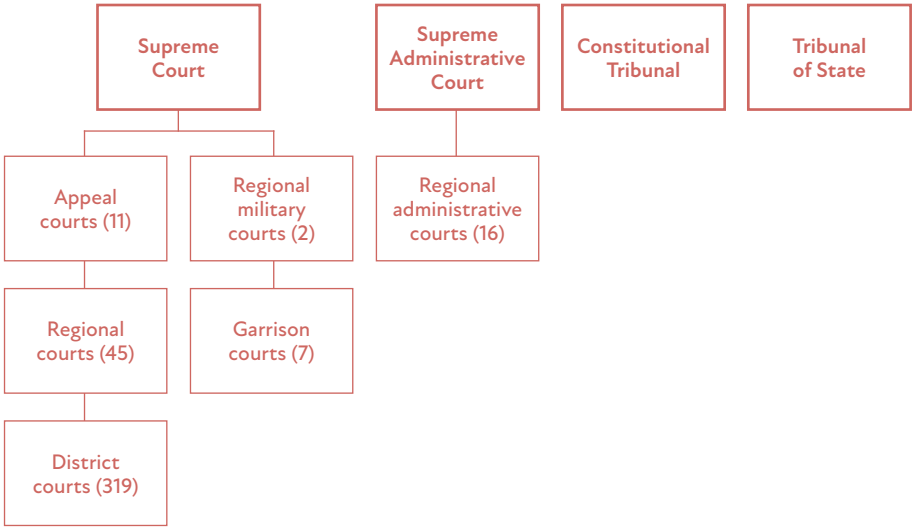
3 M. Tatała, 'Andrzej Duda wins re-election, subjecting the Polish to a second term of illiberality', https://www.1828.org.uk/2020/07/17/andrzej-duda-wins-re-election-subjecting-the-polish-to-a-second-term-of-illiberality/

2. THE LEGAL CONTEXT

The 1997 Constitution of the Republic of Poland[4] adopted most of the basic legal arrangements that can be found in its counterparts across Central and Western Europe. Influenced by the German Basic Law *[Grundgesetz]* and the European Court of Human Rights (ECHR), the Constitution stipulates the principle of the rule of law (Article 2) and gives concrete expression to this in the subsequent provisions under which the state authorities function on the basis of, and within the limits of, the law (Article 7); and that the system of government is based on the separation of and balance between the powers (Article 10(1)). With regard to the judicial branch, the separation from the legislature and executive is further reinforced by explicitly referring to the principle of the independence of the judiciary (Article 173)[5] and the right to court (Article 45(1)).

According to the Constitution the judiciary is divided into courts and tribunals (Article 10(2)). The former consists of the Supreme Court (SC), common courts, administrative courts (including the Supreme Administrative Court (SAC)) and military courts (Article 175), while the latter includes the Constitutional Tribunal (CT) and the Tribunal of State. Unless provided for in the statutes, the default jurisdiction is vested in the common courts (Article 177). The issues related to the organisational structure, jurisdiction and procedure before courts and tribunals are specified by statutes. In this respect, the laws concerning the organisation of courts set out the current structure of Poland's judiciary, with their jurisdiction based mostly on the regional location.

FIG. 1: STRUCTURE OF POLAND'S JUDICIAL SYSTEM



4 For an English translation, see: https://www.sejm.gov.pl/prawo/konst/angielski/kon1.htm

5 This means 'complete isolation' in matters concerning adjudication as it may have a noticeable effect on the individual's right to fair trial (see the judgement of the Constitutional Tribunal of 25 May 2016, Kp 5/15, para 158 and the case-law cited).

THE APPOINTMENT AND PROMOTION OF JUDGES

In general, judges are appointed and promoted for an indefinite period by the President of the Republic on a motion from the National Council of the Judiciary (NCJ) (Article 179), whereas due to their special role, the judges of the CT and the Tribunal of State are elected by the lower chamber of the parliament (Sejm) for a term of office of either 9 years or the term of office of the Sejm respectively.

The NCJ is constitutionally tasked with safeguarding the independence of courts and judges (Article 186(1)). According to Article 187(1) of the Constitution, the NCJ consists of 25 members:

1. 4 members elected by the Sejm from amongst its Deputies,
2. 2 members elected by the Senate (the upper chamber of the parliament) from amongst its Senators,
3. 15 judges of the Supreme Court, common courts, administrative courts and military courts,
4. the First President of the Supreme Court,
5. the President of the Supreme Administrative Court,
6. the Minister of Justice,
7. an individual appointed by the President of the Republic.

Until 2017 it was indisputable that each branch of power was allowed to pick the members from within their own group alone, so that the parliament would choose six of them, the head of state one, and the judiciary fifteen. Since then, due to the amendments to the Law on the NCJ, it is the Sejm which now has the power to elect both parliamentarians and judges; hence the judiciary has lost its influence on the recruitment and promotion of judges. This is rightly regarded as an unconstitutional violation of the independence of judiciary; this issue is further elaborated in Section 4b.

THE SUPREME COURT

The Supreme Court, which is the highest court for its common and military counterparts, is divided into five chambers:

1. the Civil Chamber,
2. the Criminal Chamber,
3. the Labour Law and Social Security Chamber (LLSSC),
4. the Extraordinary Control and Public Affairs Chamber (ECPAC), and
5. the Disciplinary Chamber (DC).

The last two were established under the Law on the SC of 2017 (passed simultaneously with the above-mentioned amendments to the Law on the

NCJ) which also altered the jurisdiction between chambers (see Section 4c for more details).

Each chamber is chaired by its President (who at the same time is the Vice-President of the SC), while the whole SC is presided over by the First President of the SC; this person is appointed by the President of the Republic for a constitutional 6-year term of office from among candidates presented by the General Assembly of SC judges.

Poland's highest court is constitutionally responsible for exercising supervision over the common and military courts regarding judgements. The main tasks of the Supreme Court are:

1. examining appeals on a point of law against the judgements of common and military courts, and adopting resolutions settling legal issues to ensure consistency in case law (all chambers);

2. examining extraordinary appeals in order to ensure the observance of the rule of law (ECPAC).

Apart from that, the SC:

3. deals with electoral complaints and adjudicates upon the validity of elections to the parliament, the European Parliament and the Presidency of the Republic, as well as national referendums, and also complaints concerning these elections and referendums (ECPAC, previously LLSSC);

4. examines disciplinary cases against judges, prosecutors and other legal professions to the extent specified in the statutes (DC, previously the Criminal Chamber and the former Military Chamber).

The establishment of two new chambers in the SC (which have been packed in full by the current NCJ), the purge of SC judges (halted by the CJEU) and the latest developments regarding the appointment of the new First President of the SC have provided further evidence for doubts as to the rule of law (see Section 4c).

COMMON AND MILITARY COURTS

Both common and military courts operate as the courts of first and second instance in most criminal, civil and commercial cases. Out of a total of c. 10,000 judges, about 90% of them are appointed to these courts. Each court consists of divisions that deal with particular types of cases.

In 2017 a new regime for the appointment of presidents of the common and military courts' was adopted, under which the power to select them was moved from the judicial bodies to the Minister of Justice. As a result, about 160 presidents and vice-presidents of these courts have been dismissed prematurely without any judicial remedy to challenge the Minister's decision[6]. Moreover, under the so-called 'muzzle law' of 2020, all courts,

6 B. Grabowska-Moroz, M. Szuleka, 'It starts with the personnel: Replacement of common court presidents and vice presidents from August 2017 to February 2018', https://www.hfhr.pl/wp-content/uploads/2018/04/It-starts-with-the-personnel.pdf

including common and military, are explicitly prohibited from "questioning the status of courts and judges" in order to prevent them from challenging the judicial nominations of the new NCJ (see Chapter 4d).

ADMINISTRATIVE COURTS

The administrative courts (the SAC and its regional counterparts) exercise control over public administration from the legal point of view; they have the power to quash administrative decisions[7]. Each regional administrative court consists of divisions that deal with particular types of cases, including taxes, environmental law, freedom of information and expropriation. The SAC, like the SC, is divided into three chambers: the Financial Chamber, the Commercial Chamber and the General Administrative Chamber.

THE CONSTITUTIONAL TRIBUNAL

The Constitutional Tribunal is a specialised court which deals with a posteriori and a priori reviews of laws as to their conformity with the Constitution, ratified international agreements (including ECHR and EU treaties) and statutes. This is exercised under three types of proceedings:

1. constitutional complaints by individuals,
2. questions of law referred by courts, and
3. motions for review submitted by a limited set of bodies, including groups of deputies and senators, the speakers of both chambers, the President of the Republic, the Council of Ministers, the Prosecutor General and the Commissioner for Human Rights.

The CT is composed of fifteen judges elected by the Sejm for a non-extendable 9-year term of office. Its judgements are final and universally binding. The dispute over the nominations to the CT led to the constitutional crisis in late 2015 which is still ongoing as of this writing (see Section 4a).

THE TRIBUNAL OF STATE

The Tribunal of State is a special court established to hear cases against the highest state authorities, including the President of the Republic, the Prime Minister and members of the parliament, for violations of the Constitution or of a statute within their office. It operates as a criminal court on motions from the Sejm, the Senate or both chambers (acting as the National Assembly) passed by a qualified majority (depending on the office, that figure is two-thirds, three-fifths, or an absolute majority in one of the combined chambers). The Tribunal of State is composed of 16 members elected by the Sejm for its term of office, and is chaired by the First President of the SC.

Due to the high threshold which must be passed to bring a case before the Tribunal of State, it has been virtually inactive for many years.

7 In a limited set of proceedings they are also entitled to adjudicate on the merits of the case.

THE PUBLIC PROSECUTOR'S OFFICE

The Prosecutor's Office in Poland is divided into national, provincial, regional and district prosecutions. The head of the Prosecutor's Office is the Prosecutor General, who as of 2016 is also the Minister of Justice. The aim of the Public Prosecutor's Office is to conduct and oversee preparatory proceedings regarding criminal law, to act as the public accuser in criminal cases, to put forward complaints in criminal and civil cases, and to oversee decisions concerning pre-trial detention.

3. REASONS FOR THE ATTACK ON THE RULE OF LAW

The ruling Law and Justice (PiS) party's dual electoral victory in 2015, both in the presidential and parliamentary elections, allowed it to take control over all aspects of the legislative procedure. This created a fast-track mechanism for adjusting the legal system to the current political will without paying any attention to constitutional review. Although PiS did not acquire the two-thirds parliamentary majority required to amend the Constitution, they nevertheless began their programme of changing Poland's constitutional reality.

However, certain factors made it easier for PiS to criticise the judiciary and justify its programme of 'reforms'. These also explain why it was more difficult to defend the rule of law, as to do so was sometimes portrayed as defending the system's existing weaknesses. The lack of effective procedures and transparency, the incoherent language of court' decisions and the deficiencies in organisational culture among judges have been problems in the judiciary for many years. This led to growing backlogs and resulted in low public trust in courts. The majority of Polish people had negative opinions about courts before Law and Justice initiated their 'reforms', although other public institutions, including the parliament and social & healthcare public insurers had even worse ratings. According to surveys, the length of proceedings still remains the main problem in the judiciary, while public opinions about the courts in Poland have not improved despite the 'reforms'.

FIG. 2: MAIN PROBLEMS OF THE JUDICIAL SYSTEM IN 2012 AND 2017, SOURCE: OPINION SURVEYS BY CBOS

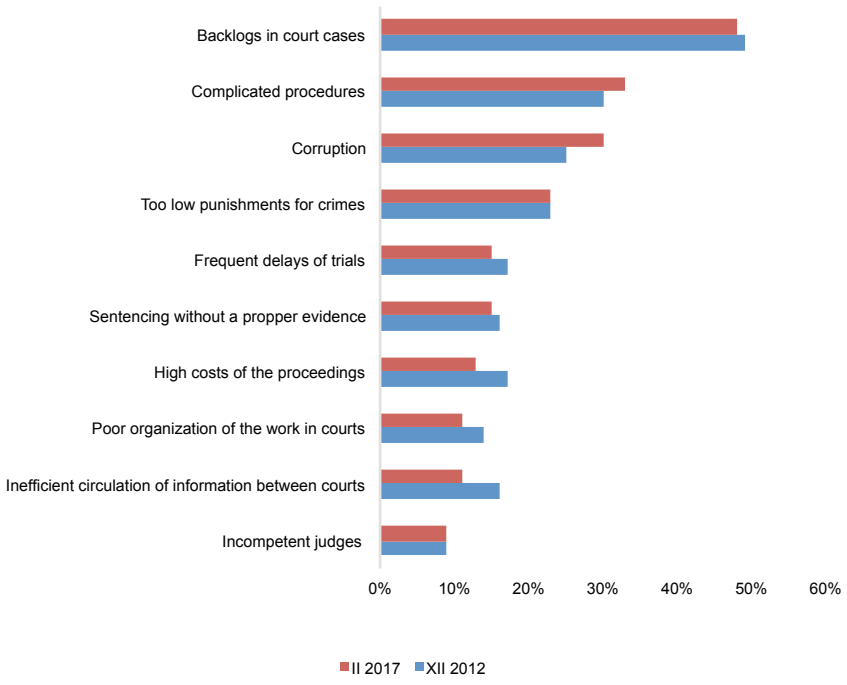
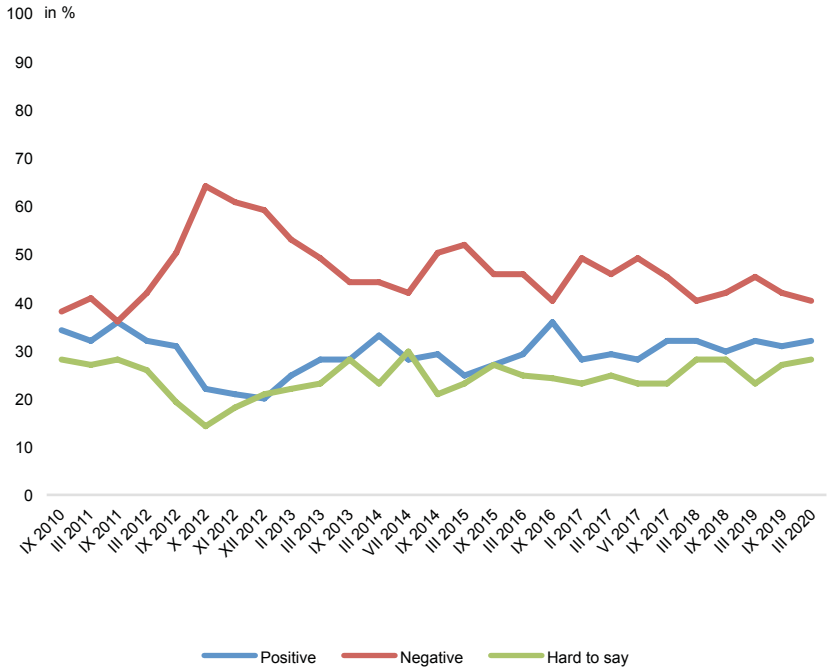


FIG. 3: PUBLIC ATTITUDES TOWARDS THE COURTS (2010–2020), SOURCE: OPINION SURVEYS BY CBOS



Moreover, many of the decisions issued by Poland's top courts, including the pre-2015 CT, generated a great deal of controversy among people, even though their grounds were based on correct legal reasoning and settled case law. We may recall the CT's judgements which authorised the nationalisation of social security funds or the introduction of a higher retirement age. Notwithstanding the fact that a small proportion of judicial decisions may be controversial among the public in every country, this does not in itself permit any ruling majority to introduce changes in the judiciary that jeopardise its independence. It is rather a matter of the use of plain language and better knowledge about the legal system, which would allow people both to understand controversial judgements better and thus be more familiar with the procedures of domestic courts.

The disciplinary system against judges is also perceived as 'corporatist'; this created a growing opinion that judges whose misconduct is considered by their colleagues may still go unpunished, regardless of the severity of their offence[8]. While there was room to improve the transparency of the procedures, there was no reason to politicise the disciplinary system and use it against those defending the rule of law in Poland.

These issues were cynically exploited by PiS in their first term of office (2005–2007), and they have only doubled down on their approach since returning to power in late 2015. The judges are presented as a 'caste' which

8 "Until now in Poland, we've had a ''judgeocracy,'" says Ast. "It was judges who decided what the justice system looks like. They alone judged themselves within the disciplinary system. Despite their many pathological behaviours, they remain unpunished.", https://www.npr.org/2020/02/13/805722633/polands-overhaul-of-its-courts-leads-to-confrontation-with-european-union?t=1596629575449&t=1596710147597

lacks democratic supervision and consists of Communist holdovers who will always oppose the government. This was accompanied with scandalous reports about alleged mass corruption within the judiciary and their failure to settle accounts with the previous regime (i.e. the Communist state ruling from 1944 to 1989) in the courts. The judges were accused of generating huge backlogs, even though Poland is one of the leading EU member states in terms of spending on the judiciary. Most of these matters were addressed in a white paper on the reform of the Polish judiciary adopted by the Polish government in 2018[9].

In response to these statements, the largest Polish association of judges, Iustitia, supported by renowned constitutionalists, debunked some of the fallacies mentioned[10]. In their opinion, the excessive length of proceedings is a systemic problem (this view was also shared by the ECHR[11]) and it is the lack of decisive reforms of procedures that has created the main obstacle to reducing the backlog.

As far as the issue of 'de-Communisation' is concerned, it was recalled that the average age of a judge is currently about 46, and there is no proof of any influence of Communism on the adjudication process. Moreover, the establishment of the NCJ in 1990 and the reform of the SC brought about the replacement of over 80% of its composition. The remaining SC judges that served after 1990 have little or no influence on case law.

In conclusion, none of the excuses put forward by the ruling majority as the reason to introduce changes to the courts justified such excessive measures which, when taken together, have led to a serious deterioration of the rule of law in Poland. Law and Justice used popular criticism and low levels of trust towards the judiciary to justify their 'reforms' which, instead of improving the justice system, have so far led to the opposite: further abuses of trust in the judiciary, increased length of court proceedings, and the lack of the independence that is essential to preserve the rule of law.

9 Chancellery of the Prime Minister, White Paper on the Reform of the Polish Judiciary, https://www.premier.gov.pl/files/files/white_paper_en_full.pdf

10 'The Response of the Polish Judges Association "Iustitia" to the White Paper on the Reform of the Polish Judiciary presented to the European Commission by the Government of the Republic of Poland', https://www.iustitia.pl/images/pliki/response_to_the_white_paper_full.pdf

11 Helsinki Foundation for Human Rights, 'HFHR's communication to Committee of Ministers: Poland fails to address lengthy proceedings', https://www.hfhr.pl/en/hfhrs-communication-to-committee-of-ministers-poland-fails-to-address-lengthy-proceedings/

4. POLAND'S LEGAL SYSTEM INSTITUTIONS UNDER FIRE (2015-2020)

4a. The Constitutional Tribunal

The Constitutional Tribunal used to be seen as the key element of the constitutional system in Poland. Nevertheless, its role has been marginalised since it was unconstitutionally captured by the ruling party and gradually converted into a rubber-stamping body.

The Constitutional Tribunal examines the compliance of legal acts and international agreements with the Constitution, but also resolves disputes of competence between different state authorities. The Tribunal's judges are elected by the lower house of the parliament (Sejm) for nine-year terms. In order to begin acting as such, all newly elected judges take an oath before the President of the Republic of Poland. This did not happen in 2015 as President Andrzej Duda refused to take oaths from judges of the Constitutional Tribunal who had been elected by the previous ruling party. This led to a deep constitutional crisis and was the first of many violations of the Polish Constitution committed by Law and Justice.

The ruling party used the excuse that the previous majority had elected too many judges, five instead of the permissible three. However, this was later corrected by the Constitutional Tribunal in its judgement of 3 December 2015, so this excuse was not legitimate. There were five judges of the Constitutional Tribunal which terms were ending in 2015, but only three of them were due to leave office during the Sejm's seventh term (2011-15). The remaining two were supposed to leave on 2 and 8 December, after the 2015 parliamentary elections, when the new Sejm was already in session. A majority from the Civic Platform (PO) and the Polish People's Party (PSL) elected all five judges of the Constitutional Tribunal before the end of the Sejm's 7th term. In response, Law and Justice filed a motion with the Constitutional Tribunal, but this was withdrawn after they won the elections. A similar motion was then submitted by the Civic Platform' members of parliament. The Constitutional Tribunal examined the constitutionality of this action and on 3 December 2015 ruled that the election of only three judges was constitutional. Thus, the Sejm of the 8th term, where Law and Justice had a majority, could have chosen only two judges, and the President should have taken the oath from the other three who had been elected during the parliament's previous term. This was the moment when Law and Justice decided to intensify the legal and political conflict which led to the serious constitutional crisis[12].

After the presidential elections of 2015, the ruling majority decided that the election of all five judges by the formerly ruling coalition was legally flawed,

12 Helsinki Foundation for Human Rights, *The Constitutional Crisis in Poland 2015 – 2016*, https://www.hfhr.pl/wp-content/uploads/2016/09/HFHR_The-constitutional-crisis-in-Poland-2015-2016.pdf

and Law and Justice chose all five judges. The president, without waiting for the judgement of the Constitutional Tribunal, put himself in the role of a quasi-judicial authority and took oaths from all the five judges elected by the new ruling majority. It should also be highlighted that the judges were sworn in at night, as if the governing majority wished to keep it as secret as possible. On the day of the oath-taking, the president openly admitted that he would not comply with the judgement of the Constitutional Tribunal in this case. This was an open violation of the Constitution, which clearly indicates that "the judgements of the Constitutional Tribunal shall be binding and final".

In the meantime, the Law and Justice ruling majority adopted the Law on the Constitutional Tribunal at an extremely quick pace, disregarding any rules of proper legislation. They used the new act to justify why they had not complied with the judgement of the Constitutional Tribunal. The provisions of this legal act were very controversial and the Constitutional Tribunal itself found some of them unconstitutional. This concerned, *inter alia*, the possibility of the re-election of the President of the Tribunal and the expiry of the term of office of the President and Vice-President of the Tribunal three months after the Act was to come into force. As a result, the ruling party decided to wait until the end of the term of office of the President of the Constitutional Tribunal, Andrzej Rzepliński.

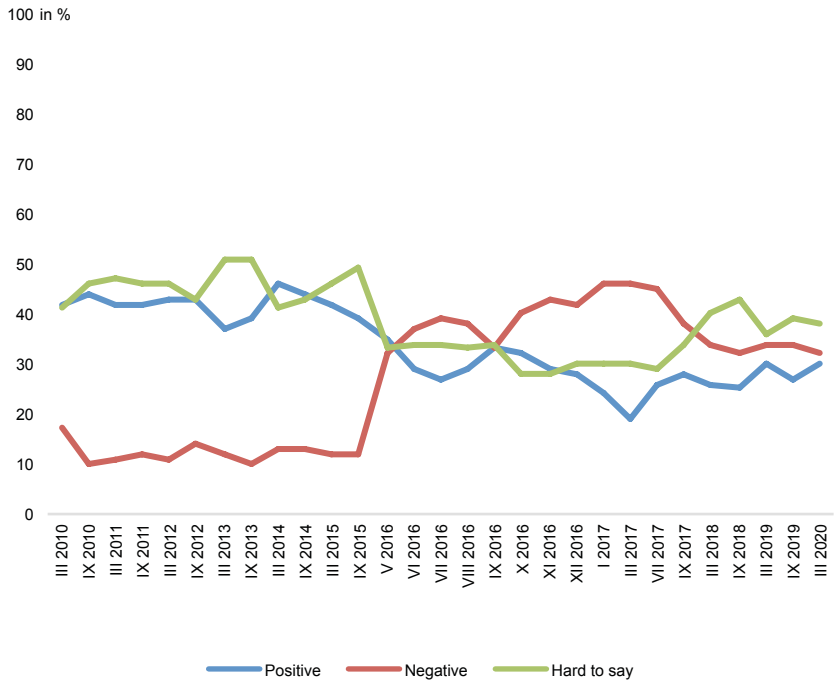
When Rzepliński's term ended on 19 December 2016, President Andrzej Duda entrusted the performance of the duties of the President of the Constitutional Tribunal to Julia Przyłębska, whom the ruling majority had elected to the court in December 2015. Przyłębska was then appointed President of the Constitutional Tribunal by President Duda. The way in which the General Assembly of the judges of the Tribunal (which nominates the candidates for 'presidents of the courts) was conducted and the procedure by which Przyłębska's candidacy was indicated, raise serious legal doubts. Additionally, three "fake judges"[13] were allowed to participate in the General Assembly. As they had been selected for places already occupied in the Constitutional Tribunal, they were not entitled to rule and participate in this meeting. There was also no formal written resolution from the General Assembly. Thus, the claims that Przyłębska become the president of the Constitutional Tribunal illegally are legitimate.

Since the unconstitutional capture of the Tribunal by the ruling party's nominees, it has been performing much worse than in the past, and is losing its legitimacy. A rapid decline in the number of courts' questions and motions has been noted since the beginning of the constitutional crisis. This has mainly happened because of concerns about the issuing of judgements by persons not authorised to rule in the Constitutional Tribunal, as well as concerns about the Tribunal's independence. Moreover, the Constitutional Tribunal has prohibited the presence of cameras at the hearings or deliveries of judgements, so the citizens have been left with only low-quality live streaming on the Internet or their personal presence in the courtroom.

13 As explained by L. Pech these are individuals who, after their flagrantly irregular appointments to judicial posts, masquerade as judges: https://reconnect-europe.eu/wp-content/uploads/2020/05/RECONNECT-WP8.pdf. Other terms used in this situation are "usurpers" and "pseudo-judges". In Poland these members of the Constitutional Tribunal are referred to as judges' "doubles".

The quality of the process for selecting candidates has also deteriorated. In the past, non-governmental organisations and experts criticised the late submission of candidates, the lack of public hearings, and the insufficient verification of candidates' competences and views by parliament. The situation worsened after 2015, and there has been almost no parliamentary debate about Law and Justice's nominees to the Tribunal with each debate coming to a symbolic early end when the opposition begins asking the candidates questions about the CT's lack of independence. The hearings were usually cut short even if the opposition wanted to continue interviewing the proposed nominees. It is no surprise that opinions of the CT have deteriorated significantly since the end of 2015.

FIG. 4: PUBLIC ATTITUDES TOWARDS THE CONSTITUTIONAL TRIBUNAL (2010–2020), SOURCE: CBOS SURVEYS



The Constitutional Tribunal is also used instrumentally by the ruling party, not to review the constitutionality of legal acts, but to support amendments passed by the ruling party or to fight other state- and constitutionally-established bodies (such as the Supreme Court) and EU institutions. For example, the Constitutional Tribunal deemed the resolution of the three combined chambers of the Supreme Court to be incompatible with the Constitution of the Republic of Poland and the EU treaties[14]. This creates a situation in which a body masquerading as a court has a final say on whether domestic legislation is in line with EU law – an approach which ought to be reserved for bodies that meet the Union's standards regarding both their composition and independence.

14 https://ruleoflaw.pl/captured-constitutional-tribunal-rules-on-the-supreme-court-implementation-of-cjeu-judgment-inconsistent-with-eu-law/

4b. The National Council of the Judiciary

Until 2017, politicians had elected only 32% of the members of the National Council of Judiciary, and the judiciary was more isolated from other authorities. Since the changes introduced by Law and Justice, 92% of the members of this body have been chosen by politicians.

TABLE 1: COMPOSITION OF THE NCJ BEFORE AND AFTER LAW AND JUSTICE'S CHANGES

	1990–2018	2018–...
Legislature	6	21
Judiciary	15	0
President of the Republic	1	1
Ex officio members	3	3

The National Council of the Judiciary (NCJ) participates in the nomination of judges; according to the Polish Constitution, the NCJ is responsible for safeguarding the independence of the courts and judges. By mid-2020, the new National Council of the Judiciary had nominated around 800 people for judicial positions, and around 400 judges had received appointments from President Andrzej Duda.

The new NCJ has not enjoyed confidence among other judges. According to a survey conducted by judges (around 30% of all judges in Poland took part in this vote[15]), over 90% of those who voted believe that the new NCJ is not safeguarding the independence of courts and the independence of judges, and 87% demand the resignation of the judicial part of the Council chosen by the ruling majority.

The new mechanism for appointing judicial members of the NCJ allows groups of judges (at least 25) or citizens (at least 2000) to put forward candidates to the Speaker of the Sejm. This was presented as a way to make NCJ both more democratic and transparent. Although all changes to the judiciary were carried out under the banner of greater transparency, this was – once more – not the true case. In order for a person to be nominated to the new NCJ, one had to gather 25 signatures from other judges as proof of support for his or her candidature. In reality, this meant that the nominees supported by the government usually gathered signatures from those with direct ties to the Minister of Justice[16].

Moreover, for several months, the Chancellery of the Sejm and the Ministry of Justice, with the support of yet another Law and Justice nominee,

15 M. Jałoszewski, '3000 Polish judges want the dismissal of the National Council of the Judiciary', *Rule of Law in Poland* 2 January 2019, https://ruleoflaw.pl/3000-polish-judges-want-the-dismissal-of-the-national-council-of-the-judiciary/

16 'Judges elected to the new National Council of the Judiciary (NCJ) and their connections with the Ministry of Justice', https://www.iustitia.pl/images/english/Judges_elected_to_the_new_National_Council_of_the_Judiciary.pdf

the Data Protection Officer, refused to disclose the names of the judges who had supported candidates for the new NCJ. The Chancellery of the Sejm, despite a legally binding ruling of the court calling for its disclosure under freedom of information laws, decided to ignore this request. Thanks to pressure from civil society, NGOs and opposition politicians, these signatures were finally released. The Civil Development Forum waited for the disclosure of signatures for 749 days from the date of submitting the request for access to public information. The analysis of the lists confirms that the members of the new National Council of the Judiciary were supported by a narrow group of judges associated with the Minister of Justice, including more than 50 presidents and vice-presidents of courts or judges who had been appointed by the Ministry of Justice. This contradicts the assurances of the ruling politicians about the broad representation of the Council.

After the landmark judgement by the CJEU in November 2019[17], and following the decisions of the Supreme Court in Poland (including the resolution of the three combined chambers from January 2020), it was confirmed the NCJ in its current composition is not independent from the legislature and the executive. The above-mentioned deficiencies in the composition of the NCJ and the way the council operates under the amended legislation pose threats to the right to court, since the way in which the judges have been appointed or promoted on the motion of the current NCJ raises legitimate doubts as to their influence on the legislature and the executive, as well as their neutrality.

From the international perspective, it should be also mentioned that the new NCJ was suspended by the European Network of Councils for the Judiciary (ENCJ). On 17 September 2018 it was stripped of its voting rights and excluded from participation in ENCJ activities[18]. Moreover, on 4 May 2020 the European Association of Judges publicly expressed support for the proposal to expel the Polish NCJ entirely from the ENCJ[19]. On 27 May 2020, the ENCJ Board adopted a 'Position Paper of the Board of the ENCJ on the membership of the NCJ of Poland'. In the paper, the Board sets out the reasons for its proposal to the General Assembly to expel the Polish NCJ from the Association[20].

4c. The Supreme Court

The capture of the CT and the NCJ facilitated the politicisation of the Supreme Court by creating two new chambers, the appointment of a new First President and packing the courts, thanks to nominations from the new NCJ.

17 Judgement of 19 November 2019, 'A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)', C-585/18, C-624/18 and C-625/18, EU:C:2019:982 https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-11/cp190145en.pdf

18 https://www.encj.eu/node/495

19 https://twitter.com/JoseIgrejaMatos/status/1257294375748546561

20 https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/News/Position%20paper%20ENCJ%20Board%20on%20position%20KRS%20and%20annexes%2027%20May%202020.pdf

The Supreme Court (SC) was the third institution to come under attack from the ruling party. It is responsible for ruling in cassation proceedings and acts as a court of 'extraordinary instance'. The SC also provides interpretations of provisions of the law in concrete cases, which the common courts can use later in their rulings. Hence, Law and Justice saw it as yet another obstacle in their race for complete control over the judiciary.

In addition to the establishment of two new chambers – the Disciplinary Chamber (DC) and Extraordinary Control and Public Affairs Chamber (ECPAC) – the Law on the SC of 2017 vested in the President of the Republic the power to adopt the Rules of the SC which, among other things, regulate the number of judicial seats in each chamber, the distribution of cases among judges, and the manner in which the First President of the SC and the heads of the chambers are appointed.

The SC's two new chambers have been entirely filled by the NCJ in its current composition, in tandem with the increase of judicial seats in the SC and the changes in the procedure to fill the office of the First President of the SC. These changes taken together cast doubts on the independence of the entire SC with regard to the real motives behind these amendments.

Moreover, the law on the Supreme Court retroactively lowered the retirement age from 70 to 65; this was done in order to dismiss a significant group of the judges, including the First President of the court, whose term of office is explicitly secured in the Constitution.

As part of the changes to the Supreme Court, with the help of the new National Council of the Judiciary (dominated by the nominees of the ruling majority), a special Disciplinary Chamber (DC) was created and filled as an appellate court in disciplinary cases against judges, prosecutors and other legal practitioners. This chamber received a specific 'special status' which some lawyers find unconstitutional, indicating that courts of this sort may only be created in times of emergencies i.e. under martial law[21]. Many people associated in the past with the Minister of Justice/Prosecutor General Zbigniew Ziobro and Law and Justice, including five former prosecutors, have been appointed to sit on the Disciplinary Chamber.

The existence of the Chamber raises fundamental constitutional concerns and remains the subject of proceedings before the Court of Justice of the European Union (CJEU). On 8 April 2020, the Tribunal ruled on the imposition of a temporary measure that the Disciplinary Chamber may not conduct disciplinary cases against judges or refer them to courts that do not meet the criterion of independence as understood under EU law[22]. The provision is valid until the CJEU issues a judgement on the action brought by the European Commission against the PiS government. Moreover, in a judgement of 19 November 2019, the CJEU indicated that in order to verify whether the Disciplinary Chamber is an independent court in accordance with EU law, another court that has no formal jurisdiction to hear a case

21 'Former Chief Justice: court laws amendment is a slap in CJEU's face', *TVN 24* 5 February 2020, https://tvn24.pl/tvn24-news-in-english/polands-former-top-judge-says-court-laws-amendment-is-a-slap-in-cjeus-face-3795664

22 Order of 8 April 2020, 'Commission v Poland', C-791/19 R, EU:C:2020:277 https://curia.europa.eu/jcms/upload/docs/application/pdf/2020-04/cp200047en.pdf

reserved to the DC should assess the method by which the new NCJ was created and how it exercises its powers, as well as under what circumstances the Disciplinary Chamber was established[23].

Moreover, in a resolution of the three combined chambers of 23 January 2020[24] (the members of the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber were disqualified due to their personal involvement), the Supreme Court questioned the participation of the judges appointed at the request of the new, politicised National Council of the Judiciary in adjudication. The SC stated that a bench is incorrectly selected if a person is appointed to the bench after having been appointed to the office of judge on a motion of the National Council of the Judiciary formed in accordance with the provisions of the legal changes in this Council in 2017.

Due to the growing controversy among the status of individuals appointed or promoted via the NCJ in its current composition (resulting in the above-mentioned judgement of the CJEU and the decisions of the SC), the so-called 'Muzzle Law' was adopted in early 2020. Among other things, it equipped the ECPAC with the power to consider legal actions (regardless of the proceedings) in which the courts' jurisdiction or the status of judges is questioned (in particular due to deficiencies in the nominating procedure), and required this chamber to discontinue such proceedings. The Venice Commission also viewed this as a breach of the right to a court previously established by law (as far as its composition is concerned)[25]. As a result, the ECPAC, which itself casts doubts as to its composition and independence, is dealing with issues concerning the composition of other courts appointed in the same manner.

The Law on the SC of 2017 introduced a new tool called the extraordinary appeal – a new form of judicial review of final and binding judgements and decisions (including those issued before the above-mentioned law). It can be submitted to the ECPAC by *inter alia* the Prosecutor General (who is also the Minister of Justice) or the Commissioner for Human Rights. The main reason for this remedy is to 'ensure compliance with the rule of law', although according to the Venice Commission, this instrument violates the principle of *res judicata* and resembles the old Soviet system in which no legal certainty was guaranteed[26].

When the former First President of the Supreme Court Małgorzata Gersdorf's term came to an end on 30 April 2020, a new First President had to be elected. The ruling party had attempted to get rid of Gersdorf previously by trying to lower the retirement ages of all judges, thus cutting short her constitutionally mandated term. This was effectively blocked by the CJEU,

23 'A. K. and Others (Independence of the Disciplinary Chamber of the Supreme Court)...' https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-11/cp190145en.pdf

24 'Resolution of the formation of the combined Civil Chamber, Criminal Chamber, and Labour Law and Social Security Chamber' (case BSA I-4110-1/20), http://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=350-b6b3e804-2752-4c7d-bcb4-7586782a1315&ListName=Komunikaty_o_sprawach&rok=2020

25 https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2020)017-e

26 https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e

initially by granting interim measures[27] and finally in a ruling of June 2019[28]. However, due to the fact that according to the Constitution the President of Poland is responsible for choosing the new First President of the SC from 5 candidates elected by the SC General Assembly, it was only a matter of time before a nominee of the governing party would be elected to take over the post. This came about in May 2020.

Thanks to the so-called 'Muzzle Law', a legal act aimed at providing a broad understanding of disciplinary proceedings (see section 4d for more details) and creating the position of 'acting first president of the SC', the governing majority could use its nominees in the SC to manipulate the election of the new First President. The 'Muzzle Act' introduced an Article 13a, which allowed for the election of an 'acting president of the Supreme Court'. According to the provision, he or she is elected from among the judges of the Supreme Court by the President of the Republic of Poland, if, in accordance with the provisions of the Act on the SC, 5 candidates for the new First President of the Supreme Court (elected by the General Assembly of the Supreme Court) are not presented to the President by the General Assembly.

The former First President of the SC was unable to organise the General Assembly due to the coronavirus pandemic. Hence, the President appointed the 'Acting President of the SC'. The first to be appointed to this post was Kamil Zaradkiewicz, a nominee of the new NCJ. He also prove incapable of actually conducting the General Assembly, and he handed in his own resignation notice. The second to be appointed to act as the First President of the SC was Aleksander Stępkowski, the former president of the Ordo Iuris institute, an ultra-right wing legal think-tank which has currently become prominent for pushing for Poland to withdraw from the Istanbul Convention on preventing and combating violence against women and domestic violence[29]. On 25 May, 50 judges of the SC published a statement naming all the inconsistencies and unlawful actions taken by Stępkowski during the newly organised General Assembly, such as his unjustified and illegal rejection of a motion for the General Assembly to adopt a resolution to present five candidates to the President, even though the obligation to adopt such a resolution arises under Article 183(3) of the Constitution and was confirmed by a decision of the Constitutional Tribunal[30].

27 Order of the Vice-President of the Court of 19 October 2018, 'Commission v Poland (Independence of the Supreme Court)', C-619/18 R, EU:C:2018:852

28 Judgement of 24 June 2019, 'Commission v Poland (Independence of the Supreme Court)', C-619/18, EU:C:2019:531

29 D. Tilles, 'Poland to begin withdrawal from international convention on violence against women', *Notes from Poland* 25 July 2020, https://notesfrompoland.com/2020/07/25/poland-to-begin-withdrawal-from-international-convention-on-violence-against-women/

30 Statement by 50 Supreme Court judges regarding irregularities in the selection of candidates for the position of the First President of the Supreme Court', *Rule of Law in Poland* 25 May 2020, https://ruleoflaw.pl/statement-by-50-supreme-court-judges-regarding-irregularities-in-the-selection-of-candidates-for-the-position-of-the-first-president-of-the-supreme-court/

TABLE 2: RESULTS OF THE VOTING OF THE SC GENERAL ASSEMBLY

Candidate	Number of votes
Włodzimierz Wróbel	50
Małgorzata Manowska	25
Tomasz Demendecki	14
Leszek Bosek	4
Joanna Misztal-Konecka	2

All of these incidents listed above led to a very controversial selection of candidates for the First President of the Supreme Court. Although the majority of SC judges supported Włodzimierz Wróbel, President Duda appointed Małgorzata Manowska, a judge nominated to the Supreme Court by President Duda at the request of the new National Council of the Judiciary, to take over the office.

4d. The common courts

Over the last five years, the law on the system of common courts has been amended several times. This has led to many personnel changes and the politicisation of the disciplinary system.

The initial changes focused on the Minister of Justice's replacement of court presidents and directors. The presidents of common courts were frequently dismissed via fax, without any justification. Ziobro arbitrarily removed almost 160 presidents and vice-presidents of courts and replaced them with his own nominees. Thanks to the new law, the Minister no longer had to consult these appointments with the judges.

In 2017, a new disciplinary system was created to ensure that the judges were subordinated to executive power. The Minister of Justice and Prosecutor General appointed Piotr Schab as disciplinary spokesman for the judges of common courts, and Przemysław W. Radzik and Michał Lasota as his deputies. They initiated disciplinary proceedings against common court judges for offenses such as demanding respect for rule of law, wearing a T-shirt with the slogan 'Constitution [*Konstytucja*]', and referring a question for a preliminary ruling to the Court of Justice of the European Union if the ruling in question was inconsistent with the prosecution's or the government's interests.

The amendments to the law on the system of common courts have also led to new rules of judicial promotion, and have also lowered the retirement age, with the aim of accelerating the personnel changes in the judiciary. Promotions from the lowest to one of the highest tiers of the judiciary have become easier. The retirement age was reduced from 67 to 65 for men and 60 for women, which was justified by changes in the general pension system. Women who turned 60 and wanted to continue working had to ask the Minister of Justice for consent. Currently, this age has been standardised: a judge retires on the day she reaches 65, unless she notifies the National Council of the Judiciary of her will to continue to hold the position

and presents a certificate declaring that her medical condition permits her to continue adjudication.

It should be emphasised that the CJEU ruled on a complaint by the European Commission concerning the lowering of the retirement age of judges, stating that Poland had breached the requirements of independence and the principle of non-discrimination on grounds of sex[31]. This resulted from the sudden reduction of the retirement age of common court judges and the differentiation of this age, as well as the granting the minister of justice the right to freely decide on the extension of the active status. The CJEU found that "the criteria on the basis of which the Minister of Justice issues his decision are too vague and unverifiable, and the decision itself does not have to be justified and cannot be the subject of an appeal before a court. On the other hand, the length of the period during which judges may wait for a decision of the Minister of Justice will depend on the discretion of the Minister himself". The CJEU also stressed that "the principle of irremovability requires, in particular, that judges may remain in office until the compulsory retirement age is reached or the term of office has expired, if it is temporary".

Finally, the so-called 'Muzzle Law' was intended to stop judges from questioning the appointment of the new NCJ's nominees. It also requires each court which faces such a claim to share it with the ECPAC, a special Chamber in the Supreme Court, which is *de facto* obliged to discontinue the proceedings. This creates a situation in which every doubt as to the composition of a court can ultimately be dismissed by a body which itself raises the very same doubts. Moreover, all judges and prosecutors have been obliged to report any previous memberships they may have held of political parties and civil society organisations. This was aimed at all those judges who are members of independent judges' associations who have criticised the governing party, or other memberships including those which could indicate their sexual orientation or other sensitive data. The 'Muzzle Law' has also prohibited judges from adopting resolutions "undermining the principles of the functioning of the authorities of the Republic of Poland and its constitutional organs", which in fact was a response by the ruling politicians to numerous resolutions criticising their actions in the legal system. In short, the 'Muzzle Law' has become the ultimate, unconstitutional legal act to stop judges from speaking out and curb their bravery in their attempts to block the dismantling of the rule of law in Poland.

4e. The Prosecution

In 2016, the ruling majority passed a new law on the prosecution service, changing the entire system. Nevertheless, Law and Justice did not offer a reliable diagnosis of the real problems in the prosecution; instead of reforming the system, they transferred almost all power over the prosecution into the hands of one person – the Minister of Justice and the Prosecutor General, Zbigniew Ziobro.

31 Judgement of 5 November 2020, 'Commission v Poland (Independence of common courts)', C-192/18, EU:C:2019:924 https://curia.europa.eu/jcms/upload/docs/application/pdf/2019-11/cp190134en.pdf

The new Act on the Prosecution, apart from the merger of the functions of the Minister of Justice and the Prosecutor General (previously these two positions had been separate), increased the Prosecutor General's power to transfer pending cases between prosecutors. This allows Ziobro to transfer such cases in an arbitrary manner, without any justification. This allows for a biased allocation of cases to a trusted prosecutor, who may in return be promoted by the Prosecutor General or receive other benefits. In the past, a special justification was required to transfer already pending proceedings to another prosecutor.

The provisions introduced by the Law and Justice government enable the Prosecutor General and the Minister of Justice to interfere in decisions made by prosecutors in the course of pending proceedings. This makes the actions and functioning of the prosecutor's office even more dependent on the Prosecutor General, granting one person – the Minister of Justice, an active politician – virtually unlimited influence over proceedings.

The Act on the Public Prosecutor's Office of 2016 limited the disciplinary liability of public prosecutors. As a result, prosecutors do not bear disciplinary responsibility if their actions were taken solely 'in the public interest'. The introduction of such a restriction is unjustified, because the idea behind the functioning of the prosecutor's office is that the prosecutors employed there act solely in the public interest and as guardians of the rule of law. This mechanism for exclusion, instead of strengthening the prosecutors' responsibility for the decisions taken, actually weakens this responsibility. Moreover, it could be used to protect those prosecutors who have supported the government by making procedural decisions in line with their political expectations.

A 'reward and promotion' mechanism has been created in the prosecutor's office which allows for the promotion of obedient prosecutors and for building a relationship between the prosecutor's career and the execution of orders from the superior, including the Prosecutor General. The Act on the Public Prosecutor's Office states that the Prosecutor General can freely decide on awards and promotion. This means that a prosecutor may be easily promoted from the lowest to the highest rank. The terms of office in managerial positions in the prosecutor's office have also been amended, which allows for heads of units to be replaced at any time. Moreover, the Act stipulates that "in particularly justified cases" – without explaining what cases are 'particularly justified' – recruitment procedures for the position of district prosecutor can be ignored. In the case of the position of regional and appeal prosecutor, the Act does not provide for any recruitment procedures at all: the Prosecutor General decides on the particular appointments[32].

The legal changes of 2016 have also made it possible to punish prosecutors by demoting them from the highest ranks of the prosecution offices, and has facilitated their transfer to other organisational units without their consent. The legislation introducing the Act on the Public Prosecutor's Office of 2016 made it possible to demote skilled prosecutors with

32 An English translation of the Act can be found at http://lexso.org.pl/wp-content/uploads/2017/12/ACT-ON-THE-PUBLIC-PROSECUTOR'S-OFFICE.pdf

extensive professional experience from the highest prosecutor positions. In their place other prosecutors, often from the lowest ranks, have been promoted to higher prosecutor's offices. Thus, nearly a third of the prosecutors from the former General Prosecutor's Office and former appellate prosecutor's offices have been seconded to lower units. Moreover, the new act made allowed for a prosecutor to be seconded to another public prosecutor's office[33], also at a lower level and very distant from the one in which the prosecutor performs his duties, without his consent. Currently a long secondment is possible, lasting 12 months each year, and the prosecutor transferred cannot comment on such a decision, appeal against it, or appeal it to a court. These are, in fact, hidden disciplinary proceedings. Before the amendment to the act, the secondment of a prosecutor to another unit for more than six months was not possible without the prior consent of the delegate in question.

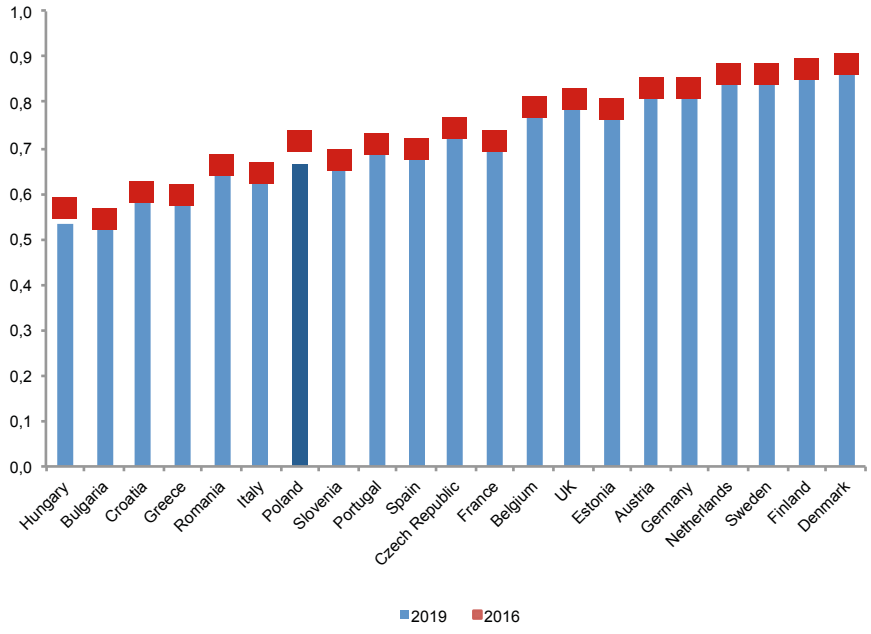
33 The Council of Europe, European Commission for Democracy Through Law (Venice Commission), Opinion No 892/2017 of 11 December 2017 on the Act on the Public Prosecutor's Office as amended, CDL-AD(2017)028, https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)028-e

5. THE STATE OF THE RULE OF LAW FROM A COMPARATIVE PERSPECTIVE

The unprecedented attacks on the rule of law in Poland have resounded among the press and scholars abroad. This has been reflected in the leading indices concerning not only the rule of law but also the quality of democracy and individual freedoms. In this respect, regardless of the methodology employed, a continuing decline in Poland's position is being observed. These results have been caused by the actions of the ruling majority with regard to the judicial system, among other things.

The Rule of Law Index by the World Justice Project is one of many examples of indices where Poland's position has fallen, from 12th place in 2016 to 15th in 2019[34], the steepest drop in a score in the EU, as indicated at Fig. 5. The second highest decline was observed in Hungary when attacks on the rule of law were initiated by Viktor Orbán's government; the whole process of institutional deterioration has thus been going on much longer within the EU.

FIG. 5: RULE OF LAW INDEX 2016 AND 2019 IN THE EUROPEAN UNION; SOURCE: WORLD JUSTICE PROJECT[35]



While decline of the score is visible one may ask why Poland is still doing better than some of the other 'new' and 'old' member states. The Rule of Law Index uses a broad definition of the rule of law, composed of 44 sub-factors grouped in 8 categories such as constraints on government powers, order and security, open government, absence of corruption, civ-

34 Maximum score = 1, minimum score = 0

35 Only 21 out of the EU's 28 member states were included in the 2016 and 2019 indices.

il and criminal justice, etc. Therefore, some sub-factors may improve and others decline at the same time, which affects the overall score. While the World Justice Project gives all the sub-factors equal weight, a deterioration in some of them might be worse for the rule of law and the quality of democracy.

In Poland we have observed the worst types of violations: attacks on the independence of the judiciary and the weakening of the separation of powers in the state. This is clearly visible when we look at changes between 2016 and 2019. The highest decline was related to improper government influences on the judiciary and the growing concentration of government powers. Deteriorations in transparency and the freedoms of assembly and association have been also observed.

TABLE 3: SUB-FACTORS OF THE RULE OF LAW INDEX, WHICH EXPERIENCED THE LARGEST DROP BETWEEN 2016 AND 2019 EDITIONS; SOURCED FROM THE AUTHOR'S OWN CALCULATIONS BASED ON THE WORLD JUSTICE PROJECT

Sub-factors of the Rule of Law Index	2016	2019	Change
8.6 Criminal system is free of improper government influence	0.80	0.50	-0.30
7.4 Civil justice is free of improper government influence	0.70	0.50	-0.20
3.2 Right to information	0.75	0.56	-0.19
1.1 Government powers are effectively limited by the legislature	0.61	0.45	-0.17
4.7 Freedom of assembly and association is effectively guaranteed	0.75	0.63	-0.12

When we compare the sub-indicators in which divergence between Poland and the EU average is the highest, they are also linked to the independence of judiciary and the inadequate separation of powers. In terms of improper government influences on criminal and civil justice, Poland received the third worst score in the EU after Hungary and Bulgaria.

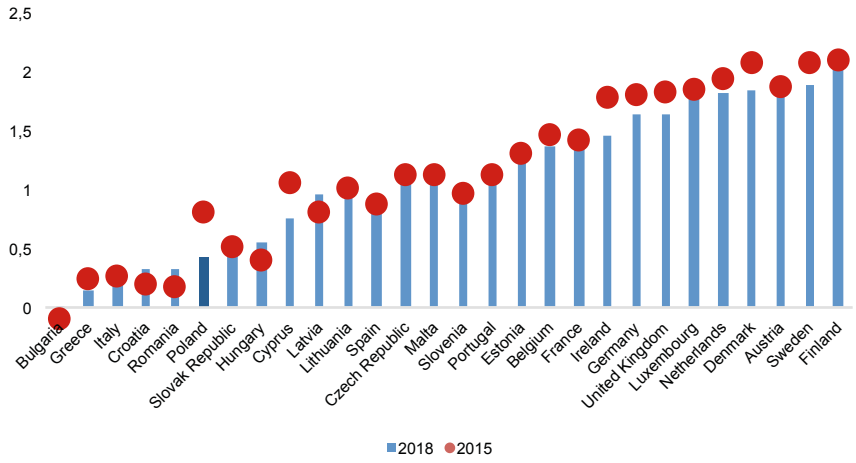
TABLE 4: COMPARISON OF POLAND'S SCORE IN SELECTED SUB-FACTORS OF THE RULE OF LAW INDEX 2019 WITH THE EU AVERAGE; SOURCED FROM THE AUTHOR'S OWN CALCULATIONS BASED ON THE WORLD JUSTICE PROJECT

Sub-factors of the Rule of Law Index	EU average 2019	Poland versus EU average
1.1 Government powers are effectively limited by the legislature	0.73	-0.28
8.6 Criminal system is free of improper government influence	0.73	-0.24
7.4 Civil justice is free of improper government influence	0.73	-0.22
1.2 Government powers are effectively limited by the judiciary	0.70	-0.18
4.5 Freedom of belief and religion is effectively guaranteed	0.76	-0.18

There are other indices of the rule of law, many of which are aggregated in the Worldwide Governance Indicators[36]. According to this measure, Poland is the sixth worst country in the EU, and experienced the fastest decline of the score between 2015 and 2018. As with the Rule of Law Index, the aggregated measure includes a long list of sub-factors based on a broad definition of the rule of law, so this index might underestimate the attacks on judicial independence and the separation of powers in Poland.

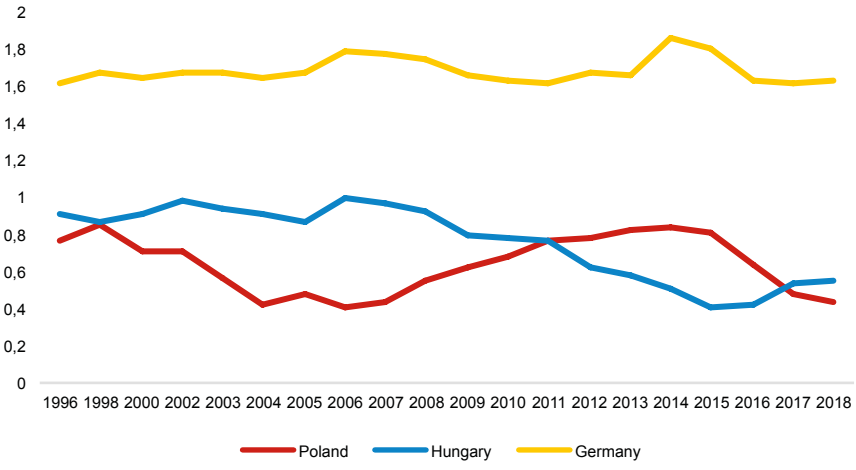
36 Maximum score = 2.5, minimum score = -2.5

FIG. 6: RULE OF LAW ESTIMATE; SOURCE: WORLD BANK, WORLDWIDE GOVERNANCE INDICATORS



For the same reason, we should be cautious when comparing changes in the index over time. Nevertheless, when we compare the rule of law estimates from the Worldwide Governance Indicators for Germany, Hungary and Poland, we can see what happened to the rule of law under the first (2005-7) and second (2015-...) PiS governments, or since Orbán began consolidating his power in Hungary.

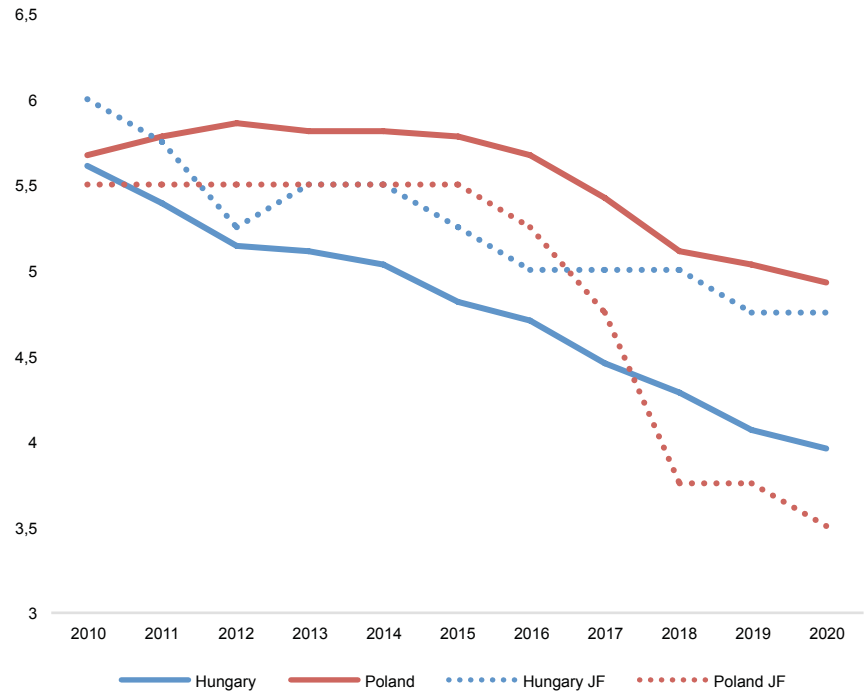
FIG. 7: RULE OF LAW ESTIMATE 1996-2018 IN GERMANY, HUNGARY AND POLAND; SOURCE: WORLD BANK, WORLDWIDE GOVERNANCE INDICATORS



The deterioration of the rule of law is affecting the quality of democratic institutions in Poland. One of the indices reflecting this negative trend is the Democratic Score measured by the Freedom House in Nations in

Transit[37]. It is a research project on democracy in 29 formerly Communist countries from Central Europe to Central Asia. In the most recent edition Poland's score declined again, and an accelerated deterioration has been observed since 2015. While the Democratic Score in Poland is still higher than in Hungary, we can see that Poland has recently become much more advanced in the worsening of its Judicial Framework and Independence. This then is another measure that shows the worst type of violations of the rule of law connected with the independence of the courts. Freedom House warns that "if Poland continues on this course, it will join hybrid regimes and autocracies that routinely mete out politicized justice"[38].

FIG. 8: THE DEMOCRATIC SCORE AND JUDICIAL FRAMEWORK SUB-INDICATOR (JF) IN POLAND AND HUNGARY; SOURCE: FREEDOM HOUSE

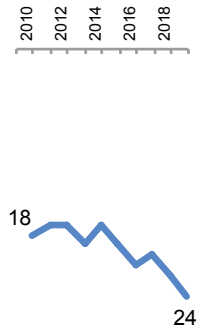


A similar deterioration in the rule of law, democracy, human rights and institutional stability is confirmed when other popular measurements are take into consideration. Fig. 9 summarises the declining position of Poland on many popular indices and rankings, often around the year 2015 when Law and Justice took power.

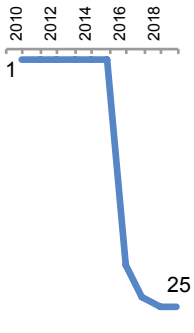
37 Maximum score = 7, minimum score = 1

38 Z. Csaky, 'Nations in Transit 2020: Dropping the Democratic Facade', *Freedom House*, https://freedomhouse.org/report/nations-transit/2020/dropping-democratic-facade

FIG. 9: POSITION OF POLAND AMONG EU MEMBER STATES (INCLUDING THE UK) IN POPULAR INDICES CONCERNING THE RULE OF LAW, DEMOCRACY, HUMAN RIGHTS AND INSTITUTIONAL STABILITY



World Economic Forum, Global Competitiveness Index (Institutional Pillar)

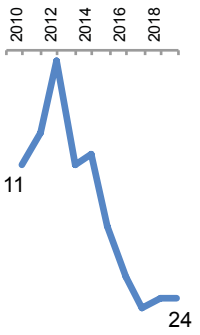


Freedom House, Freedom in the World

Reporters without Borders, World Press Freedom Index

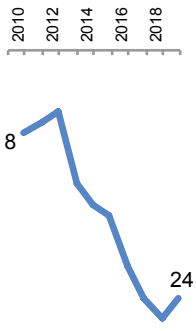
Transparency International, Corruption Perception Index

World Bank, Worldwide Govenance Indicators (Voice and Accountability)



V-Dem Institute, Varieties of Democracy (Electoral Democracy)

V-Dem Institute, Varieties of Democracy (Liberal Democracy)



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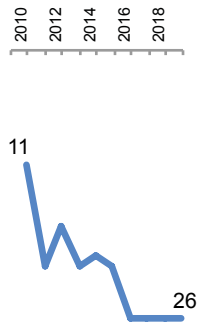
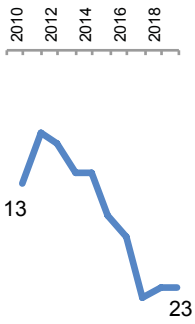
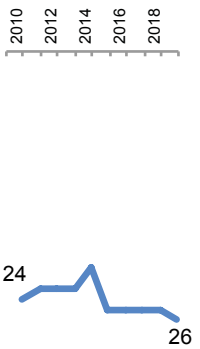


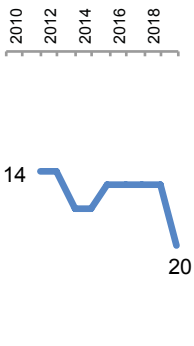
V-Dem Institute, Varieties of Democracy (Deliberative Democracy)



V-Dem Institute, Varieties of Democracy (Egalitarian Democracy)

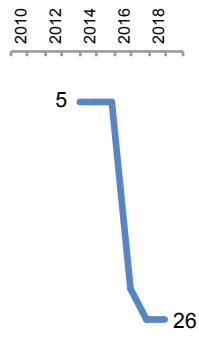


Economist Intelligence Unit, Democracy Index

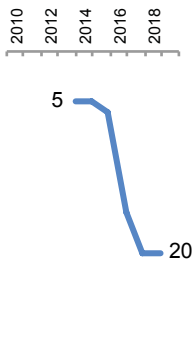


Friedrich Naumann Foundation, Human Rights Index

Bertelsman Stiftung, Sustainable Government Indicators (Policy Performance)



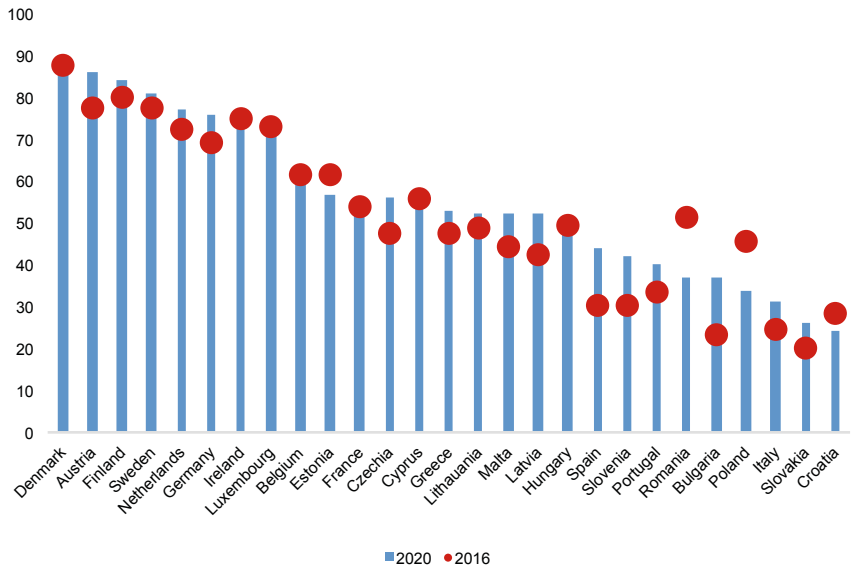
Bertelsman Stiftung, Sustainable Government Indicators (Democracy)



Bertelsman Stiftung, Sustainable Government Indicators (Governance)

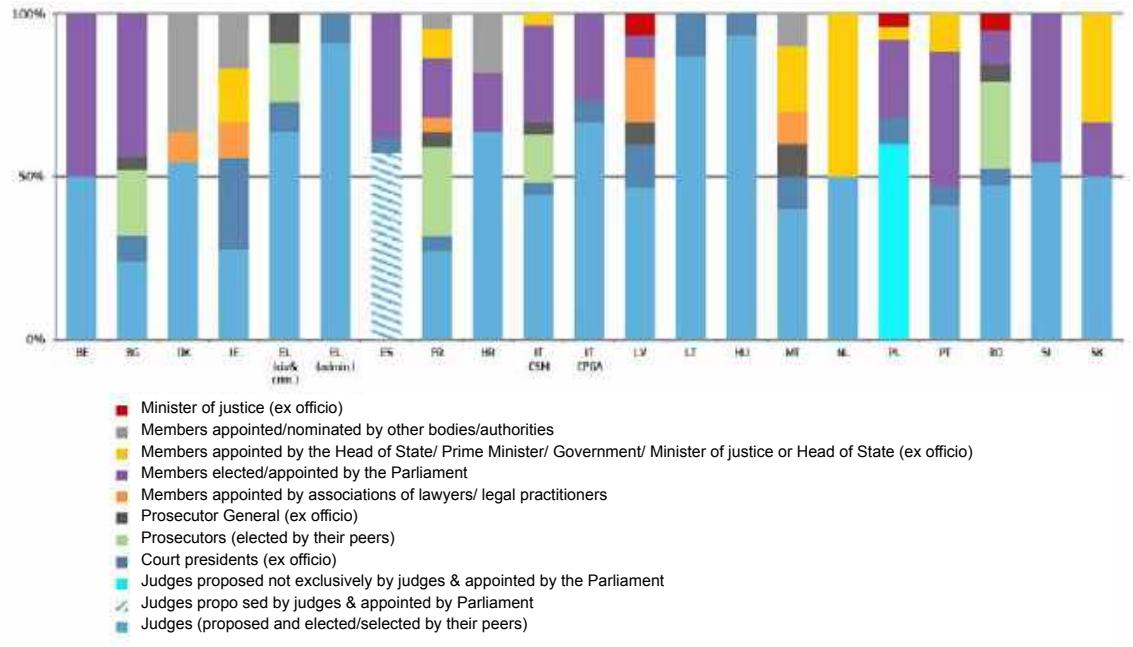
Although PiS's 'reforms' to the judiciary were justified by the Polish people's low trust in domestic courts (see Section 3), among many other things, the comparative data shows that there was no improvement in this field. When we look at the Eurobarometer statistics on the perceived independence of courts and judges among the general public, only 34% of Poles assess this independence as very good or fairly good. While there are still three countries where this measure is even worse, Poland has experienced the second steepest decline in this measure since 2016. And the picture is even worse when we compare the percentage of people claiming that the level of independence is very bad and fairly bad: their share in Poland has increased the most throughout the EU since 2016.

FIG. 10: PERCEIVED INDEPENDENCE OF COURTS AND JUDGES AMONG THE GENERAL PUBLIC (ANSWERS VERY GOOD AND FAIRLY GOOD) IN 2016 AND 2020; SOURCE: EUROBAROMETER



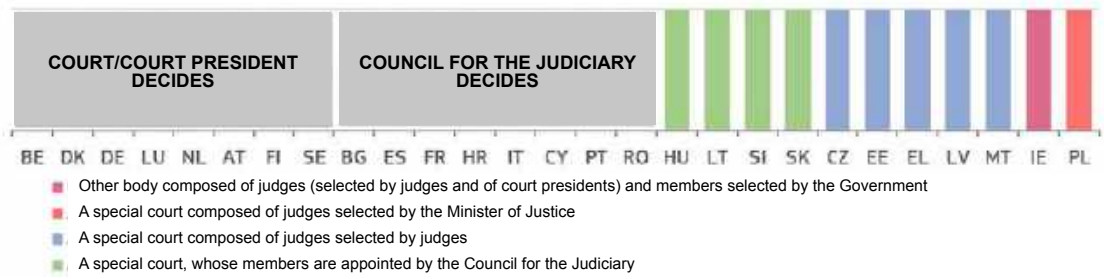
Finally, the most recent EU Justice Scoreboard provides useful comparative data about the structural independence of the judiciary in the EU. While judges in the councils are proposed and elected by their peers in most EU countries, in Poland over 90% of the members, since the legal changes starting in 2017, have been elected by politicians (mostly the ruling majority).

FIG. 11: COMPOSITION OF THE COUNCILS FOR THE JUDICIARY ACCORDING TO THE NOMINATION PROCESS; SOURCE: EU JUSTICE SCOREBOARD 2020



Moreover, only in Poland is the authority which decides on disciplinary sanctions regarding ordinary judges selected by the Minister of Justice. This structural weakness of the system enables the ruling politicians to influence the disciplinary procedures in order to achieve their political goals, and the system can be easily converted into a tool for intimidation.

FIG. 12: AUTHORITY DECIDING ON DISCIPLINARY SANCTIONS REGARDING JUDGES; SOURCE: EU JUSTICE SCOREBOARD 2020



6. CONCLUSIONS

Almost five years of Law and Justice's policies in the area of the justice system have resulted in the deterioration of the rule of law and the quality of democratic institutions in Poland. In this report we have summarised the key violations and the state of the rule of law as of mid-2020 from both domestic and international perspectives. This is the first in a series of reports on this topic by the Civil Development Forum.

The re-election of President Andrzej Duda, the candidate of the ruling Law and Justice party, signals that we should expect a further deterioration of the rule of law in the future. Therefore, Polish civil society and the opposition have to be ready to defend what has not yet been captured by the ruling politicians. Moreover, it is important to be ready when the window of opportunity opens – an agenda for the defence of the rule of law is needed. On the one hand, this should include methods to reverse PiS's policies in accordance with the Polish Constitution and EU law. On the other hand, it would be not enough to simply return to the status quo of the year 2015, so real reform of the justice system is necessary. This topic will also be covered in our series of reports. In the meantime, it is essential that international public opinion be made aware of the current state of the rule of law in Poland.

While the conditionality of EU funds based on the rule of law was one of the issues negotiated recently in the European Council, the final decision to link payments with the rule of law has been watered down, and it is still too early to assess the effectiveness of this new mechanism. Nevertheless, the EU institutions have been active in the field of the rule of law in Poland, and in another report we will also analyse these activities, as well as the actions undertaken by other international organizations, so as to show what has been working the best so far and what can be done better in the future. The rule of law in Poland and other member states is important not only for the citizens of these countries, but also for the future of the European project as a club of countries with high-quality democratic institutions safeguarding human rights.

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Civil Development Forum (FOR Foundation) is a non-governmental think tank based in Poland promoting and defending economic freedom, the rule of law, individual liberties, private property, entrepreneurial activities, and ideas of limited government. Our activities are based on our vision of a society with favourable conditions for growth and productive activities, combining labour, entrepreneurship, innovation, saving, investment and obtaining knowledge. FOR aims to achieve its goals through fact-based reports and analysis, efficient communication and civil society mobilization.

Civil Development Forum was founded in 2007 by Professor Leszek Balcerowicz, former Deputy Prime Minister and Minister of Finance in the first non-communist government of Poland after the Second World War. FOR Foundation is a member of various networks of pro-liberty think tanks and NGOs – 4Liberty Network, Epicenter Network and Atlas Network. Our experts frequently appear in Polish and international media.

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