



White Paper on the Reform of the Polish Judiciary

THE CHANCELLERY OF THE PRIME MINISTER



WHITE PAPER
on the Reform of the Polish Judiciary

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LADIES AND GENTLEMEN,

Poland's judiciary reforms have stirred great interest in Poland and abroad in recent months. Irrespective of earlier doubts whether the application of the procedure of Article 7 the Treaty of the European Union in this case holds any ground, we are pleased to provide you with this White Paper. Its purpose is to explain that the criticism of the reforms is unfounded, but primarily to clear any doubts our European partners may have about the rule of law in Poland.

This paper, although lengthy, presents only a brief account of the reasons why Poland needs judicial reforms, and how they will make the judiciary more effective; it is also a comparative study of Polish and other EU countries' legislation, and presenting it in light of the international jurisdiction, as well as opinions and reports of organisations safeguarding the rule of law. Furthermore, we discuss some fundamental European values like the principle of constitutional pluralism and the need to account for the totalitarian past.

We are aware of the fact that there may be differences in the specific way laws in different Member States regulate their respective justice systems and that some measures operate better and some worse. However, our experts' analyses show that the new Polish legislation is not significantly different from regulations that have been in place for many years in countries with well-established democratic traditions – and that the laws on which our system is modelled have never been called into question by the European Commission or by organisations that guard the rule of law.

For the last weeks the Polish government continues an intensive dialogue with the European institutions, pointing to the reasons for the reform of the judiciary, and to its conformity with the rule of law. This White Paper is another step in this dialogue. Our government invites you to read it and would welcome any comments or questions you may consider relevant. It is our intention to explain our reforms as best as possible so as to leave no doubt that they are fully in line with European standards.

We put special attention today to the need for a reasoned and calm discussion. The way it has evolved so far has undermined the already low trust of the Polish public in the justice system. Sharp words were delivered by both the advocates and the critics of the reforms. We regret this fact and in presenting the White Paper to you, we would urge resorting to reasoned legal arguments in the ongoing discussion.

We are prepared for a constructive discussion based on facts and we believe that it will lead to a resolution that will be favourable both for Poland and the European Union.

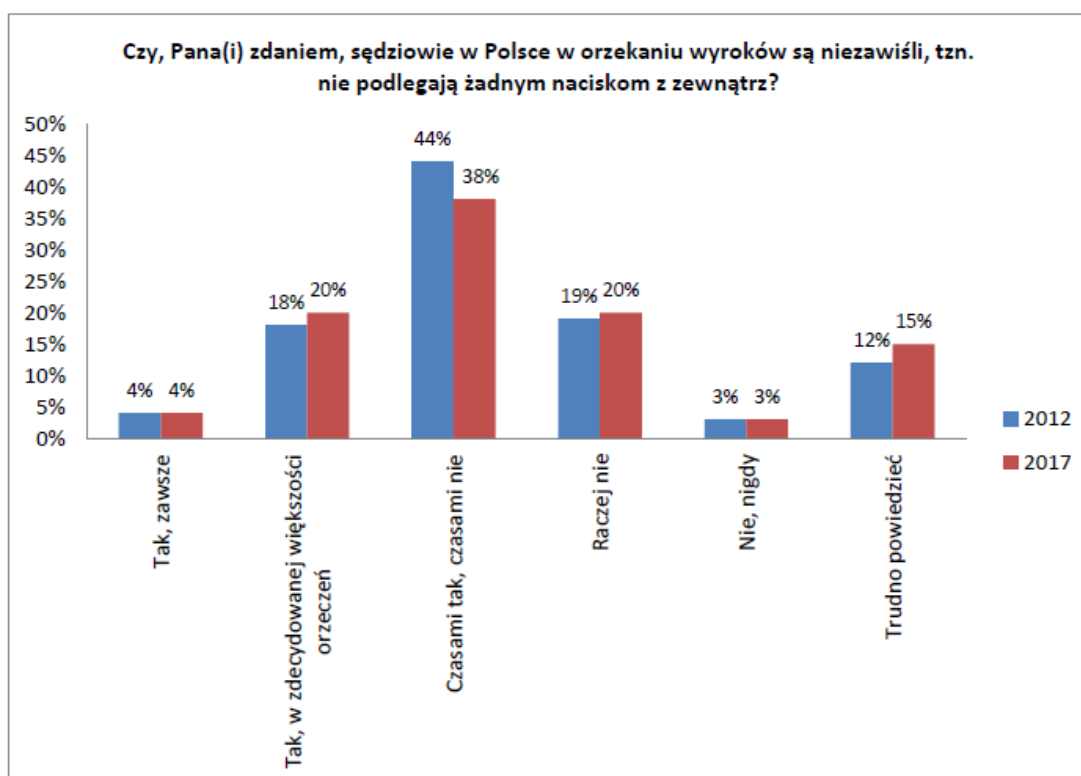
I. WHY DOES POLAND NEED TO REFORM ITS JUDICIARY?

LOW TRUST IN THE JUDICIARY

1. **Public trust in the Polish system of justice is at a very low level.** According to a 2017 World Justice Project survey (conducted before the reforms were introduced), it was markedly lower than in the majority of developed countries, with Poland ranking 24th out of 35 countries in its group. The factors rated lowest were **judicial constraints on government powers** (31st place), **judicial protection of fundamental civic rights** (31st place), and the **quality of civil and criminal justice** (28th and 26th place)¹.
2. In 2017 (also before the reforms), as few as **24% of our citizens believed that the courts and judges were independent “always” or “in the overwhelming majority of rulings.”** As many as 61% were of the opinion that the judges were not independent at all or were independent “occasionally”. Such sentiment has been at a consistent level for a long time; in 2012, 22% of citizens believed in judicial independence, with 66% being critical.²

¹ *WJP Rule of Law Index 2017-2018*, World Justice Project <http://data.worldjusticeproject.org/#/groups/POL> [available: 28.02.2018].

² *Assessment of the Polish Judiciary in surveys*, CourtWatch Polska, May 2017, s. 22; <https://courtwatch.pl/wp-content/uploads/2017/05/Raport-Fundacji-Court-Watch-Polska-Ocena-polskich-s%C4%85d%C3%B3w-w-%C5%9Bwietle-bada%C5%84-maj-2017.pdf> [available: 28.02.2018]



Źródło: Centrum Badania Opinii Społecznej. *Społeczne oceny wymiaru sprawiedliwości. Komunikat z badań nr 31/2017.*

Source: Centre for the Public Opinion Research.

Public assessment of the justice system. Statement no 31/2017

(In your opinion, do judges in Poland rule independently i.e. are not subject to any external pressure? Answers: Yes, always; Yes, in the great majority of rulings; Sometimes yes, sometimes not; Mostly not; No, never; Hard to say)

3. The judges themselves have not viewed the state of the judiciary too favourably either. **In a 2015 survey, only 35% said they believed promotions were based solely on merit, which is to say performance and experience.**³ In another study published in June 2017 (also before the reform of Poland's judiciary was introduced), 33.6% of the surveyed judges expressed such opinion,⁴ with improvement on this named as the second most important question regarding the Polish justice system. The only issue ranked higher by the judges was ensuring better working conditions when it comes to the caseload of individual judges.⁵

³ *Independence and Accountability of the Judiciary and of the Prosecution. ENCJ Report 2014-2015*, European Network of Councils for Judiciary, Hague 2015, p. 138

⁴ ENCJ Report on Independence, Accountability and Quality of the Judiciary – performance indicators 2017 adopted by the General Assembly, Paris 2017, p. 142.

⁵ *ibidem*, p. 62.

EXCESIVE LENGTH OF PROCEEDINGS

4. In 2016, there were 10,114 judges in Poland (26.2 per 100,000 citizens on average).⁶ **In the European Union, only Germany had more judges** (Poland was ranked 7th in a survey of 28 countries when it comes to the number of judges per citizen). In France – a country almost twice as big as Poland – there is less than 7.000 judges. Even adding lay judges (or other non-professional judges) to the equation leaves Poland with more adjudicating officials per citizen – there is 62 of them for every 100 000 inhabitants in Poland (48 in France). It is evident then that it is not staff shortages that cause excessive length of court proceedings.
5. The reason for it is not underfunding, either. To the contrary, **the relative level of public spending on the system of justice in Poland is very high** and stands at 1.77% of the central state budget⁷ (by far the highest percentage in the European Union) and at 0.35% of the GDP. Only Slovenia and Croatia have higher ratios⁸ (according to 2015 data, it was even higher, and Poland was just behind Bulgaria).⁹

⁶ A. Siemaszko, B. Gruszczyńska, M. Marczewski, P. Ostaszewski, A. Więcek-Durańska, *Judiciary. Poland against the backdrop of other EU countries*, Institute of Justice 2016, pp. 31-32.

⁷ *ibidem*, p. 17.

⁸ *ibidem*, p. 19.

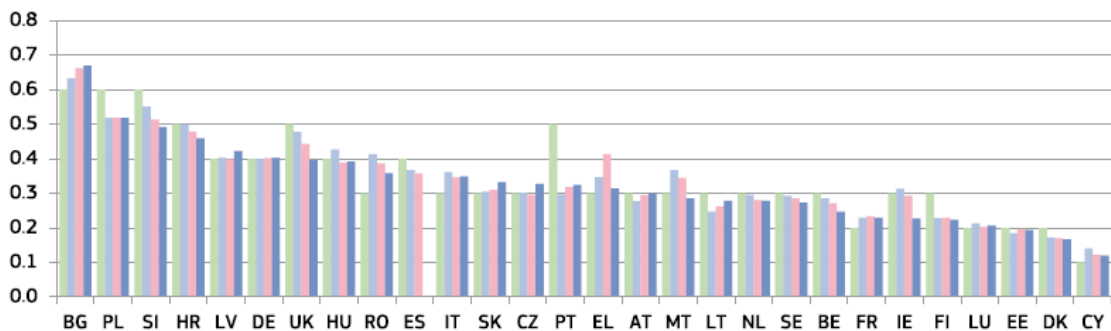
⁹ *Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions — The 2017 EU Justice Scoreboard*, European Commission, Brussels 2017, https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2017_en.pdf [available: 28.02.2018].

Figure 33

General government total expenditure on law courts (*) (as a percentage of GDP)

2010 2013 2014 2015

Source: Eurostat



(*) Data for NL, SK are provisional.

Source: 2017 EU Justice Scoreboard, p. 25.

6. Despite a comparatively large budget and a high number of judges, court proceedings are very ineffective. **In 2015, the European Court of Human Rights pointed out that excessive length of proceedings is a systemic problem in Poland**, and that it violates the European Convention on Human Rights.¹⁰
7. Excessive length of proceedings poses a problem not only for the judiciary; ineffective courts have a negative impact on the sense of economic security and consequently on investments and growth of national income. In *Doing Business*, the World Bank's regular survey, Poland ranks 55th in the world in enforcing contracts, **and 5th from the bottom out of 31 countries of the European Economic Area as far as the length of court proceedings is concerned.**¹¹
8. Other statistics give a slightly more efficient picture of the Polish justice system as compared with other European Union countries. For example, the *EU Justice Scoreboard 2017*, a report based on the European Commission on the Efficiency of the Judiciary (CEPEJ) data, concludes that the average disposition time of 1st instance civil and commercial litigious cases is 203

¹⁰ Rutkowski and Others v. Poland (ECHR No 72287/10, 13927/11 and 46187/11); [https://hudoc.echr.coe.int/eng#{"itemid":\["001-121178"\]}](https://hudoc.echr.coe.int/eng#{) [available: 28.02.2018]

¹¹ *Doing Business/Enforcing contracts*, The World Bank, http://www.doingbusiness.org/data/exploretopics/enforcing-contracts?dataPointCode=DB_ec_time [available: 28.02.2018].

days¹² - which would place the Polish justice system 13th in the European Union. However, these statistics could be unreliable: the data quoted there was collected in 2014 and the average score probably accounts for all types of civil and commercial litigious cases, including also hundreds of cases examined in writ-of-payment proceedings, which could lower this average for other cases. Irrespective of why this is so, **the length of proceedings has been systematically increasing.**

Table 5.7 Evolution of the Disposition Time of civil and commercial litigious cases between 2010 and 2014 (Q91)

States/entities	Disposition time of 1st instance civil and commercial litigious cases			
	2010	2012	2014	Trend
Poland	180	195	203	

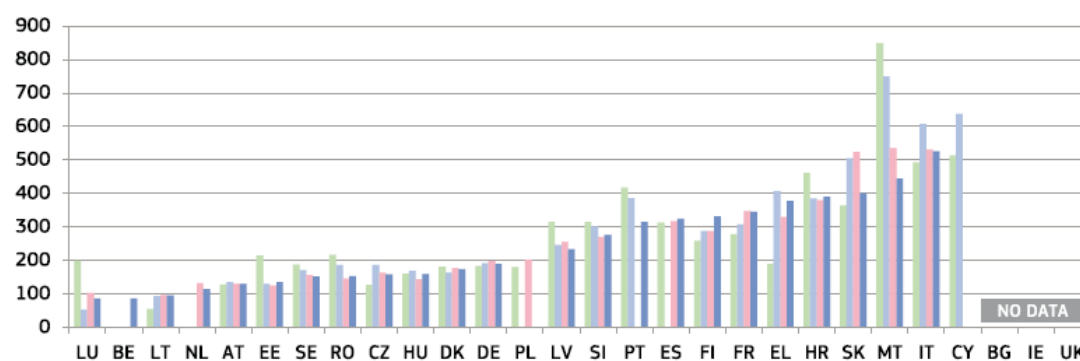
Source: CEPEJ Report European judicial systems. Efficiency and quality of justice – Edition 2016 (2014 data), p.197.

Figure 5

Time needed to resolve litigious civil and commercial cases (*) (1st instance/ in days)

2010 2013 2014 2015

Source: CEPEJ study



(*) Under the CEPEJ methodology, litigious civil/commercial cases concern disputes between parties, e.g. disputes regarding contracts. Non-litigious civil/commercial cases concern uncontested proceedings, e.g. uncontested payment orders. Methodology changes in CZ, HR, IT, HU, MT, PT, and FI. Pending cases include all instances in CZ and SK. Data for NL include non-litigious cases. DE: Data solely based on the statistics on the administration of justice published by the German Federal Statistical Office.

Source: 2017 EU Justice Scoreboard, p. 8.

¹² *Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions — The 2017 EU Justice Scoreboard*, European Commission, Brussels 2017, https://ec.europa.eu/info/sites/info/files/justice_scoreboard_2017_en.pdf [available: 28.02.2018].

9. Ministry of Justice data shows that in the first half of 2017 the average length of a typical litigious civil case pending before a district court was almost 11 months. Of the 250 thousand such cases registered at that time 60 thousand were pending for longer than one year. Commercial cases were even lengthier: the average time it took to close such case was over 14 months, and of the more than 49 thousand proceedings, nearly 50 percent (almost 22 thousand) lasted longer than one year¹³. Not surprisingly then as much as 49 percent of Poles considered that excessive length of proceedings is one of the most significant problems of the judiciary¹⁴.

2.5. Czas trwania postępowania sądowego (sprawność) od dnia pierwszej rejestracji do dnia uprawomocnienia się sprawy w I instancji (łącznie z czasem trwania mediacji) w sądach rejonowych w wybranych kategoriach spraw w I półroczu 2017 roku

Wyszczególnienie	Razem	do 3 miesięcy	powyżej 3 do 6 miesięcy	powyżej 6 do 12 miesięcy	powyżej 12 miesięcy do 2 lat	powyżej 2 do 3 lat	powyżej 3 do 5 lat	powyżej 5 do 8 lat	ponad 8 lat	Średni czas trwania postęp. sądowego (w mies.)
Sądy rejonowe	2 886 861	1 205 990	972 636	542 194	121 798	26 348	12 652	4 106	1 137	5,2
Sprawy cywilne	1 898 099	645 826	737 027	414 488	73 080	15 641	8 149	3 113	775	5,5
z tego:										
procesowe (rep. C)	248 372	25 736	61 549	99 333	45 221	10 133	4 475	1 534	391	10,9
Sprawy gospodarcze	246 073	74 749	89 056	56 976	18 833	4 331	1 790	305	33	6,5
z tego:										
procesowe (rep. GC)	49 299	2 575	7 046	17 746	16 194	3 976	1 564	172	26	14,1

Source: Key facts on the operation of common courts of law – 1st half of 2017 compared to earlier statistical periods, Warsaw, July 2017

(The length of court proceedings (efficiency) from the date of first registration until the day a case in 1st instance court becomes final and valid (including the time of mediation) in district courts in selected categories of cases in the 1st half of 2017

Total | 3 months or less | over 3 to 6 months | over 6 to 12 months | over 12 months to 2 years | over 2 to 3 years | over 3 to 5 years, over 5 to 8 years | over 8 years | the average length of court proceedings (in months)

District courts | Civil cases | of which: | litigious cases (repertory C) | Commercial cases |of which: | litigious cases (repertory GC)

¹³ Key facts on the operation of common courts of law – 1st half of 2017 compared to earlier statistical periods, Warsaw, July 2017

¹⁴ Assessment of the Polish Judiciary in surveys. CourtWatch Polska Foundation, May 2017, p.5

FAILURE TO ACCOUNT FOR THE COMMUNIST PAST

10. Another major issue is the **lack of a practical method to hold to account judges who were directly and shamefully involved with the communist system**. There are still sitting Supreme Court judges who used to impose long prison sentences on opposition activists for handing out flyers, organizing strikes, and marching in street demonstrations during martial law that was imposed in Poland in the 1980s – and also the judges who were members of the communist party.
11. As recently as 2007, nearly **20 years after the collapse of communism, the Supreme Court adopted a resolution¹⁵ which virtually absolved all judges from responsibility** for the unlawful rulings delivered during martial law in the 1980s. The resolution was issued in a case related to a judge who had sentenced one opposition activist to a six-years term in prison. The adjudicating panel included a judge who was a former member of the Polish United Workers' Party.
12. Judges and prosecutors were involved in the communist system to a very wide extent. It was most intensive in the Stalinist era, when the courts – staffed with communist security service officers – sentenced many Polish underground soldiers to death or lengthy jail terms. The verdicts were issued in kangaroo courts, often preceded with tortures and with no right to a proper legal defence (sometimes the state would grant the defendants public attorneys that argued their "clients" are guilty and should be severely punished).

Captain Witold Pilecki case

During World War II Captain Witold Pilecki deliberately let the Nazis apprehend him in a street roundup and be transferred to Auschwitz – to collect intelligence about it and deliver it to the Allies. He managed to get inside the camp and survive there for almost 3 years, organizing underground within it and making preparations for taking control of the camp. After a successful escape from Auschwitz he further served in the Polish Home Army and other underground forces.

¹⁵ Resolution of the Supreme Court of 20 December 2007, file no I KZP 37/07.

After the war has ended, Poland was occupied by the Soviets, and cpt. Pilecki intended to organize resistance against the new oppressors. He was finally captured in 1947, and after tortures and a show trial he was sentenced to death and executed on 25 May 1948.

General August Emil Fieldorf „Nil” case

Gen. Fieldorf was one of the leaders of the Polish Home Army. Right before World War II ended he was captured by the soviet NKVD, and then transferred to a Gulag in Siberia. After coming back to Poland, he was insidiously convinced to reveal his involvement with the Home Army – that the soviets considered an enemy organisation.

In 1950 gen. Fieldorf was arrested on the account on fighting against the soviets and later – after tortures and a trial before a kangaroo court – sentenced to death and executed on 24 February 1953.

13. **The judges that issued those verdicts (and hundreds more alike) were never held accountable.** Some of them had already died before 1989, some peacefully lived in the free Poland (or emigrated) after the collapse of communism. That was the fate of judges Igor Andrejew and Maria Gurowska, who sentenced gen. Fieldorf to death – they never heard any sentences themselves (Andrejew died in 1995, Gurowska – in 2002). Another one who has never been held accountable is Mieczysław Widaj, who between 1945 and 1953 sentenced 106 soldiers of the Polish resistance army to a capital punishment; democratic Poland after 1989 paid the judge high pension until his death in 2008.
14. Severe verdicts were issued also after Stalin's death. Capital punishment was applied to people accused by the communists of economic crimes. Death sentences were delivered in the trials of Bolesław Dedo in 1960 (he was eventually "pardoned" and given a sentence of a life imprisonment) or Stanisław Wawrzecki in 1965 (he was executed). The trials were carried out extraordinarily hasty and the defendants had no right to appeal. The judges delivering these verdicts were never held accountable, either.
15. Judges' involvement in the communist regime continued in the following years. Severity of judgments varied, but until 1989 all anti-government activity

was subject to prison. Jail terms were applied in verdicts delivered in the 50s (e.g. for protesters in Poznań in 1956), in the 60s (towards students protesting censorship and anti-Semitic witch-hunt orchestrated by the communists), or in the 70s (against workers' union organisers and opposition group members).

16. The repression was stronger again in the 80s. In 1981 a martial law was introduced, and the courts were sentencing people to prison in hasty proceedings, with no real right to defence against the accusations of "crimes" such as organizing strikes, activity in workers' unions, distributing leaflets, sticking posters, or even *"spreading false claims on political and economic relations between Poland and USSR"*.
17. Vast majority of judges issuing these verdicts could freely continue their careers in Poland after 1989. Even though in the Supreme Court there was a shift in 1990 and a considerable part of its staff was replaced, **lower courts were never de-communised in any way**. Gradually, judges of these courts – including those involved in persecution of human rights – made progress and were promoted, achieving in some cases the highest court of the country.

In the Supreme Court there are currently sitting judges that during the martial war issued sentences such as:

3 years and 6 months of imprisonment – for printing and distributing leaflets *"containing sneers at major institutions of the Peoples' Republic of Poland"*;

3 years of imprisonment – for an activity in workers' union;

3 years and 6 months of imprisonment – for organizing strikes;

3 years of imprisonment – for spreading false claims on political and economic relations between Poland and USSR and on situation in the country;

2 years of imprisonment – for distributing anti-socialist materials;

2 years of imprisonment – for *"sneering at the organization and major institutions of the Peoples' Republic of Poland"*;

1 year and 6 months of imprisonment – for creating and running an opposition group;

1 year and 6 months of imprisonment – for spreading false claims on political and economic relations between Poland and USSR and on situation in the country;

1 year of imprisonment and 1 year of deprivation of public rights – for sticking anti-communist posters;

3 years of imprisonment – for spreading leaflets critical towards institutions of the state;

6 months of imprisonment – for spreading false claims on political and economic relations between Poland and USSR and on situation in the country;

2 years of imprisonment – for distributing leaflets;

1 year and 6 months of imprisonment – also for distributing leaflets;

1 year of imprisonment – for calling co-workers to strike;

10 months of imprisonment – for persuading union members to strike and to distribute NSZZ „Solidarity” union materials among them;

18. Some of these judges are still largely uncritical about their attitude at the time. **This January, more than 30 years after martial law**, one of the Supreme Court judges stated that **the fact that he had handed down a prison sentence of one year or 10 months after the accelerated procedure was waived “was in itself an expression of the attitude of protest against martial law.”**¹⁶ The penalties were imposed for organizing workers’ strikes.
19. Another judge, who had sentenced a woman taking part in an anti-communist manifestation to 8 months in prison (she was accused of infringing the bodily integrity of a ZOMO officer – brutal communist riot police), **claims to this day that “evidence collected in the case clearly pointed to the accused as perpetrator;** moreover, [...], the defence counsel only appealed against the decision on penalty, he did not challenge the guilt.” He also believes to have

¹⁶ Statement by Supreme Court Justice Andrzej Siuchniński of 26 January 2018, <http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/NewForm/2018.01.26%20%C5%9Bwiadczenie%20SSN%20Andrzeja%20Siuchni%C5%84skiego.pdf> [available: 28.02.2018].

been acting on the basis and within the limits of law, and states he did not contravene the principle of independence.¹⁷

20. Continuous presence of these judges in the Supreme Court sparks outrage of a considerable part of Polish society and is hard to accept by people who suffered communist oppression before 1989. As the abovementioned ruling of 2007 shows, their presence has also had practical consequences when it came to adjudicating cases related to totalitarian regime.
21. This impact was visibly manifested in inability or unwillingness to hold accountable those responsible for communist crimes committed before 1989. For almost 30 years Polish judiciary could not efficiently deal with crimes such as murder of 9 miners (and hurting over 40 more) in the mines "Wujek" and "Manifest Lipcowy" during the martial law in 1981, or murder of over 40 workers protesting during the strikes in 1970. Judgments in these cases were either never delivered, or it took years to do it (the sentence concerning "Wujek" mine was finally binding in 2009 – 20 years after the collapse of communism).
22. And these verdicts only sentenced direct perpetrators (communist police and army officers that pulled the trigger) – and merely to symbolic terms (few years imprisonment for participating in murder). Communist leaders were never held accountable. Courts could have not closed the cases of:
 - Stanisław Kociołek – co-responsible for the massacre of workers in 1970 (41 killed and over 1000 wounded), his trials started in 1995 and were never concluded until his death in 2015;
 - Wojciech Jaruzelski – also co-responsible for the 1970 massacre, as well as the martial law in 1981 (tens of people killed) and anti-Semitic cleansing in 1968; his trials started in 2008 and were also not concluded until Jaruzelski's death in 2014;
 - Czesław Kiszczak – chief of the communist security service, co-responsible for the martial law; Kiszczak was finally sentenced in 2015 to a symbolic punishment of 2 years suspended sentence.

¹⁷ Statement by Supreme Court Justice Waldemar Pióciennik of 30 January 2018, <http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/NewForm/2018.01.30%20%C5%9Bwiadczenie%20SSN%20Waldemar%20P%C5%82%C3%B3ciennik.pdf> [available: 28.02.2018].

23. In XX century Europe has witnessed birth and then demise of fascism, Nazism and communism. These experiences are at the roots of European integration – its main purpose was to assure peace among the nations of Europe and to safeguard civil rights of the citizens. Accounting for the crimes of totalitarian regimes, including judicial murders and other crimes committed by the judiciary, is undoubtedly one of the most basic values of the European Union.
24. Rule of law that the EU safeguards is definitely one of its most important values, as well. The judges – especially those serving in the highest court of the country – play a vital role of its guardians, and the judge's prestige is the foundation of the rule of law. **If this function is to be exercised by people who were entangled in a dishonorable service to totalitarian or authoritarian systems and did not guard the law but abused it to persecute human rights and civil liberties, it negatively affects the public trust in the judiciary – and thus the rule of law itself.** Even though almost 30 years have passed since the collapse of communism and some of the judges involved in it have already left their posts, this issue still needs to be addressed – as it casts long shadow on the whole justice system.

IMBALANCE BETWEEN POWERS

25. A related problem is **the peculiar bureaucratic corporate culture which has emerged in the Polish administration of justice**. Citizens view the courts as a closed community that is very difficult to access, and consider procedures to be complex and incomprehensible. There is a general sense that the courts are dominated by the “cult of formalism”; in other words, it is more important that a judgement be justified on formal grounds rather than for it to be actually fair.¹⁸ This culture stems not only from intricate procedural provisions, but also from the **disruption of the mechanism of tripartite separation of powers**, which, under the Polish Constitution, **should be based not only on the separation of, but also on the balance** between its branches.
26. The existing model of judicial appointments and assessment of court performance placed practically exclusive control in the hands of judges themselves, **without any external agents being able to influence these processes. This violated the balance between the judiciary and the two other powers.**

Article 10 (1) of the Polish Constitution

*“The system of government of the Republic of Poland shall be based on the **separation of and balance between** the legislative, executive and judicial powers.”*

27. The citizens were deprived of the ability to exert such influence either, even though Article 182 of the Constitution provides them with a guarantee to that effect by ensuring participation of lay judges in court proceedings. This also resulted in ineffective disciplinary procedures; there was a general sentiment that accountability had so far been illusory, with judges avoiding holding their colleagues to account out of a sense of group solidarity, which is natural in every profession. It was a factor that further undermined the already low trust in the Polish judiciary.

¹⁸ J. Sokołowski, *Revolution and balance. Proposition for a complex reform of the judiciary*, Analytical Centre of the Jagiellonian Club, Warsaw 2017, <http://cakj.pl/wp-content/uploads/2017/11/Raport-5-2017.pdf>

28. Polish judges enjoy very extensive immunity. Without the consent of the court in which they hold their office or the consent of the judges themselves, they cannot be charged with a crime or even petty offense (including traffic violations). This solution is very legitimate in principle, as it protects judges against groundless charges and greatly enhances their independence. In practice, however, there were situations where judicial immunity was abused, leading to unwanted effects.

Article 181 of the Polish Constitution

*"A judge **shall not, without prior consent granted by a court specified by statute, be held criminally responsible nor deprived of liberty.** A judge shall be neither detained nor arrested, except for cases when he has been apprehended in the commission of an offence and in which his detention is necessary for securing the proper course of proceedings. **The president of the competent local court shall be forthwith notified of any such detention and may order an immediate release of the person detained.**"*

29. In 2013-2016, penalties for committing judicial misconduct were ruled in 166 proceedings (there were 322 such proceedings overall). In ten cases, the penalties were the most severe leading to the removal of judge from office. **In as many as 50 cases (almost 1/6 of all), no penalties for committing judicial misconduct were ruled for reasons other than acquittal,** that is because the case became time-barred, the limitations period ran out, or the fact that proceedings were discontinued for other reasons.
30. Low efficiency of disciplinary proceedings also raises public dissatisfaction and diminishes public trust in judiciary – especially that there were many outrageous cases involving judges:
- in 2009 a Supreme Court Judge advised another judge (of the Supreme Administrative Court) how to prepare a cassation – and then "asked for benevolence" of a judge that was to adjudicate it; none of the judges was held accountable – the case fell under statute of limitations;
 - in 2012 president of the Regional Court of Gdańsk thought that he was on the phone with the Chancellery of the Prime Minister and settled details of how and when one sensitive (also politically) case should be

resolved – in fact it was a journalist on the phone who recorded and later published the conversation; the judge was not expelled from office, he was only punished with moving to a different post and still adjudicates;

- president and director of Appeals Court in Krakow (highest level of common courts in Poland) were charged with involvement in organized crime group and accepting bribes, as well as exposing the court to a loss of 21 million złoty (approx. 5M €); their trial started in December 2017;
- one district court judge was involved in usury – he lent money at extraordinarily high interest rate (40% per year), and then intimidated and harassed his debtors; disciplinary procedures fell under statute of limitations in 2016.

31. Obviously, given the size of this group – over 10,000 people – there are bound to be some “black sheep” who break their oath of office. **The problem with Poland’s judiciary is not, however, that such people exist, but that the system cannot effectively eliminate them from its ranks and to effectively bar them** from administering justice.

Ineffective disciplinary proceedings

A good example is the case of a judge at one of the court of appeal (the highest level of common courts in Poland). The prosecutor’s office intended to charge him with two counts of theft of electronic equipment (worth approx. PLN 4,000), committed together and in collusion with another person in January and February 2017.

On 9 February 2017, the other person was charged, and criminal proceedings were instigated against her. In order to bring the same charge against the judge, it was necessary to revoke his immunity. **This alone took over 12 months** – the immunity was finally lifted on 27 February 2018.

Another judge, of one of the regional courts, was charged with shoplifting in June 2016. Even so, **he was able to adjudicate for another 6 months and was not suspended by a disciplinary court until early 2017**. Ultimately, the judge was dismissed in November 2017; the verdict is not yet final.

32. **All those examples were not invoked to stigmatize the judges or to accuse them, as a profession, of illegal acts.** Majority of judges undoubtedly have never committed any such acts. Despite that, the inability to point out and to expel from office those members of the judiciary that have done so, certainly affected the public trust towards the whole group. Procedures were ineffective, proceedings took too long, and relatively frequently ended without conviction due to statute of limitations. Also for this reason some part of the society views the judges as a closed, self-supporting group of colleagues, acting on principles of a specific, distorted professional solidarity.

IDEA: RESTORING BALANCE, STRENGTHENING ORDINARY JUDGES, DEMOCRATIZATION

33. It should be made clear that **subordinating the judiciary to other branches of government cannot be a solution to all the problems described above. The sole purpose of the reform is to redress the balance, while safeguarding and even enhancing all guarantees of independence**, and to create mechanisms that would prevent the ills which the judges have not been able to fix on their own.
34. The judiciary must remain independent from other powers – and it will remain so. The reforms do not introduce any mechanism which would let the legislative or executive branch affect – directly, or even indirectly – the judicial verdicts. To the contrary, along with already existing very strong guarantees of independence, new provisions are introduced that further strengthen judges position towards the court administration, and thus the Minister of Justice as well.
35. The aforementioned problems of the judiciary call for action in at least three fields. These include:
- reforming ineffective procedures;
 - changing the organisation and staffing structure of the administration of justice;
 - making the administration of justice more accessible to citizens.

Only comprehensive change covering each of these fields will make it possible to improve the quality of the judiciary, and to rebuild public trust in the third power.

36. We are confident that **all the introduced changes will help to remedy the shortcomings of Poland's judiciary, and that they are fully in line with the standards underpinning the European Union.**

II. EUROPEAN COMMISSION'S REMARKS AGAINST THE BACKDROP OF THE LEGAL SYSTEM IN POLAND AND IN OTHER EU MEMBER STATES

37. According to the Commission, nearly all changes introduced to Poland's judiciary over the past two years represent a threat to the rule of law. In its proposal under Art. 7 of the Treaty on European Union, the Commission states they lead to an increased influence of the legislative branch on the composition, powers, and administration of judicial authorities, ultimately producing a risk of a breach of the principle of separation of powers.
38. In its analyses, the Commission seems to overlook three issues. First, **the principle of separation of powers is inextricably linked with the principle of checks and balances**. The changes recently introduced by the Polish government have restored the checks and balances, which were until recently significantly disrupted—and that is not only in the interest of the general public, but also judges themselves.
39. The judiciary has so far retained (and will continue to retain) full independence from other branches, but **no effective mechanisms were in place that could address the pathologies within the system of justice that made judges dependent on sympathies and antipathies within their community, thus undermining their internal independence**.
40. Second, **all changes recently introduced into Poland's judiciary are in harmony with long-standing standards in other European Union countries and the regulations that were in the Polish legal system before**. That is the case with the reformed procedures, structural and personnel changes in the judiciary, as well as new appeal remedies available to the public.
41. It is obvious that the new Polish regulations are not an exact copy of the Spanish, British, German or French legislation. It is completely natural for the legal regimes of specific EU Member States to differ. Such differences stem from distinctive national and legal identities, which are protected by the European Union's treaty law. However, those differences are not significant enough (e.g. mechanism of appointing judicial members for the National

Council of the Judiciary varies from Spanish system only in details) to warrant claims that solutions resembling regulations that have proved themselves in other EU countries for years (and that have never presented any threat to the rule of law) should violate the tripartite separation of powers in Poland.

42. Third, **the Commission—while accusing Poland of arbitrarily picking features of diverse legal systems and putting them together into one— itself fails to take note of a big portion of solutions that either have been here for a long time or have been introduced by the recent changes.** The first category should include provisions about the very broad judicial immunity, the appointment of judges solely from candidates put forward by the judicial community, and the life-long status of a judge. The other one should include the new provisions on random allocation of cases, the ban on transferring judges between court divisions, or on greater influence of rank-and-file judges on the composition of the National Council of the Judiciary.
43. **By so doing, the Commission—censuring Poland for cherry-picking— actually embraces that approach itself,** ignoring those features in our legal system that provide for proper safeguards of judicial independence and render concerns about threats to the rule of law groundless.
44. It is also worth indicating that the content of acts adopted in December 2017 significantly varies from the regulations that were vetoed by the President of the Republic of Poland in July 2017. Most importantly, the rules for electing judicial members of the National Council of the Judiciary changed (now only other judges or a group of 2.000 citizens may put forward their candidates – political institutions were deprived of such competence). The role of the Minister of Justice was also decreased – some of its powers were attributed to the President. It shows that Poland is open to dialogue with critics of the reforms.
45. In the latter part of this document we explain the changes that were introduced to the polish judiciary, what are the reasons for introducing them, their intended effect and what other legal systems inspired particular regulations. We also present a number of opinions and reports of the Venice Commission and other international organisations, as well as quotes of judges themselves and other legal scholars – indicating that the model of judiciary as amended by the reform not only does not deviate from European

standards, but is desirable in many aspects, especially from the point of view of separation and balance between powers.

46. Certain tension between the executive, the legislative and the judiciary lies in the very nature of democratic systems – it is inherent to the very idea of separation between powers. Intensive debate over the direction of the reforms proves that Polish democratic system works really well and functions properly. Debates as such took place before and will continue to take place, in other EU-countries as well. We believe that this document will contribute to a further reasoned dialogue about those issues – and that it will be a basis to achieve a solution desirable both for Poland and for the European Union.

III. PROCEEDINGS REFORM

The system so far:

- Proceedings are lengthy, complicated and ineffective – according to the Ministry of Justice data average time needed to resolve a civil litigation before a district court amounted to almost 11 months (14 months in commercial cases).
- There are no provisions in the civil procedure code that would require both the court and the parties to act with efficiency (it is a non-written rule that hearings are scheduled every couple of months, instead being planned at once with shorter breaks between them).
- As a result, vast part of Polish society does not believe that there is a legitimate reason to seek justice before a court of law – the perspective of obtaining the final verdict after a very long time (not mentioning the time needed to have it enforced) discourages from litigation and creates the feeling of no real protection of civil rights by the state.
- Protracted proceedings and its low efficiency pertained also to disciplinary proceedings – between 2013 and 2016 almost 1/6 of such cases ended with none disciplinary measures for reasons other than acquittal (i.e. statute of limitations or discontinuation).

Significant changes:

- A new code of civil proceedings will introduce an obligation for the court to set an organizational hearing, for detailed planning the rest of proceedings.
- All further hearings should be scheduled upfront, so that there would not be several months' periods between them (save for extraordinary circumstances) – this should accelerate the proceedings and minimize pointless waiting for any activity in the case.
- A new recourse – extraordinary appeal – widens the scope of civil rights protection. The Ombudsman or the Prosecutor General will be authorized to lodge it in case that principles or freedoms and human and civil rights **laid**

down in the Constitution have been violated, in the event of another **flagrant violation of law** or when there is **an obvious contradiction between significant material findings** of the court and the evidence collected in the case.

- In disciplinary proceedings statute of limitations term was extended to 5 years (8 – if the proceedings are initiated). Lay judges will also be involved, thus extending transparency and citizens' participation in the administration of justice (provided by the Constitution). On the other hand, the judges shall retain majority (or exclusivity in some cases) in all disciplinary panels – therefore there is threat to judicial independence.

Effect of the reform:

- Swift proceedings will enhance the level of citizens' rights protection – and thus the rule of law in general.
- Shortening the time of case resolution will **diminish economic risks** of contracting; in case the other party fails to perform it would be easier and quicker to seek redress before the court of law.
- It should overall account to **increase of legal safety**, and also to **greater social trust** – both towards the state and between the citizens.
- Extraordinary appeal does not threaten stability of judgments in any way. It may be lodged only by public authorities in exceptional circumstances. These regulations are similar to a special cassation procedure in criminal proceedings that exists in the Polish legal system for years (and there is **no time-frame for lodging it**). Prosecutor General exercises this recourse as rare as 300 times per 11 million verdicts each year.
- There is also a similar remedy **in the French law** (*cassation dans l'intérêt de la loi* – art. 620–621 of the French criminal procedure code). Lodging it is **also not limited by any term**.
- Public participation in administering disciplinary Justice is **part of the British legal system** – in every adjudicating panel in England and Wales there are two judges and two other persons, none of which may even be a lawyer.

ACCELERATION OF PROCEEDINGS

47. **The excessive length of proceedings is one of the major ills of Poland's judiciary.** To tackle this problem, it is not only necessary to replace court staff with younger and more dynamic personnel, but above all to reform procedures.
48. **Work on these reforms is very advanced.** In November 2017, the Ministry of Justice proposed significant amendments to the Code of Civil Procedure that would make it obligatory to set sittings at which a plan for every case would be organised, and to fix several dates of hearings at one time, instead of setting them individually every few months.
49. The central principle of the reform is to **reduce the time between specific actions in the course of a trial.** To that end, both the court and the parties to proceedings are required to undertake such actions at short intervals so as to eliminate unnecessary delay, which is commonplace today at practically every stage of the trial. We are aiming at a situation where the parties know from the very beginning of the trial what the court expects of them, which circumstances are relevant to the case, and what evidence will be heard.
50. The reform of the Code of Civil Procedure has now reached the stage of public consultations with representatives of courts, the legal professions and social organizations. The legislative process is fully open to all interested parties and the Ministry of Justice has responded to suggestions made by citizens by modifying its own proposals (like the proposal to change court fees).

EXTRAORDINARY APPEAL

51. The introduction of extraordinary appeal aims to expand the legal protection of citizens. It is intended to ensure appropriate protection of fundamental rights and freedoms guaranteed by the Constitution. **The appeal may be lodged in the event that the principles or freedoms and human and civil rights laid down in the Constitution have been violated, in the event of another flagrant violation of law or when an obvious contradiction**

between significant material findings of the court and the evidence collected in the case.

52. The extraordinary appeal is allowable provided a ruling may not be annulled or changed by other extraordinary means of appeal. Practice shows that final rulings which are flagrantly unjust or based on wrong interpretations of the law do appear in legal relations. By introducing an additional institution for extraordinary review of court rulings to the Polish legal system, citizens will be guaranteed wider access to courts, and will enjoy enhanced protection of their rights.
53. At the same time, the new **regulations have been designed to ensure the stability of court rulings, and to maintain legal certainty.** The appeal may only be lodged by state institutions (the Ombudsman or the Prosecutor General and several other entities in a much narrower scope) – which ensures that it will only be brought if these bodies find the appeal really necessary
54. The mere act of lodging an appeal will not affect the legal validity and enforceability of the rulings against which it has been brought. The bodies eligible to file an appeal will only include the public authorities specified by statute, and **only rulings deemed defective by the Supreme Court will be removed from the legal order.**

Article 89 (2) of the Supreme Court Law

(date of entry into force: 3 April 2018)

§ 2. The extraordinary appeal may be lodged by the Prosecutor General, the Commissioner for Citizens' Rights and, within the scope of their competence, the President of the General Counsel to the Republic of Poland, the Commissioner for Children's Rights, the Commissioner for Patients' Rights, the Chair of the Polish Financial Supervision Authority, the Financial Ombudsman, and the President of the Office of Competition and Consumer Protection.

55. The interim provision of Article 115 (1) of the Supreme Court Law makes it possible to bring an extraordinary appeal against all final rulings that end proceedings in cases which became final after 17 October 1997 (i.e. after the date of entry into force of the Polish Constitution). Appeals against such rulings may be lodged within 3 years of the entry into force of the new

Supreme Court Law. Despite fears, this does not present any threat to the stability of jurisprudence, which is guaranteed by Article 115 (2) of this Law.

Article 115 (2) of the Supreme Court Law

*If 5 years have passed since the date on which the ruling which has been appealed against became final, and the ruling has had irreversible legal effects, or the principles or freedoms and human and citizens' rights laid down in the Constitution so warrant, the Supreme Court may **limit itself to holding that the ruling which has been appealed against was issued unlawfully** and to indicating the circumstances which have prompted it to deliver such a determination.*

56. As in all other court cases, the decision in this case remains within the exclusive competence of independent judges. Without a Supreme Court ruling no verdict shall be annulled or changed – and will remain binding.
57. The extraordinary appeal, criticised by the Commission as a measure undermining certainty of court rulings, is not a Polish invention. **A similar measure, *cassation dans l'intérêt de la loi*** (appeal in the interests of the good administration of justice) **exists in French law¹⁹**. It allows to overturn a final court decision which flagrantly violates the law and as such could not be reconciled with the principle of the rule of law.
58. Moreover, measures allowing to overturn final court rulings have been present in the Polish legislation for a long time. The mechanism of lodging extraordinary appeal very much resembles the procedure of cassation in criminal cases (in force since 1998), which gives the Prosecutor General and the Commissioner for Citizens' Rights (the Ombudsman) the right to challenge every verdict, without any time limitations.

Article 521 of the Code of Criminal Procedure

§ 1. The Minister of Justice – the Prosecutor General and also the Commissioner for Citizens' Rights may bring a cassation appeal against any valid and final judgment concluding court proceedings.

¹⁹ Articles 620-621 of the French Code of Criminal procedure (*Code de procédure pénale*)

§ 2. The Commissioner for Children's Rights may bring a cassation appeal against any final judgment of the court concluding the proceedings if the child's rights have been violated by issuing the decision.

§ 3. The bodies referred to in § 1 and 2 have the right to demand access to court and prosecution files as well as files of other law enforcement authorities after the conclusion of the proceedings and the passing of the decision.

Article 524 of the Code of Criminal Procedure

§ 1. The time limit for filing cassation by the parties shall be 30 days from the date on which the judgment with reasons was served. The motion requesting the service of the judgment with reasons should be filed with the court which rendered the judgment within the final time-limit of 7 days from the date it is announced, and if the act foresees service of the judgment, from the date it was served. Article 445 § 2 shall apply accordingly.

§ 2. The time limit set forth in § 1 shall not apply to the cassation brought by the Minister of Justice – the Prosecutor General and the Commissioner for Citizens' Rights and the Commissioner for Children's Rights.

59. Despite the existence of this provision, cassation appeals are rarely brought under this procedure. In 2013, the Prosecutor General brought 298 of them, in 2014 – 250, in 2015 – 220, in 2016 – 196, and in 2017 – 318. Bearing in mind that **in 2016 alone, over 11 million criminal cases were substantively settled**, the figures prove that cassation lodged as foreseen in Article 521 of the Code of Criminal Procedure is in fact an extraordinary measure applied solely in exceptional cases.
60. It is possible that the extraordinary appeal foreseen in the new law on the Supreme Court will be lodged more often, at least initially (given that it was not possible to make use of such a measure up until now), yet **requirements concerning this measure are so strict that there is no risk that it might endanger the stability of court rulings**. The hypothesis put forward by the Commission that once extraordinary appeal is introduced verdicts passed

in the last 20 years will be overturned on a massive scale is absolutely improbable.

DISCIPLINARY PROCEEDINGS

61. **New regulations are designed to prevent situations when judges avoid disciplinary responsibility solely because the statute of limitations.** Its term is extended: so far it was only 3 years (and if the proceedings were initiated – 5 years). It has led many cases to be discontinued, because disciplinary courts were unable to conclude them (it requires preparatory proceedings and a two-instance court trial). New provisions extended these terms to 5 and 8 years, respectively. This should minimize the number of situations when a judge avoids responsibility not because they are not guilty – but because of the statute of limitations.
62. **Democratisation also stands for more public influence on judicial disciplinary accountability.** New laws establish a separate Disciplinary Chamber at the Supreme Court for hearing disciplinary proceedings, with the participation of a public constituent in the form of lay judges elected by the Senate. The change will allow greater transparency of proceedings, while leaving intact the guarantees of judicial independence. **In disciplinary cases, judges will have a majority on each bench**, in other words there will never be a situation when any external authority decides on imposing a disciplinary sanction on a judge.
63. The solutions concerning judicial disciplinary proceedings are also reflected in the legal systems of other EU member states. Including lay judges in the process of adjudication (with minority vote) **resembles the British solution**, where the procedure foresees that the panel adjudicating about disciplinary misconduct must always be composed of – next to two judges – two other persons, none of whom can be a judge or even a lawyer²⁰. **It is meant to ensure that disciplinary proceedings are transparent on the one hand, and on the other to prevent the temptation to assess peers more leniently, without any engagement of external factors.**

²⁰ The Judicial Discipline (Prescribed Procedures) Regulations 2014, Article 11

64. Participation of the Minister of Justice in disciplinary proceedings of judges is to ensure that such proceedings will take place in cases where judges themselves would unduly refuse to initiate them. As was pointed out above, the Polish judiciary is struggling with inefficiency also as regards disciplinary proceedings, which makes the society perceive judges as a group protecting each other's own interests. Addressing this problem should improve public trust in judiciary.
65. Minister of Justice will have indirect influence on some cases – but **only during preliminary phase**. It will be carried out by a disciplinary officer appointed by the Minister to handle a case. Implementing this regulation is an answer to the problem of excessive length of disciplinary proceedings and frequent discontinuation of cases due to statute of limitations.
66. It must be emphasized that the role of the Minister of Justice is to be limited solely to the preliminary, preparatory disciplinary proceedings; **in the main phase, proceedings will be conducted by disciplinary courts, the rulings of which will not be impacted in any way by the Minister (and no one else)**. It is a fundamental rule of court proceedings – rooted even in the Roman law – that the functions of prosecutor and judge are separated. This rule is preserved in the new regulations – and that is why there is no risk at all that an external force would influence the decision on disciplinary sanctions and thus affect judicial independence.

IV. JUDICIAL INDEPENDENCE

The system so far:

- Court presidents could transfer judges between court divisions even without their consent (e.g. a criminal division judge – to a civil division); it granted them an instrument to potentially pressure judges “defiant” towards the court president (and indirectly – towards the Minister of Justice).
- The cases were allocated by court division heads (there was an alphabetical order in criminal proceedings, but the division head could waive it and hand-pick a judge “if necessary”).
- The Minister of Justice could only appoint court presidents in appellate and regional courts (not even 15% courts in Poland). There was no such competence for the Minister in district courts, thus the minister had no real instrument to react on inefficiency in their management.

Significant changes:

- New law on composition of common courts **directly forbids transferring judges between court divisions without their consent**. It only may happen in exceptional circumstances – and the judge has the right to appeal the decision.;
- **Cases are now allocated randomly**, by a computerized system. Head of division (and – indirectly – the court president or the Minister of Justice) is no longer able to manipulate the adjudicating panel to affect who should resolve the case.
- Minister of Justice may appoint court presidents in all common courts. They may also be revoked – granted that the National Council of the Judiciary does not express its objection by a two-thirds majority (such majority is wielded by judicial members of the NCJ alone).
- Trainee judges (judges on probation) are introduced, as a default first step in judicial career. It should improve the quality of justice through verifying in practice whether a person after judicial training and exam actually possesses the abilities to adjudicate for a life tenure. **Such verification will**

only be conducted by other judges.

- Trainee judges shall be appointed solely on the basis on a ranking list made upon examination results (the Minister of Justice only has “ceremonial” competences in the process) and they are guaranteed full independence, to the same amount as judges appointed for life – they may never be revoked, and their life appointment is decided solely on a merit-based assessment of qualifications carried out by an auditing judge, with no involvement of the Ministry of Justice whatsoever.

Effect of the reform:

- No more transferring judges without their consent and random allocation of cases **strengthen “rank-and-file” judges’ position towards heads of divisions and presidents of the courts** – and indirectly towards the Minister of Justice, as well. Their independence not only is threatened but enhanced.
- The Minister of Justice is granted with an instrument to address irregularities in court system – but it is **limited to the administrative scope**. There are no means of influencing verdicts or merely the decision on who is going to resolve the case.
- During first 6 months since the law on composition of common courts was amended, that is until 12 February 2018, **the Minister of Justice dismissed 18,6% court presidents and vice-presidents**. The scale shows that it was never a purpose to “purge” courts, but to proportionally address the flaws in management of some courts.
- During first 8 years of Poland’s membership in the EU the Minister of Justice could dismiss a court president for a flagrant failure in exercising their duties even when the National Council for the Judiciary expressed its objection. These regulations were never challenged by the EU. **Current reform grants the Minister with lesser power – the NCJ may block a decision on dismissal.**
- Regulation for trainee judges are based on guidelines resulting from judgments of ECHR and the Polish Constitutional Tribunal. The European Commission uses imprecise translation of the term “*asesor*” as an “*assistant*”

judge” – while “*judge on probation*” or “*trainee judge*” would be more appropriate. The regulations are similar to German law regulating “*Richter auf Probe* (a judge on probation) – such judge may even be dismissed during the first 4 years of their tenure (Polish trainee judge is irrevocable); the regulations were deemed in line with the rule of law in the case *Stieringer v. Germany*²¹

- The mechanism of prolonging judicial retirement age exists in **British** (where consent may be granted by the Lord Chancellor) and **French legal system** (where consent may be given by the Council for the Judiciary, and the Minister of Justice is authorized to transfer the judge to another court of the same or lower level). It does not pose a threat to judicial independence: **a judge at the peak of their career is rarely susceptible to potential pressure or political influence** “in exchange” for another year or couple of years of tenure – especially that **at this point they would usually have achieved full possible pension bonuses.**

67. In 2012 the European Commission for Democracy Through Law (the Venice Commission) published a report on judicial independence. The report states clear that **this independence has two dimensions: external and internal**²². The first one involves freedom of the judiciary from pressure exerted by the government, parliament and local authorities. The second is the independence of individual judges from members of their own community. The Venice Commission also highlights this issue in its 2010 report.

Report by the Venice Commission of 16 March 2010 on the independence of judges²³

The issue of internal independence within the judiciary has received less attention in international texts than the issue of external independence. It seems, however, no less important. In several constitutions it is stated that “judges are subject only to the law”. This principle protects judges first

²¹ Decision of the European Commission of Human Rights of 25 November 1996, *Stieringer v. Germany* (case file No. 28899/95).

²² *The Various Aspects of External and Internal Independence of the Judiciary*, Venice Commission, March 2012; [http://www.venice.coe.int/webforms/documents/?pdf=CDL\(2012\)035-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2012)035-e) [available: 28.02.2018].

²³ *Report on the Independence of the Judicial System*, Venice Commission, Strasbourg 16 March 2010, CDL-AD(2010)004

of all against undue external influence. It is, however, also applicable within the judiciary. A hierarchical organisation of the judiciary in the sense of a subordination of the judges to the court presidents or to higher instances in their judicial decision-making activity would be a clear violation of this principle.

68. Obviously, a hierarchical organisation of the judiciary is inevitable to some extent: when delivering a judgement, judges will always have to consider how it would be reviewed by a court of higher instance. That influence, though, must be minimised, especially when speaking about potential pressure or expectations from other judges with administrative functions at the same court. Such judges could indirectly affect the comfort of a judge handing down a sentence (e.g. by assigning an excessive number of cases to him, or by transferring him between court divisions).
69. Concerned about that, a judge may be tempted to hand down a decision that he or she thinks will be well received by the court president or division head. **It is therefore important to assure that there as few such mechanisms as possible. That is indeed the purpose of the reform** of the law of common courts – enhancing, not diminishing independence of individual judges.

RANDOM ALLOCATION OF CASES BASED ON PROPORTIONALITY SYSTEM

70. One of the most significant changes introduced by the reforms is **providing transparent and proportional assignment of cases to replace the previous arbitrary practice**. It is very often alleged that the Polish government intends to influence judges so that they deliver judgments that will meet political expectations. This claim is completely contrary to facts; Polish judges enjoy full independence and extensive immunity, and the reforms will not only do nothing to increase the executive branch's influence over courts but will also make them more independent.
71. Before 1 January 2018, it was the division head, who was appointed by the court president, who was in turn appointed by the Minister of Justice, who made the decision on who would deliver a ruling in almost every trial.

Although every judge is independent not only of the Minister, but also of the court president and division head, under such system specific cases could be assigned to judges who, for one reason or another, were favoured by their superiors.

72. The new system has completely changed this by eliminating possible illegal pressure. **Today, a computer system assigns cases by lot, according to the type of cases and the workload of individual judges. This procedure is in line with the Venice Commission's recommendations** which pointed out that this system makes judges more independent and that it was very desirable. The Committee of Ministers of the Council of Europe also recommended the implementation of such objective system.²⁴

Recommendation No. R (94) 12 by the Committee of Ministers of the Council of Europe on the independence, efficiency and role of judges

"The distribution of cases should not be influenced by the wishes of any party to a case or any person concerned with the results of the case. Such distribution may, for instance, be made by drawing of lots or a system for automatic distribution according to alphabetical order or some similar system."

Material by the Venice Commission of 27 April 2012 on various aspects of external and internal independence of the judiciary²⁵

"It has been noted that in the frequent cases of a court with more than one section or more judges, the allocation of the work to the specific section or judge is often left to the subjective and discretionary choices of the president of the court. It would then be possible to influence the outcome of the case by choosing a judge with certain ideological or political inclinations.

In order to overcome the risks of discretionary choices, which were supposed to be inherent in the power of the head of the office, the rule has been adopted that the natural judge is identified [...] on the basis of objective and

²⁴ Recommendation no R (94) 12 of the Committee of Ministers of the Council of Europe of 13 October 1994, section 2 (e).

²⁵ *The Various Aspects of External and Internal Independence of the Judiciary*, Venice Commission, March 2012; [http://www.venice.coe.int/webforms/documents/?pdf=CDL\(2012\)035-e](http://www.venice.coe.int/webforms/documents/?pdf=CDL(2012)035-e)

general criteria, as for instance the alphabetical or chronological order of the cases, the categories of cases, a computerized system.

PROHIBITION OF JUDICIAL TRANSFERS

73. Another change that has made judges more immune from the pressure exerted by court administration is the **prohibition on transferring judges between court divisions without their consent**, introduced by the Law on the Organisation of Common Courts.
74. Such transfers used to be possible; every year a court president would set annual tasks plan that allowed for easy transferring judges between court divisions. A judge being transferred could appeal to the board of the court, but the lack of his or her consent was not an obstacle, e.g. in transferring a judge from civil division to criminal division. Court presidents (and indirectly also Minister of Justice) could pressure judges using this tool.
75. After the reform, except for cases specified by statute that provide for an appropriate appeal procedure for the judge, the court president is no longer in a position to do so, and is therefore much less likely to put judges under pressure (even indirectly) by moving them arbitrarily between divisions
76. This change, along with random allocation of cases, minimize the risk of unwanted pressure – and thus strengthen position of individual judges vis-a-vis court presidents and division heads.
77. **Individual judges also become more independent from the executive branch of government as a result.** If the Minister of Justice would have the power to nominate a court president who can then have a say in the transfer of a judge or (indirectly, through a division head) in the allocation of specific cases to such judge, this can theoretically trigger a mechanism of hierarchical exertion of pressure, leading to a judgement that the executive branch would want to see passed.
78. The changes that were implemented eliminate this risk: from now cases are not allocated based on a human factor (so the Minister of Justice cannot even indirectly influence case allocation). It is also no longer possible to “punish”

a judge by administrative means by transferring him or her to another position without his or her consent.

APPOINTMENT AND DISMISSAL OF COURT PRESIDENTS

79. For reasons described above, fears over the appointment of court presidents by the Minister of Justice are unfounded. The aim of this power is to maintain a balance between the judiciary and the executive branches. Moreover, **the Minister has been vested with such competence for a long time** with respect to the presidents of regional courts and courts of appeal (the law adopted in July 2017 extended its scope to include district courts).
80. Contrary to the allegations, this poses no threat to judicial independence, as **the function of court president is only administrative in nature**, with presidents being responsible for effective organization of work in their respective courts. Given what has been described above, namely that individual judges have become more independent of court presidents, there are no grounds whatsoever to maintain that the reform made it possible to exercise political influence over the administration of justice.
81. It should be pointed out that the Polish Minister of Justice had even wider power in this scope at the time when Poland joined the European Union and during the next eight years of membership (until 2012). The legislation then in force provided that the court president is appointed by the Minister of justice after requesting an opinion of the competent general assembly. Such opinion, as a rule, did not bind the Minister. The Minister of Justice had also the **exclusive right to dismiss a court president in the event of a flagrant failure on his or her part to exercise his or her duties – the Minister had to consult the National Council of the Judiciary, but its opinion was not binding for the Minister.**²⁶
82. In light of the legislation now in force, when dismissing presidents and vice-presidents, **the Minister is bound by the National Council of the Judiciary's negative opinion issued by a two-thirds majority of votes and**

²⁶ Art. 27(2) in connection with par. 1(1) of the Law on the Organisation of Common Courts in the wording that was in effect until 27 March 2012.

for that to happen the votes of judges sitting on the Council will suffice. Therefore, the judges have more possibilities to block such decision today than they did before 2012, or when Poland was joining the European Union. Current criticism of these measures is all the less understandable because **it is contradictory to the conclusions of the Poland-European Union accession negotiations and with the way in which the judicial system was regulated in the next eight years when it did not raise the Commission's reservations.**

83. The Minister of Justice needs to have the right to appoint court presidents (which is to say, the administrative bodies of courts), as it is the only tool at his or her disposal to react to organizational irregularities discovered in courts, notably as far as the excessive length of proceedings is concerned.
84. As has been already mentioned, it is one of the most serious problems of the judiciary. Leaving powers in this respect only to judges alone has not worked out—**proceedings take a lot of time, although the number of judges per resident in Poland is among the European Union's highest**²⁷. Giving the Justice Minister the power to change a court's management and recruit it on the basis of managerial merit equips him with a proper tool to mend the situation where required. At the same time, **it leaves the independence of such court's judges unaffected:** they may not be removed; without their consent they may not be transferred not only to other courts but even between divisions of the same court; and cases are assigned by a draw.
85. It is worth pointing out that previous regulations required that a president of the court is appointed with the support of judges' assembly (and if the assembly disagreed, the NCJ must have given a positive opinion). It led some presidents – who cared for judges' support – to hesitate in taking some actions to improve their courts efficiency if these actions would not be welcome by judges.
86. As 12 February 2018 marks the end of the half-year period during which the Minister of Justice could dismiss court presidents and deputy presidents under a simplified procedure (i.e. without consulting the National Council of the Judiciary), it must be noted that **this tool has been used in a proportionate**

²⁷ A. Siemaszko, B. Gruszczyńska, M. Marczewski, P. Ostaszewski, A. Więcek-Durańska, *Judiciary. Poland against the backdrop of other EU countries*, Institute of Justice 2016, https://www.iws.org.pl/pliki/files/IWS_S%C4%85downictwo.%20Polska%20na%20tle%20pozosta%C5%82ych%20kraj%C3%B3w%20Unii%20Europejskiej.pdf [available: 28.02.2018].

manner. In the six months when the new regulations operated, the Justice Minister dismissed 69 court presidents and 67 deputy presidents. Considering that Poland currently has 374 court presidents and 357 deputy presidents, a total of **18.6% of judges in these roles have been affected** by the changes. It shows that the procedure was not abused — on the contrary, **it was a proportionate and appropriate means** to replace the management of the least effective courts.

87. Currently the Minister of Justice may dismiss court presidents after consulting the National Council of the Judiciary. **If the NCJ passes a negative opinion by a two-thirds majority (commanded by the judicial members of the Council), it will be binding on the Minister of Justice.**

JUDGES ON PROBATION (TRAINEE JUDGES)

88. The Commission's concerns that judicial independence is at risk because the institution of trainee judges (or judges on probation) was introduced are also unfounded. This institution existed in the Polish legal system until 2007, but its construction at that time was wrong, as it gave the Minister of Justice virtually complete freedom to dismiss trainee judges from their positions at any time. The Polish Constitutional Tribunal, and later the European Court of Human Rights found these measures to be contrary to the law, while pointing out that **the institution of trainee judge in itself is permissible, provided that proper safeguards are in place guaranteeing him independence.**
89. **The modification that has been in force for several months now provides such safeguards.** The role of the Minister of Justice has been limited to "ceremonial" activities, i.e. appointments, while all substantive decisions are taken solely on the basis of a ranking list made upon examination results, and the quality of a trainee judge's work is evaluated only by judges (auditing judge and the National Council of the Judiciary). A trainee judge may appeal to the Supreme Court against NCJ resolution that expresses objection against taking duties of a judge by him or her. They also have a guarantee that during the full term of training he or she cannot be dismissed by anyone. **It is especially worth comparing these regulations to a German legal**

system and the existence of “judges on probation” there – it shows that the independence of a Polish trainee judge is stronger.

Polish law on the composition of the common courts	German Judiciary Act (<i>Deutsches Richtergesetz</i>)
<p>Art. 106j (1) <i>A judge on probation is independent in exercising their office and is subject only to the Constitution and the statutes.</i></p> <p>Art. 106k (1) <i>A judge on probation is irrevocable.</i></p>	<p>Art. 22</p> <p>(1) <i>A judge on probation can be dismissed on expiry of six, twelve, eighteen or twenty-four months following his appointment.</i></p> <p>(2) <i>A judge on probation can be dismissed on expiry of the third or fourth year</i></p> <ol style="list-style-type: none"> 1. <i>where he is not suited to hold judicial office, or</i> 2. <i>where a judicial selection committee refuses to give him judicial tenure for life or for a specified term.</i>

90. **The negative opinion on the institution of a trainee judge may be due to a rather imprecise translation of the term into English that the Commission uses.** The term “assistant judge” is not correct because it suggests an assistant to a judge, i.e. a person who has no right to adjudicate, has not undergone many years of training. Only a person who completed legal training in the National School of Judiciary and Public Prosecution and subsequently passed the exam to become a judge or a prosecutor can become a trainee judge. Candidates for judges had to meet exactly the same conditions.
91. It is probably this imprecise translation that caused the Commission to raise its objection that trainee judges should not adjudicate in panels composed of a single judge, without any other judges. This would explain it, as the term “assistant to a judge” suggests that the person performing the function is not autonomous and independent and only supports a judge who has full powers.

92. A more precise translation, one that better renders the essence of the function of a trainee judge, would be the term *"judge on probation"*. Polish legal provisions resemble in fact German solutions and the German institution of *"Richter auf Probe"* which means exactly that. Importantly, while the German judge can be dismissed from the position (if an appropriate commission finds that the person is unfit for the function), the Polish trainee judge has a guarantee of irrevocability. It is also worth noting that **even the lower level of independence, as provided in the German system, was deemed enough by the European Commission of Human Rights in the case *Stieringer v. Germany*.**

***Stieringer v Germany*, case file No. 28899/95²⁸**

*"Under the German system, the participation of probationary judges [in administering justice] serves at the same time the purposes of training and selecting candidates for appointment as permanent judges and of allowing the courts to benefit from the work of these judges who, following legal studies and training, obtained the general qualification to exercise the functions of judges. In the exercise of their function as judges, they enjoy the full guarantees as to their objective independence. **The fact that for the sole purpose of training, they remain for a period regularly not longer than three years liable to removal by the judicial authorities does not justify the conclusion that their objective independence is no longer established.**"*

93. Introduction of the institution of trainee judges is a matter of professionalization of the judicial corps and raising quality of justice. In the previous system, a person once nominated for this position had a guarantee to hold it for life, even if it turned out that for any reasons he or she was not fit for this profession. It is nothing out of the ordinary: candidates with the best results in theoretical exams may, once they sit on the bench, have problems with practical application of the acquired knowledge. Therefore, a verification mechanism is necessary.

²⁸ Decision of the European Commission of Human Rights of 25 November 1996, *Stieringer v. Germany* (case file No. 28899/95).

94. Such verification takes place naturally in every profession. However, since the profession of a judge is special and requires a guarantee of independence, it was necessary to create a solution that would, on the one hand, ensure full independence to trainee judges, and on the other, make it possible to verify in practice if they are fit to be lifelong judges.
95. As was pointed out above, the solutions introduced last year provide all these safeguards. A trainee judge cannot be dismissed and the nomination to the position of a judge is conducted **solely on a merit-based assessment of qualifications carried out by an auditing judge**. From the moment a trainee judge is appointed (which in itself takes place solely based on substantive criteria), the Minister of Justice has no instruments to influence him or her.

AMENDMENTS TO JUDICIAL RETIREMENT AGE

96. Another reform that seeks to change the Polish judiciary's corporatist culture is **rejuvenating the judicial corps**. The goal is not only to get rid of the judges who collaborated with the communist regime but also empower younger judges in their impact on courts' operations.
97. The average age of common court judges has been increasing recently. In 2017, it increased (compared to 2013) from 54.8 to 55.2 years of age for court of appeal judges, from 50.5 to 51.29 for region court judges, and from 42.47 to 44.4 years for district court judges. The total average age of all judges increased over this period from 45.34 to 46.83 years of age.
98. Faster retirement for the oldest judges means that the reform is based solely on the objective and neutral age criterion. Furthermore, **all judges will keep their existing guaranteed rights**, and none will be deprived of their right to retirement benefits, on the same terms and conditions as before.

Art. 100 (2–4) of the Law on the Organisation of Common Courts

*§ 2. A judge who retires or is retired due to age, illness or physical incapacity is entitled to an emolument equal to **75 percent of the basic salary and***

seniority allowance received at the most recent post.

§ 3. The emolument referred to in Article 100(1) and (2) is increased in line with changes of the basic salaries of active judges.

§ 4. A judge who retires is entitled to a **one-off severance payment in the amount of six months' remuneration.**

99. The reform of judicial retirement age is justified with historical experiences of communism, the failure to account for the past for many years, and pathological mechanisms of the functioning of courts that have been perpetuated for years. Furthermore, it cannot be neglected that the **Polish Sejm has the right to independently define the right retirement age of judges, which results directly from Article 180(4) of the Constitution and is a sign of balance between the judiciary and the legislative.** With all caveats, it needs to be remembered that each retired judge retains all pension rights.

Art. 180 (4) of the Polish Constitution

A statute shall establish an age limit beyond which a judge shall proceed to retirement.

100. The Court of Justice of the European Union explicitly upheld Member States' discretion over setting the retirement age as well personnel management in order to optimize the age structure of judicial personnel.

The ECJ judgement of 21 July 2011: Gerhard Fuchs (C-159/10) and Peter Köhler (C-160/10) v Hessen.

"(...) the aim of establishing an age structure that balances young and older civil servants in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age, while at the same time seeking to provide a high-quality justice service, can constitute a legitimate aim of employment and labour market policy."²⁹

²⁹ The ECJ referred to this opinion also in its judgement C 286/12, Commission v. Hungary, C 286/12.

101. The new regulations that set a new retirement age for judges do not attempt to artificially remove them from office at a disproportionate rate; the age limit (65 for men and 60 for women) is identical to the general retirement age.

Polish law on the composition of the common courts	The law on pensions of the Social Insurance Fund
<p><i>Art. 69 (1)</i></p> <p><i>A judge retires on the day of their 60th birthday – with regards to a woman, and on the day of their 65th birthday – with regards to a man (...)</i></p>	<p><i>Art. 24 (1)</i></p> <p><i>The insured born after 31 December 1948 is entitled to a pension after reaching the Retirement age of no less than 60 years for women and 65 years for a man (...)</i></p>

102. Judges who continue to adjudicate despite reaching retirement age could be less efficient, could have more leaves of absence for health reasons, and could be less willing to improve their qualifications and align them with the changing legal environment (because of their long experience). Such circumstances will also be assessed under the solution whereby the President or the Minister of Justice have the right to say whether it is desirable that the judges in question continue their judicial work.
103. This solution is in fact **very close to the British law, where for most judges this power is vested in the Lord Chancellor (the equivalent of the Minister of Justice)³⁰ – or the French law (where these competences are vested in the Supreme Council of the Judiciary, and **the Minister of Justice also participates in the decision-making process and can decide to transfer a judge to another court of the same or a lower rank)³¹.****
104. Also in this capacity there were hardly any objections to the rule of law in France or the United Kingdom, and there is nothing surprising about it, since vesting the right to postpone retirement with an executive body does not constitute any threat to judicial independence. **It is hard to imagine that the perspective of keeping the position for an additional year or a couple**

³⁰ Article 26 (6) and (13), and Article 30 of the UK's Judicial Pensions and Retirement Act.

³¹ Article 76 and Article 76-1-1 of the French law on the status of judges (*Loi organique relative au statut de la magistrature*)

of years could make judges being at the peak of their professional careers susceptible to pressure from the executive that takes the decision in this respect, the more so as once retired the judges still keep the main part of their emoluments (after 20 years of service every judge is already at maximum possible level of bonuses for long-term tenure).

Art. 91 (7) of the act on composition of common courts

*Judges remuneration is in addition variable by a bonus for long-term service, amounting to, starting from sixth year of service, 5% of the basic remuneration **and increasing every year by 1% until it reaches 20% of the basic remuneration.***

105. Hence, the presence of an external factor in the process of postponing the retirement of a judge does not pose a threat to judicial independences and is desirable from the point of view of the balancing of power. When deciding to stay in office each judge might assess his or her own qualifications subjectively, therefore, it is desirable that the decision is not taken by the judge him- or herself alone but with the participation of another body. Bearing in mind that this function has for years been entrusted to the equivalent of the Minister of Justice in the United Kingdom, the solutions introduced in Polish legal acts seem to be adequate and present no risk whatsoever to the rule of law.
106. It needs to be added that the Commission did not present objections to the retirement age of judges in the case of Italy either, where since 2014 there have been several changes in this subject matter. First, the age was lowered from 75 to 70, just to be raised to 72 for some judges, and currently work is underway aimed at further raising it for the remaining ones. Those reforms were also criticised internally, but **the objections were not supported by the European Union bodies.**

V. NATIONAL COUNCIL OF THE JUDICIARY

The system so far:

- 15 out of 25 members of the NCJ were nominated by judges themselves in a long, multi-stage procedure, no other branches of power were included in this process.
- In practice it led to domination of the judges of the higher-level courts in the Council – as well as those who exercised functions of presidents of the court and heads of the divisions.
- Polish judges themselves labelled this system „**non-democratic curial elections**” and claimed that it is unconstitutional.
- It was unconstitutional indeed – the Constitutional Tribunal ruled that there also should be one uniform term of office (instead of individual terms of every member of the NCJ)

Significant changes:

- 17 out of 25 members of the NCJ shall remain independent, irrevocable judges – they continue to wield over two-thirds majority in the Council, as the Constitution provides.
- The election of 15 judicial members shall be made by Sejm – only among judges with a support of 25 other judges or a group of 2.000 citizens. The law also provides that no less than 40% of the elected judicial members would be nominated out of candidates presented by the parliamentary opposition.
- There will be one singular 4-year term of office and the members of NCJ shall be irrevocable – thus the parliament shall have no mechanism of exerting any pressure on their decisions after they are elected.
- As politicians have no mechanism of influence on the Council, none of its decisions – especially those regarding judicial nominations or promotions to the common courts or Supreme Court – will be subject to such pressure, all the more on any verdicts issued by particular judges.

Effect of the reform:

- National Judiciary Council has its counterparts in many EU-member states – but there are also countries without such council (Germany, Austria, Czech Republic), where judicial nominations are decided by commissions composed solely or overwhelmingly by politicians (as is the case with Germany on federal level and most of the *Länder*).
- The composition of the judiciary council varies among European countries – in some of them there is a majority of judges (Spain, Poland, Italy, Great Britain), in some – not (Denmark, France, Netherlands, Portugal). In some countries the judges are elected by their peers (Belgium), in some – by the parliament (Spain) or by the executive out of the candidates presented by the judiciary (the Netherlands).
- The Venice Commission and other international organizations safeguarding rule of law have repeatedly pointed out that too extensive influence of judges on the judiciary council may affect the justice system negatively – as it poses a risk of **cronyism, self-interest, illegitimate self-protection and the public perception of judicial corporatism**. However, in the opinion of the Venice Commission on the Polish reforms (widely quoted by the European Commission, too) **these arguments were overlooked**.
- Polish legislation is most similar to Spanish – there is also a majority of judges in the Council (13 – 8, in Poland 17 – 8), also elected by the parliament on a joint term, with a 3/5 majority.
- Previous, individual terms of office of 11 out of 15 NJC Judicial members (that were deemed unconstitutional) would anyway expire during the next two weeks (until 24 March), further two – in May and June 2018. Terminating them now is justified by the fact that they were unconstitutional, and also – due to the fact that there is such a short time until their lapse, **the termination should not affect the Council in any significant way**.
- To the contrary, have they not been terminated, **the Council would be effectively paralyzed until February and March 2020** (only then last two of the individual terms would lapse) – out of 25 seats in the NCJ 13 would be vacant.

107. The National Council of the Judiciary is responsible for safeguarding the independence of judges and courts. One of its main tasks is to recommend candidates for judicial positions to the Polish President, and to recommend judges for promotion to higher-level courts.
108. Under the Polish Constitution, the National Council of the Judiciary is composed of the Minister of Justice, six parliamentarians, one representative of the President of the Republic, and 17 judges, who thus have more than 2/3 of votes in the Council. Of the last group, 2 representatives sit on the Council *ex officio* (First President of the Supreme Court and President of the Supreme Administrative Court), and **15 are elected. The Polish Constitution does not specify who elects them; it only says that the 15 judges must be chosen from amongst judges, for a common term of 4 years.** The independence of elected members of the National Council of the Judiciary rests on the irrevocability of their mandate.

Article 187 of the Polish Constitution

1. *The National Council of the Judiciary shall be composed as follows:*
 - 1) *the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic;*
 - 2) *15 judges **chosen from amongst the judges** of the Supreme Court, common courts, administrative courts and military courts;*
 - 3) *4 members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its Senators.*
2. *The National Council of the Judiciary shall choose, from amongst its members, a chairperson and two deputy chairpersons*
3. ***The term of office*** of those chosen as members of the National Council of the Judiciary ***shall be 4 years.***
4. *The organizational structure, the scope of activity and procedures for work of the National Council of the Judiciary, as well as **the manner of choosing its members, shall be specified by statute.***

109. Previously, judicial members of the National Council of the Judiciary were elected in a complex process comprising many stages. In stage one, general assemblies of judges of circuit courts would chose representatives from amongst their members, who went on to form another assembly, and it was only from amongst its members that 8 members of the National Council of the Judiciary were elected. At the same time, delegates would be chosen by specific courts of appeal, and the assembly of such delegates would elect another two Council members. Delegates selected by the judges of the Provincial Administrative Courts would form a single assembly with the judges of the Supreme Administrative Court, and such assembly chose another two Council members. The General Assembly of Judges of the Supreme Court would elect the last two members of the National Council of the Judiciary.
110. A point worth making is that **his process did not in fact involve a significant number of judges, especially district court judges, who represent the largest group in the Polish judiciary.** As a result, judges of high-instance courts have dominated the National Council of the Judiciary in recent years. Despite the fact that the Constitution provides that the Council should comprise of judges of all types of courts, there is only one district court judge sitting on the Council today – even though district court judges account for over 2/3 of all Polish judges. For almost 30 years of its history only 4 members of the Council were judges of these courts (district courts resolve almost 95% cases in Poland).
111. In 2014, the problem was raised by district and regional court judges themselves. In a resolution adopted at the time, they accused the election mechanism of being inconsistent with democratic standards and demanded that the mechanism’s constitutionality be reviewed.

Resolution No 4 of the Meeting of Representatives of General Assemblies of Circuit Judges concerning electoral rules for the National Council of the Judiciary of 26 February 2014.

*“The Meeting of Representatives of Regional Court Judges would like to point out that the multi-stage process of selecting members of the National Council of the Judiciary consists in **non-democratic curial elections which employ voter qualification on the basis of official positions.**”*

(...) common court judges, whom the quoted provision names as one group, have been divided into two categories without giving any grounds. Such division is especially favourable to court of appeal judges. Numbering around 500, they have two representatives, whereas regional and district court judges, of whom there are around 9,000 in total, have only eight representatives. On the other hand, no distinction was made between administrative and military court judges, where higher and lower instance courts also exist.

Such provisions may, and actually do divide the judicial community.

Consequently, we express our serious doubts over whether Article 11 (3) and (4), and Article 13 (1), (2) and (3) of the National Council of the Judiciary Law of 12 May 2011 is consistent with Article 187 (1) (2) of the Polish Constitution, which the said law is supposed to implement.

The Meeting of Representatives expects the National Council of the Judiciary to make application for reviewing the constitutionality of the aforementioned provisions.”

112. The National Council of the Judiciary did not take any steps in reaction to this resolution and did not make application to the Constitutional Tribunal as suggested by the judges. The Prosecutor General did, however. After examining this application, the Constitutional Tribunal ruled that the provisions under scrutiny violated the Constitution inasmuch as district and regional court judges were not treated equally with court of appeal judges, and district court judges were not treated equally with regional court judges.³²
113. In the previous model, most judges had no real impact on the composition of the National Council of the Judiciary, while the Council would take actions that were unacceptable to the judicial community.

NCJ against the judges

A case in point is a recommendation for a vacancy at the Przemyśl District Court which was issued by the National Council of the Judiciary. The Council endorsed a candidate who was supported by only one of 39 judges making up the General Assembly of judges from the local circuit. In their subsequent resolution, **the judges expressed their strong opposition to the Council's**

³² Constitutional Tribunal judgment of 20 June 2017, file no K 5/17.

actions, stating that they “lacked impartiality”, that there are legitimate reasons to believe they were “inherently biased” and that they manifested “a total ignoring of the judicial community’s opinion, and a profanation of the ideal of self-governance of this profession”.³³

A similar situation occurred at the Warsaw-Mokotów District Court, where the National Council of the Judiciary recommended Joanna Raczkowska, the wife of Piotr Raczkowski, the Council’s Vice-Chairman. Despite 93 other candidates and the fact that the General Assembly of Judges of the Warsaw Regional Court objected to her candidacy, the National Council of the Judiciary unanimously backed Ms Raczkowska.

114. Although the National Council of the Judiciary is mostly composed of judges, who have so far been chosen by judges themselves, **a number of undesirable phenomena emerged in the Council (and indirectly across the whole system of justice as well): nepotism, putting private interest above the interest of citizens, and illegitimate protection of members of one’s own group.** This resulted in the public image of a closed, stand-alone professional corporation that does not serve society but puts itself above it.
115. **International institutions, including the Venice Commission have repeatedly highlighted the danger of judiciary councils being overwhelmingly dominated by judges.**

**Report by the Venice Commission of 16-17
March 2007 on judicial appointments³⁴**

“A balance needs to be struck between judicial independence and self-administration on the one side and the necessary accountability of the judiciary on the other side in order to avoid negative effects of corporatism within the judiciary. In this context, it is necessary to ensure that disciplinary procedures against judges are carried out effectively and are not marred by undue peer restraint. One way to achieve this goal is to establish a judicial council with a balanced composition of its members.”

³³ Resolution of the General Assembly of the Przemyśl Regional Court, 6 November 2015.

³⁴ *Judicial Appointments – Report*, adopted by the Venice Commission at its 70th Plenary Session (Venice, 16-17 March 2007), CDL-AD(2007)028.

Opinion by the Venice Commission of 15 April 1998 on certain amendments to the Albanian Constitution³⁵

"An autonomous Council of Justice [...] does not imply that judges may be self-governing. The management of the administrative organisation of the judiciary should not necessarily be entirely in the hands of judges."

Opinion by the Venice Commission of 6-7 December 2013 on the Ukrainian Constitution³⁶

"The High Judicial Council would thus have 11 judges among its 15 members. This proportion seems even too high and could lead to inefficient disciplinary procedures"

Opinion by the Venice Commission of 9 July 2002 on amendments to the Romanian Constitution³⁷

"The main thing is that all countries should adopt a system for constituting the [Judicial Service] Commission which harmoniously blends the two imperatives of resisting corporatism and keeping the institution apolitical.

*Corporatism can be avoided by **ensuring that the members of the Judicial Service Commission, elected by their peers, should not wield decisive influence as a body.** They must be usefully counterbalanced by representation of civil society."*

Opinion by the Venice Commission of 13 October 2014 on amendments to the Macedonian Constitution³⁸

"under the proposed amendment nothing prevents the Parliament from selecting one or several lay members [of the Judicial Council] from the ranks

³⁵ *Opinion on recent amendments to the law on major constitutional provisions of the Republic of Albania*, Adopted by the Sub-Commission on Constitutional Reform, CDL-INF(1998)009

³⁶ *Opinion on proposals amending the Draft Law on the amendments to the Constitution to strengthen the independence of Judges of Ukraine*, adopted by the Venice Commission at its 97th Plenary Session (Venice, 6-7 December 2013), CDL-AD(2013)034

³⁷ *Opinion on the Draft Revision of the Romanian Constitution*, adopted by the Venice Commission at its 51st Plenary Session (Venice, 5-6 July 2002), CDL-AD(2002)012

³⁸ *Opinion on the Seven Amendments to the Constitution of "The Former Yugoslav Republic of Macedonia"*, adopted by the Venice Commission at its 100th Plenary Session (Rome, 10-11 October 2014), CDL-AD(2014)026

of judges. (...) The wording of the 2005 Amendment and 2014 Amendments are almost identical in this respect: they allow the Parliament to select lay members of the JC from the ranks of 'university professors of law, lawyers and other eminent legal experts'. The later term is interpreted very broadly: it permits the Parliament to elect even more judges to the [Judicial Council] in addition to the 10 judges who are already there.

*This situation creates a risk of corporatism; **although the JC should be depoliticised, and the judges should represent a "substantial element or a majority" of its members, it should not completely insulate the JC from any external oversight.** The Venice Commission thus considers that the number of judicial members of the JC may be reduced."*

116. It should not be overlooked that in its opinion on Polish reforms³⁹ the Venice Commission adopted significantly different position, omitting its own arguments made previously in favour of balancing the judiciary councils. The Commission has actually quoted parts of the abovementioned opinions on Ukraine and Former Yugoslav Republic of Macedonia – but skipped the elements which pointed to certain risks resulting from lack of balancing judicial influence on the system with different mechanisms. In the opinion on Poland there is also no mention of the Romanian system assessment – where it was directly recommended that the regulations should prevent judges elected by their peers from dominating the judiciary council. In Poland's view **this is a manifestation of double standards – a selective application of guidelines which should be homogenous for all European countries.**
117. It is even more apparent while taking into consideration the voice of the OSCE Office for Democratic Institutions and Human Rights (ODIHR). The Office also took note of these dangers in its opinion about Poland (which was, incidentally, based on bills that did not come into force). As the Office pointed out at the time, **it is generally acknowledged at the international level that judicial councils should not be composed completely or over-prominently of members of the judiciary, so as to prevent cronyism, self-**

³⁹ *Opinion on the Draft Act Amending the Act on the National Council of The Judiciary, on the Draft Act Amending the act on the Supreme Court, proposed by the President of Poland, and on the Act on the Organisation of Ordinary Courts, adopted by the Venice Commission at its 113th Plenary Session (8-9 December 2017), CDL-AD(2017)031*

interest, illegitimate self-protection and the public perception of judicial corporatism.⁴⁰

118. In the Polish system a historical aspect is also worth pointing out. First National Council of the Judiciary was created in 1989 – and it was composed of the judges of common courts appointed by the communist State Council. Further activity of the NCJ was based on a corporate, inner-circle model of nominating its members – and that led not to favouring to hold accountable those involved in communism, but rather was itself an obstacle; it also stood in the way of any serious reform of the judiciary.
119. The Council’s task is to protect the independence of courts and judges, but **that cannot be equated with the protection of their corporatist interest alone**, a point of criticism that has been long raised against the NCJ by almost all political forces. The need to reform was also seen among legal scholars. Professor Andrzej Rzepliński, President of the Constitutional Tribunal until 2016, now an ardent critic of amending the laws that regulate the organisation of the judiciary, proposed much deeper reforms in 2004.

A. Rzepliński, “If only judges were willing to be willing,” *Gazeta Wyborcza*, 6 February 2004⁴¹

“For the NCJ to stop being largely a sort of state labour union preserving the interests that do a disservice to Poland’s judiciary, it must be composed of representatives of other legal professions, including advocates, legal advisers, notaries public, prosecutors and law scholars. A bad judge will wreck a good law.”

120. **The current reform is not as far-reaching as Professor Rzepliński proposed in 2004—that is impossible without amending the Constitution** that does not allow for a change in composition of the Council: there must be 17 judges among its 25 members – proportions are similar to the ones that prompted the Venice Commission to voice reservations in other countries (e.g. 11 to 15 in Ukraine, 10 to 15 in Macedonia). These reservations stemmed from concern over the Council being dominated by members of the judiciary,

⁴⁰ *Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, OSCE-ODIHR, 5 May 2017, JUD-POL/305/2017-Final [AIC/YM]

⁴¹A. Rzepliński, *Żeby sędziom się chciało chcieć*, *Gazeta Wyborcza*, 6.02.2004, <http://docplayer.pl/6485285-Zeby-sie-sedziom-chcialo-chciec.html>

the lack of a mechanism to balance such dominance, and the risk of irregularities of the kind described above that could result from such imbalance.

121. As amending the Polish Constitution is not possible without a 2/3 majority in the Sejm (and the prospect of securing such a majority seems unrealistic in the current parliament), it was necessary to carry out the reform by different means, while making sure that it was consistent with the Polish Constitution and the standards adopted in other EU countries
122. That is why Polish Sejm decided to change only the way judicial members of the NCJ are nominated. From now on they are to be elected from among the representatives of all levels of the judiciary—and not by judges alone but by the Polish Sejm. In order to secure proper representation for opposition candidates, the **election would be held by a three-fifths majority, with each parliamentary grouping guaranteed the election of at least one candidate it endorses**. In the current composition of Sejm, it means that the opposition groups would have six candidates with their endorsement elected – should they decide to endorse anyone.

Art. 11d (2) and (4) of the law of National Council of the Judiciary

*2. A parliamentary group selects, among the judges whose candidacies were put forward on the basis of Article 11a, **no more than nine members of the Council.***

(...)

*4. The appropriate committee sets the list of candidates, selecting among the candidates put forward on the basis of Section (2) and (3), fifteen candidates for the members of the Council, with the reservation that **on the list there is at least one candidate presented by each parliamentary group** that was functioning within sixty days from first sitting of Sejm during which the election is made, if such candidate was put forward by the parliamentary group mentioned in Section (2)*

123. **Judges at the NCJ command the same majority as they did before, and this is provided directly in the Constitution. As mentioned above, the**

Constitution does not stipulate who the NCJ judges will be elected by, leaving that to the legislator’s discretion. It only provides that they are appointed for a joint four-year term.

124. **The judicial community continues to play a major role in the procedure—**the choice is made only from among the candidates who earlier won the backing of at least 25 other judges or 2,000 citizens. Compared with the previous multistage representative procedure, **that gives ordinary judges (particularly of lower instances) a genuine possibility of influencing the Council’s composition unlike before, when it was actually illusory.**
125. The provision that the judges should have an influence on the election process was deemed important in the abovementioned ODIHR opinion of May 2017. Compared to the draft acts that were presented at that time, current law stipulates that candidates to NCJ may be put forward only by judges themselves or by a group of 2.000 citizens; politicians or other official bodies are no longer authorized to do so.

ODIHR – Final Opinion on Draft Amendments to the law of NCJ and certain other acts⁴²

„It is noted that the Explanatory Statement to the Draft Act refers to Spain as an example where the parliament elects the judge members of the relevant judicial self-governing body. While bearing in mind the concerns voiced with respect to the Spanish model by international bodies (see par 39 supra), it is at the same time important to highlight that these members are selected by the Parliament from a list of candidates who have received the support of a judges’ association or of at least twenty-five judges.”

126. **All the safeguards of independence remain in place,** and the election of NCJ members by the Sejm will not lead to the politicisation of the Council. **It will continue to be composed of independent judges—once elected, they will be irremovable.** Neither the government nor the parliament will have any say in decisions taken by the Council after it is constituted. Much in a similar way, the Sejm elects the Ombudsman (Civil Rights Commissioner), the president of the Supreme Audit Office, or members of the Monetary Policy

⁴² Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland, OSCE-ODIHR, 5 May 2017, JUD-POL/305/2017-Final [AIC/YM], para 44.

Council—and no one accuses those bodies of being dependent on the parliament's will

127. The reason for it is simple – no matter who makes the nomination, it does not affect the independence of appointed person, as long as after he or she is nominated there are sufficient guarantees of irrevocability and freedom from undue pressure (e.g. economical). This issue was raised in Germany, when judges are in most cases nominated by commissions composed solely or overwhelmingly of politicians. In 2001 there was a controversy regarding election of judges Birgit Vezina and Wolfgang Neskovic to the Federal Court of Justice, against the recommendation of judicial groups (i.a. because of their political involvement – Vezina was supported by SPD party, and Neskovic was a member of the Green Party). It was also pointed, however, that after they were elected to the Tribunal their independence was not threatened at all – as there were legal mechanisms which prevented them from being pressurized, no matter who and how nominated them.

Professor Gerd Roellecke, ex-rector of the University of Mannheim

„judicial independence does not find its roots in the selection process, but in the organization of the system (with qualities like life tenure and panels of several judges sitting together) and the professional socialization of the participants.“⁴³

128. In Poland, the executive and legislative branches of government exert less control over the judicial appointment procedure compared with such countries as France, Denmark, Portugal or the Netherlands. In all of these countries, the equivalents of Poland's National Council of the Judiciary are mostly composed of non-judges: representatives of other authorities or legal professions. In Denmark, the 11 member-strong council has 5 judges⁴⁴, in France 6 out of 22 members are judges,⁴⁵ in Portugal 8 out of 17⁴⁶. In the Netherlands, the current ratio is 2 – 2, but non-judges can have a 3 – 2 majority under the law⁴⁷. **In other words, judges there do not enjoy**

⁴³ *Judicial Selection Controversy at the Federal Court of Justice*, German Law Journal No. 2 (2001), <http://www.germanlawjournal.com/index.php?pageID=11&artID=69> [available: 28.02.2018].

⁴⁴ Guide to the European Network of the Councils for the Judiciary, p. 50; https://www.encj.eu/images/stories/pdf/workinggroups/guide/encj_guide_version_october_2017.pdf.

⁴⁵ *Ibidem*, p. 53.

⁴⁶ *Ibidem*, p. 87.

⁴⁷ *Ibidem*, p. 83.

exclusive powers to make appointment and promotion decisions—and despite that these countries do not face accusations about breach of the rule of law.

129. On the contrary: systems of justice in these countries enjoy relatively positive views. According to the 2017 European Justice Scoreboard, the Danes have the most favourable opinions about the independence of their courts and judges in the EU.⁴⁸

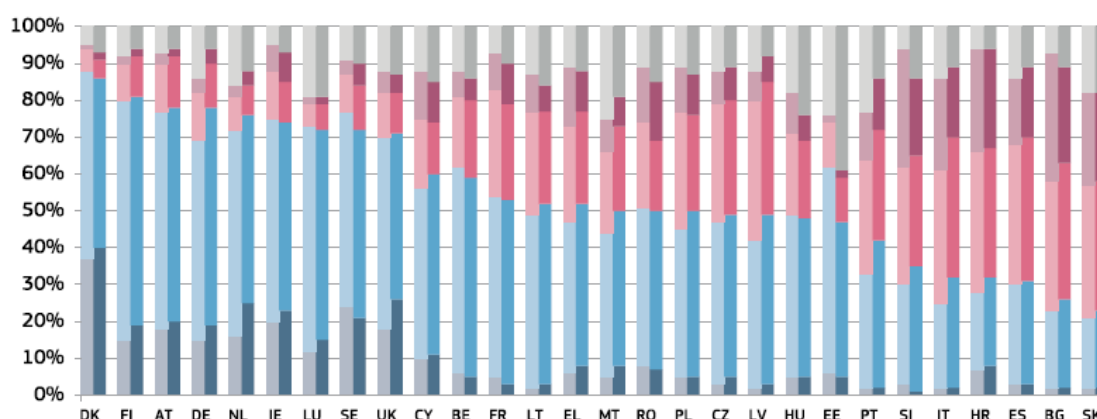
3.3.1. Perceived judicial independence

Figure 51

Perceived independence of courts and judges among the general public (light colours: 2016, dark colours: 2017)

Very good Fairly good Fairly bad Very bad Don't know

Source: Eurobarometer (62)



Source: 2017 EU Justice Scoreboard, p. 37.

130. In Germany (4th place in the abovementioned ranking of perceived judicial independence), judges have even less power over judicial appointments. The country has no equivalent of Poland's National Council of the Judiciary, and **the judges are elected by commissions composed exclusively of politicians** (at the federal level) or by ones in which they command a majority (in most federal states). What is more, as it was already mentioned, **these commissions may remove the judges from office in the first four years of their career**. Mechanisms like these sometimes draw criticism, but the European Court of Human Rights has found that they do not undermine judicial independence.

⁴⁸ The 2017 EU Justice Scoreboard, https://ec.europa.eu/info/strategy/justice-and-fundamental-rights/effective-justice/eu-justice-scoreboard_en

Art. 95 (2) of the German Basic Law

The judges of each of these [five federal] courts shall be chosen jointly by the competent Federal Minister and a committee for the selection of judges consisting of the competent Land ministers and an equal number of members elected by the Bundestag.

In various German Federal States – a political factor

- In the committee for the Land **Berlin** there is 8 Landtag MPs, 2 judges and one other lawyer, also as non-permanent members there are prosecutors or judges of various types of courts – depending on the matter that the committee considers (the judges never wield majority)⁴⁹; very similar regulation is applied in **Brandenburg**⁵⁰; while in **Thuringia** the permanent composition of the committee is comprised of 8 Landtag MPs, 2 judges and one non-permanent judicial member.⁵¹
- In **Hesse** there are 7 Landtag MPs, 5 judges and the chairperson of one of two Bar Associations of the region⁵²; in Rhineland **Palatinate** there are 8 Landtag MPs, 2 judges as permanent members, 2 judges as non-permanent members and 1 attorney⁵³.
- In **Bremen** there are three judges, three members of the Senate (executive branch of power) and 5 candidates selected by a popular vote⁵⁴; in **Hamburg** there are 3 judges, 2 other lawyers, 3 Senate members and 6 candidates selected by a popular vote⁵⁵.
- In **Schleswig-Holstein** there are 8 to 12 Landtag MPs, 2 to 3 judges, 1 attorney and – in some cases – one workers' and one entrepreneurs' union member⁵⁶.

131. Solutions concerning Poland's NCJ **are most similar to Spain's legislation in force since 1985**. Its General Council of the Judiciary is also mostly

⁴⁹ § 12 of the Berlin Judiciary Act (*Richtergesetz des Landes Berlin – RiGBln*).

⁵⁰ § 12 of the Brandenburg Judiciary Act (*Richtergesetz des Landes Brandenburg – BbgRiG*).

⁵¹ § 14 of the Thuringia Judiciary Act (*Thüringer Richtergesetz – ThürRiG*).

⁵² § 9 of the Hesse Judiciary Act (*Hessisches Richtergesetz – HRiG*).

⁵³ § 15 of the Rheinland Palatinate Judiciary Act (*Landesrichtergesetz Rheinland-Pfalz – LRiG*).

⁵⁴ § 8 of the Bremen Judiciary Act (*Bremischer Richtersgesetz – RiG*).

⁵⁵ § 14 of the Hamburg Judiciary Act (*Hamburgisches Richtergesetz – HmbRiG*).

⁵⁶ § 11 of the Schleswig-Holstein Judiciary Act (*Schleswig-Holsteinisches Richtergesetz – Landesrichtergesetz – LRiG*).

composed of judges (13–8; 17–8 in Poland), who are also elected by the parliament for a common term, by a three-fifths majority⁵⁷. **As in Poland, judges are irremovable and, once elected to the Council, they enjoy full independence from politicians.**

132. The Commission criticises Poland for allegedly unconstitutional termination of the current NCJ's term. This allegation is unfounded: **the previous election procedure was in conflict with the Constitution** (lowest level judges were effectively excluded from the process, while the terms were individual, not joint, contrary to the Basic Law⁵⁸). The Constitutional Tribunal has repeatedly found that **in exceptional circumstances a term may be shortened if warranted by the need to protect public interest**.⁵⁹ If the most important body tasked with safeguarding judicial independence has been elected in violation of the Constitution, the situation calls for urgent reform.
133. Among the 15 elected members-judges of the current NCJ, individual terms have already expired for two of them. A further 11 would have expired between February and June 2018. The Council would have had two judges elected in February and March 2016 whose terms would have run until early 2020.

<i>Judge's name</i>	<i>End of term</i>
<i>Administrative Court Judge Ewa Preneta-Ambicka</i>	<i>15 Nov. 2017</i>
<i>Regional Court Judge Piotr Raczkowski</i>	<i>28 Jan. 2018</i>
<i>Regional Court Judge Andrzej Adamczuk</i>	<i>21 Mar. 2018</i>
<i>Regional Court Judge Gabriela Ott</i>	<i>21 Mar. 2018</i>
<i>District Court Judge Sławomir Pałka</i>	<i>21 Mar. 2018</i>
<i>Regional Court Judge Waldemar Żurek</i>	<i>21 Mar. 2018</i>
<i>Regional Court Judge Maria Motylska-Kucharczyk</i>	<i>21 Mar. 2018</i>

⁵⁷ Article 122 of the Spanish Constitution and Articles 572 – 578 of the Spanish Organic Law on the Judiciary (Ley Orgánica 6/1985, de 1 de julio, del Poder Judicial).

⁵⁸ Constitutional Tribunal ruling of 20 June 2017, case No. K 5/17.

⁵⁹ Among others, rulings of 31 March 1998, case no. K 24 / 97, of 26 May 1998, case no. K 17/98, of 23 June 1999, case no. K 30/98, of 13 July 2004, case no. K 20/03, and of 20 June 2017, case no. K 5/17.

<i>Regional Court Judge Janusz Zimny</i>	<i>21 Mar. 2018</i>
<i>Administrative Court Judge Andrzej Nieduzak</i>	<i>22 Mar. 2018</i>
<i>Supreme Court Judge Katarzyna Gonera</i>	<i>24 Mar. 2018</i>
<i>Supreme Court Judge Dariusz Zawistowski</i>	<i>24 Mar. 2018</i>
<i>Supreme Administrative Court Judge Janusz Drachal</i>	<i>16 May 2018</i>
<i>Administrative Court Judge Jan Kremer</i>	<i>29 Jun. 2018</i>
<u><i>Supreme Administrative Court Judge Jan Grzęda</i></u>	<u><i>12 Feb. 2020</i></u>
<u><i>Supreme Administrative Court Judge Krzysztof Wojtaszek</i></u>	<u><i>20 Mar. 2020</i></u>

134. The legislature thus had two options: either wait for the expiry of all individual terms of all Council members (which would have created 13 vacant seats over the following two years) or terminate the terms of all its members and proceed with electing the entire NCJ, based on the principles enshrined in the Constitution.
135. As the former option would have left the Council paralysed (with more than 50% of its seats vacant), a transitional provision had to be enacted, with all individual terms terminated. **Considering that most of them would have expired within a few weeks anyway, the NCJ's actual functioning and the judiciary as a whole were not materially affected.**
136. One of the consequences of the National Council of the Judiciary's full independence is that **the independence of the Supreme Court or of its judges is not at any risk, either.** This also applies to the judges adjudicating in the newly-established Chambers of Extraordinary Review and Public Matters and in the Disciplinary Chamber. They will all need to obtain a positive opinion from the National Council of the Judiciary which will guarantee that the **judges as a group will retain complete control over this process.**
137. The National Council of the Judiciary's independence of the Sejm and – as a consequence – the independence of the Supreme Court judges of the National Council of the Judiciary is based on the fact that they cannot be

removed. **Once the Sejm elects members of the National Council of the Judiciary, it has no instruments to exert pressure on them.** There are no such instruments vested in National Council of the Judiciary as to influence judges elected to the Supreme Court, either. **Members of parliament have thus no means by which they could influence judgements delivered in this court (or any other)** – its judges would have no reason to yield to such pressure.

138. The National Council of the Judiciary needs to be made more democratic so that the public – through the Sejm – could have a say on how judicial staff is formed. However, any influence ends once a judge is appointed and guaranteed full judicial independence, safeguarded in the Constitution and statutes.

VI. CONSTITUTIONAL TRIBUNAL

Commission's remarks:

- The European Commission claims that the Tribunal is wrongly composed – namely that there are three judges nominated for seats already taken by judges “lawfully appointed” in the previous term of Sejm. The Commission also claims that the President of the Tribunal was unlawfully elected.
- The Commission believes that non-publication of three rulings of the Tribunal affects rule of law in Poland. These three rulings – of 9 March, 11 August and 7 November 2016 – pertained to previous statutes on the Constitutional Tribunal that are no longer in force.

Facts:

- All judges of the Tribunal were appointed lawfully. It was the previous term of Sejm that broke the law – current term remedied the breach. **Resolutions of the 7th term of Sejm undertaken to nominate 5 judges (1/3 of the Tribunal) were made “in the dark”, as the Sejm could not have known when its term would end and the new would begin.** It also breached the rule of legislative silence, under which no amendments to statutes regarding elections to major official posts should be made less than 6 months before these elections (this rule was established by the Constitutional Tribunal).
- 8th term Sejm lawfully declared that these resolutions were null and void from the beginning – and properly nominated 5 judges to the Constitutional Tribunal. **All these resolutions (of 7th and 8th term of Sejm) were subject to a review by the Tribunal under its previous President – and the proceedings were discontinued** (case file U 8/15; **contrary to some often repeated claims the judgments of December 2015, case file K 34/15 and K 35/15 did not pertain to these resolutions**, but the law on the Constitutional Tribunal).
- For some time, the Tribunal under the previous President issued rulings in proceedings contrary to the Constitution and statutes. Major infringements were: wrong composition of adjudicating panel, resolving cases on closed-

door sessions (in camera) instead of public hearings, groundless renouncement of the rule to adjudicate in full court.

- Despite that, Sejm decided that for the sake of stability of the legal system these judgments should be published. All of the CT verdicts – including those issued with breach of procedure - were published in the journal of laws. Only three judgements were not published, as **at that time the statutes that they pertained to were already repealed. Since the only legal effect of CT judgment is just that – a repeal of the provisions deemed unconstitutional – their publication would not have any practical meaning for the system.**
- The election of current President of the Tribunal was also in line with the law – it took place on the basis of the statute of 13 December 2016, later deemed to be constitutional by the Tribunal (case file K 1/17). Moreover, the election was acknowledged also by the former deputy President of the Tribunal (critical of most of the reforms).

Current state of affairs:

- The Tribunal under the current President carries out its duties in line with the Constitution and the statutes. Claims and motions are presented by citizens and public bodies, and they are actively participating in proceedings (including the ones nominated before current term of Sejm and critical of the reforms, like the Ombudsman).
- Since the current President took its post there is a proportional distribution of cases among CT judges – and **the judges nominated in previous terms of Sejm are granted majority in adjudicating panels even more frequently that their number would suggest.** There are 6 such judges (9 were appointed by the current term of Sejm) – and **they had majority in over 42% of cases** resolved with a judgment under the current President.
- The improvement is significant – previous President of the Tribunal assigned cases so that **the judges nominated in current term of Sejm (even those whose appointment was never contested by anyone) had never had a majority in a single case.**
- Contrary to some claims the Tribunal is currently as efficient as it was under

the previous President. In the last 14 months there were 38 judgments issued; during over 12 months before (December 2015 – December 2016) there were 41 judgments (including those with breach of procedure).

139. The Commission's claims as regards to the composition of the Constitutional Tribunal are also not well founded. Above all, it is not true that the previous Sejm correctly elected three judges of the Tribunal in October 2015; rather, **all five judges were elected incorrectly**. This is due to the fact that **at the moment of making the choice, the Sejm was not able to know when its term of office would end (the term is not fixed but movable), and as a consequence, could not elect anyone "ahead."**
140. To begin with, it was incorrect to adopt the Constitutional Tribunal Law in June 2015, i.e. shortly before the end of term of the 7th Sejm. In this context, one should emphasize the importance of the principle of legislative silence, confirmed in the jurisprudence of the Constitutional Tribunal.⁶⁰ According to this principle, legal norms governing the election of members of state organs should not be materially changed within six months prior to the next election, which is understood not as the mere casting of ballots, but as all activities covered by the electoral calendar. While special weight is attached to this principle when it comes to parliamentary elections, in a democratic state based on the rule of law it should also apply to elections to all the key state organs, not least the Constitutional Tribunal judges.
141. The President of the Republic also raised this issue, saying on 29 May 2015 that state institutions were in a transitional period, and calling on the parliamentary majority sitting in the 7th Sejm to exercise restraint when introducing significant legal changes, in particular if they would affect the constitutional system.⁶¹ The President's call went unheeded. First, on 25 June 2015, the Sejm adopted a law that changed the rules of electing Constitutional Tribunal judges, and next, on 8 October, still not knowing when its term would end, it passed resolutions on the election of 5 judges, i.e. 1/3 of the Tribunal's composition.

⁶⁰ Judgments of 3 November 2006, file no K 31/06, and of 28 October 2009, file no KP 3/09.

⁶¹ *Duda do rządu: proszę, by w okresie przejściowym nie wprowadzano poważnych zmian*, <https://www.tvn24.pl/wiadomosci-z-kraju,3/duda-apeluje-do-rzadzacych-aby-nie-wprowadzali-waznych-zmian,546876.html> [available: 28.2.2018].

142. Under the Polish Constitution, the Sejm is elected for a four-year term, but the time-limit is not fixed and precise, and it depends on the date the election is held on the one hand, and on the date the President calls the first sitting of the Sejm.

Article 98(1) and (2) of the Polish Constitution

1. The Sejm and the Senate shall be chosen each for a 4-year term of office. The term of office of the Sejm and Senate shall begin on the day on which the Sejm assembles for its first sitting and shall continue until the day preceding the assembly of the Sejm of the succeeding term of office.

2. Elections to the Sejm and the Senate shall be ordered by the President of the Republic no later than 90 days before the expiry of the 4-year period beginning with the commencement of the Sejm's and Senate's term of office, and he shall order such elections to be held on a non-working day which shall be within the 30 day period before the expiry of the 4 year period beginning from the commencement of the Sejm's and Senate's term of office.

Article 109(2) of the Polish Constitution

2. The first sitting of the Sejm and Senate shall be summoned by the President of the Republic to be held on a day within 30 days following the day of the elections (...).

143. This regulation means that the term of office of the Sejm may last precisely 4 years, a few days longer than 4 years, or a few days shorter than 4 years.⁶² Due to imprecise wording of these provisions, representatives of the doctrine of constitutional law argue whether, and if so, by how much longer and in what direction, the Sejm's term of office may diverge from the four-year period.⁶³
144. Also the existing practice of applying these provisions does not give an unequivocal answer: while the term of office of the 3rd Sejm was shorter,

⁶² Cf e.g. M. Rączka, *Rozwiązanie parlamentu przed upływem kadencji w polskim i włoskim systemie konstytucyjnym*, Toruń 2010; similarly: M. Zubik, *Termin zwołania pierwszego posiedzenia Sejmu IV Kadencji*, Przegląd Sejmowy No. 6 (47)/2001; for a different approach see, e.g. E. Gierach [in:] M. Safjan, L. Bosek (eds.), *Konstytucja RP. Tom II. Komentarz do art. 87–243*, Warsaw 2016.

⁶³ T. Litwin, *Funkcje Sejmu i Senatu a współczesny polski model dwuizbowości*, Warsaw 2016.

the term of office of the 4th Sejm was exactly 4 years, and the terms of office of the 6th and 7th Sejm were several days longer (the term of office of the 5th Sejm was shortened due to self-dissolution of the Sejm).

145. This means that **the 7th Sejm should have at least taken into consideration that its term of office might be shorter than exact 4 years** (within the scope admissible under Article 98(1) and (2) and Article 109(2) of the Constitution of the Republic of Poland), and thus **all actions taken by that Sejm need to be analysed bearing in mind this possibility.**
146. The Law on the Constitutional Tribunal, including the provisions of Article 137, which was later given as the grounds for the accelerated election of five judges of the Tribunal, was passed by the 7th Sejm on 25 June 2015. Subsequently, on 17 July 2015, the President of the Republic of Poland called parliamentary elections for 25 October 2015. This was in line with Article 98(2) of the Constitution, since the term of office of the 7th Sejm began on 8 November 2011.
147. Once the date of elections was known, it was possible to specify that the term of office would end between 25 October (if the first sitting of the 8th Sejm was summoned at the earliest possible date) and 23 November 2015 (if it was summoned at the latest possible date).
148. In 2015, the terms of office of five judges of the Constitutional Tribunal were ending. Three terms expired on 6 November, one on 2 December, and one on 8 December. No doubt the last two terms would expire during the term of office of the 8th Sejm, irrespective of the date of its first sitting.
149. The terms of office of judges of the Constitutional Tribunal expiring on 6 November could have ended both during the term of office of the 7th and the 8th Sejm, depending on when the latter would start. Its actual commencement date is not important from the point of view of the constitutionality of Article 137 of the Law of June 2015 and the correctness of the election of judges done on its basis. **The constitutionality of a provision cannot be determined *post factum* by factual events that did or did not occur at the time the provision was enacted or applied. This would lead to a kind of “conditional compliance with the Constitution” depending on future events (such as when the President would call the first sitting of the Sejm), which is unknown in the Polish legal system.**

150. The most important issue here is what the 7th Sejm knew at the time of passing the provisions of Article 137 (i.e. 25 June) and at the moment of its application and using it as the basis for the election of five judges of the Tribunal (i.e. 8 October 2015). Neither when passing the law, nor when electing the judges was the Sejm able to know when its term of office would end, and thus whether it had the right to elect the judges of the Tribunal to replace those whose term of office was to end on 6 November.
151. In fact, 7th term Sejm intended to perform a “conditional” unconstitutional election of 1/3 members of the Tribunal – while it remained unknown whether it is authorized to do so, or is this power vested in the next term of Sejm. Until the start of this term remained unknown, it was impossible to define which term of Sejm is authorized to nominate the judges – including those starting their terms in November.
152. Making these nominations without this knowledge (like the very provision constituting the basis for that) must be considered unconstitutional. The 7th Sejm should have at least taken into consideration the fact that electing five judges of the Constitutional Tribunal on 8 October might breach the competences of the 8th Sejm. It is of no importance when the term of office actually began – a legal transaction that is defective and burdened from the very onset with such an error cannot “rehabilitate” itself solely on the basis of the date of calling the first sitting of a new Sejm (which took place on 12 November 2015).
153. This was precisely the conclusion reached by the 8th Sejm, which i.a. based on these faulty acts (and procedural faults) decided, by passing the relevant resolutions on 25 November 2015, that all five resolutions on the election of the judges of the Tribunal passed on 8 October by the 7th Sejm had no legal force. Then on 2 December 2015, the 8th Sejm elected five judges; since the resolutions of 8 October had no legal force, these seats had to be treated as vacating.
154. **Resolutions of the 8th Sejm of 25 November and of 2 December 2015 were never challenged by the Constitutional Tribunal or by any other body.** Contrary to what has been often claimed, validity of nomination of the judges that the 7th term Sejm intended to make was not the subject matter of a judgment of the Constitutional Tribunal of 3 December 2015 – It only held that the provisions of Article 137 of the Law of 25 June (based on which the

resolutions had been passed) were partially constitutional and partially unconstitutional.

155. Resolutions of the 8th Sejm, both those of 25 November stating that the resolutions of 8 October lacked legal force, as well those of 2 December on the election of judges, were reviewed by the Constitutional Tribunal in separate proceedings conducted under file name U 8/15. The proceedings were discontinued, because the Tribunal found that it had no competencies to review these resolutions. This means that they are still part of legal transactions with all of its consequences.
156. The Tribunal is currently composed of 15 judges who were lawfully elected by the Sejm and sworn in by the Polish President. Immediately after the election, all of them (including the three candidates disputed since 2015) took up office in the Tribunal and were paid remuneration, also by the previous president of the Constitutional Tribunal, who, however, would not allow them to adjudicate for a long time.
157. It was the inconsistent behaviour of the previous President of the Tribunal that led to the situation in which rulings of the Tribunal were passed in violation of the statutory provisions regulating the mode of proceedings. In particular, the composition of the panel of Tribunal judges was incorrect, the Tribunal infringed the rights of the parties to participate in hearings, examined cases in closed sessions instead of hearings without any grounds to do so, or proceeded in violation of the sequence of incoming cases.
158. The situation continued until December 2016 when the currently binding Law on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal was passed, and when the term of office of the previous president of the Constitutional Tribunal ended and a new president was elected. The election was held in line with the mode of proceedings, and its result was recognized and confirmed by the then deputy president, judge Stanisław Biernat.⁶⁴
159. When passing the law, the Sejm decided that for the sake of stability of the legal system it would be better to publish all rulings of the Tribunal, even those that had been passed in the previous months in violation of the mode

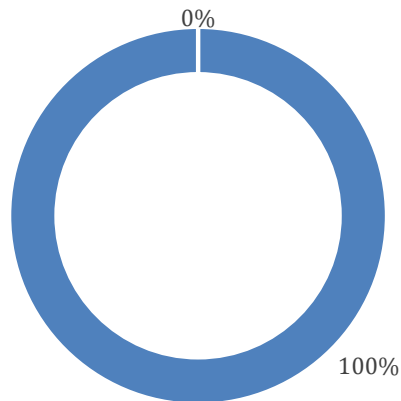
⁶⁴ *Biernat: uznajemy, że sędzia Przyłębska jest prezesem TK*, Wirtualna Polska, 21 December 2016, <https://wiadomosci.wp.pl/biernat-uznajemy-ze-sedzia-przylebska-jest-prezesem-tk-6071612765278849a> [available: 28.2.2018]

of proceedings. Therefore, the rulings were published (with the exception of three that concern laws which are not valid anymore; **since the only legal consequence of publication of a ruling of the Constitutional Tribunal is the removal of the challenged provisions from the legal dealings, their promulgation would have no effect in the Polish legal system**).⁶⁵

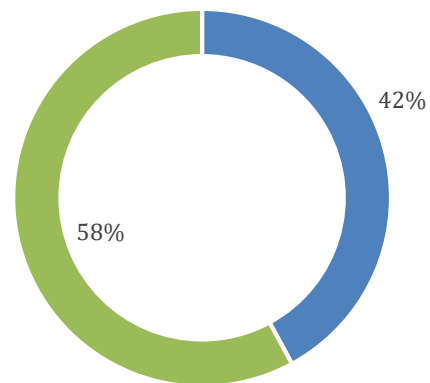
160. Currently, the Constitutional Tribunal operates correctly and performs the tasks entrusted to it by the Constitution. Accusations that pressure is being exerted on it by politicians from the parliamentary majority are groundless; **the currently binding provisions of law guarantee independence of judges of the Constitutional Tribunal to the same extent as before 2015**. The judges are irremovable and will retain their status for life once their 9-year-long term of office comes to an end. Therefore, politicians cannot exert any pressure on them.
161. From the point of view of the quality of constitutional review, it is important to analyse the composition of adjudicating panels of the Constitutional Tribunal after its current President began her term of office. 38 rulings were delivered during that period, and **in the case of 16 of them (i.e. over 42%) judges elected to the Tribunal by the previous parliament were in majority on the adjudicating panel**. At present, their number is 6, and 9 judges were elected during the present Sejm.
162. This situation should be compared with the way that panels were composed by the previous President of the Tribunal. Between December 2015 (when first judges nominated during current term of Sejm took office in the CT) and December 2016 (when the previous President's term ended) the Tribunal delivered 41 judgments (including those adjudicated with breach of proceedings). During this time, judges nominated in the current term of Sejm – including those whose nomination was never contested by anyone – **were never given a majority in a panel**.

⁶⁵ The legal basis for publication of the rulings delivered unlawfully was Article 19 of the Law of 13 December 2016 – provisions implementing the Law on the Organisation of the Constitutional Tribunal and the Mode of Proceedings Before the Constitutional Tribunal and the Law on the Status of the Judges of the Constitutional Tribunal (Journal of Laws of 2016 item 2074)

3 XII 2015 - 20 XII 2016 (President Andrzej Rzepliński)



od 21 XII 2016 (President Julia Przyłębska)



- Cases resolved with a ruling issued by a panel with a majority of judges nominated **before 8th term of Sejm**
- Cases resolved with a ruling issued by a panel with a majority of judges nominated **during 8th term of Sejm**

Source: <http://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/>

[available: 6.3.2018]

163. Number of cases concluded with a judgment (no matter the legality of the proceedings) also shows that claims about alleged ineffectiveness of constitutionality control are unfounded. 38 verdicts issued within over 14 months is a result only slightly lower than 41 such rulings between over a year between 3 December 2015 and 20 December 2016.
164. The intention of changes undertaken since 2015 was never to “appropriate” the Tribunal for one political party, but to seek to restore the necessary pluralism within it. Due to the manner of electing the members of the Polish Constitutional Tribunal and the fact that the election is held by the Sejm, i.e. a body of strictly political nature, the Tribunal has always been a *quasi*-political entity. It should never be overly dominated by one political side – as it risks weakening its legitimisation. It is, therefore, justified not to allow a situation in which the judges elected with the support of one political party are in significant majority in the Tribunal, and if such a situation occurs, to ensure that “minority” judges have due influence over the jurisprudence. The statistics quoted above prove that pluralism is sustained at the moment.

165. In the spirit of that pluralism the previous President of the Council of Ministers proposed in January 2016 that the Sejm change the Constitution by a 2/3 majority and elect a new Tribunal, to which representatives of the opposition could present 8 candidates and the ruling party – 7.⁶⁶ The proposal was not accepted by the opposition parties.

⁶⁶ 8 sędziów dla opozycji, 7 dla rządzących - Beata Szydło proponuje rozwiązanie sporu o Trybunał, Dziennik Gazeta Prawna, 21 January 2016, <http://wiadomosci.dziennik.pl/polityka/artykuly/511129,premier-beata-szydlo-spotkanie-kprm-opozycja-trybunal-konstytucyjny-kukiz-15.html> [available: 28.2.2018]

VI. RULE OF LAW AS THE FOUNDATION OF COMMON EUROPEAN VALUES

166. Art. 7 of the Treaty on European Union stipulates that certain EU member state's rights deriving from the application of the Treaties can be suspended if there is a clear risk of a serious breach by a member state of common European values referred to in Article 2 of the TEU. These values include the respect for human dignity, freedom, democracy, equality, rule of law, and respect for human rights, including the rights of persons belonging to minorities.
167. The European Union is also based on the principle of equality between member states and on respect for their autonomy. This respect is reflected most of all in the principles of conferral and subsidiarity (Art. 4 and 5 of the TEU), according to which all competences that are not conferred upon the Union in the Treaties remain with the member states and in areas which do not fall within its exclusive competence, the Union shall act only if and in so far as the objectives of the proposed action cannot be sufficiently achieved by the member states.
168. There is no doubt that respect for freedom, democracy, rule of law and human rights, as well as respect for the individuality and autonomy of member states, embrace more detailed principles. From the point of view of the present paper, the following have special importance:
- constitutional pluralism;
 - respect for the principle of division and balance between authorities, and
 - the need to account for the totalitarian past.

CONSTITUTIONAL PLURALISM AND THE RULE OF LAW

169. The legal system of the European Union is based on constitutional pluralism of the member states. It means that there are multiple constitutional systems – on one side there are national systems of the Member States, on another, the European framework, having its “constitutional charter” in the Treaties: Treaty of the European Union and Treaty on the Functioning of the European Union (see: ECJ opinion No 1/91, ECR 1991/10, s. I-6102). Each country has specific constitutional solutions that are rooted in its history and legal traditions and these differences are protected by the treaty law of the European Union. Article 4 of the Treaty on European Union quoted above shows that **the Union respects national identity which is inherent in the fundamental political and constitutional structures of the member states.**
170. Constitutional identity, a core value of each national community, determines not only the most fundamental values and resulting tasks for state authorities, but also sets the limit for regulatory intervention of the European Union.
171. Defence of constitutional identity is a key matter for the German Constitutional Tribunal, which in its 2009 ruling on the Lisbon Treaty (2 BvE 2/08) stated that **“the empowerment to embark on European integration ... applies as far as the limit of the inviolable constitutional identity”**; according to the Tribunal this identity – including “the principle of democracy” may not be balanced against other legal interests and thus it remains outside of the competence of the legislative or the executive branch of power.
172. The importance of the protection of national identity for the European Legal system was also stressed by the European Court of Justice – that ruled that it can sometimes lead even to exception from the rule of primacy of the EU law that was itself protected and strengthened by the Court (see C-208/09 – *Sayn-Wittgenstein*, C-391/09 *Runevič-Vardyn* and *Wardyn*). Respect for this rule results from a logical reasoning that the EU should not dismantle its very foundations – as long as the Member States remain the “masters of the Treaties” EU should not erode its constitutional systems, as it could lead to erosion of the EU system, too.
173. This special character of the European legal system – comprised both of national systems AND *acquis communautaire* was best described by a Scottish law philosopher, Neil MacCormick. In his commentary to the

German Federal Constitutional Tribunal in its ruling over the Treaty of Maastricht (case *Brunner*) where one can find roots for the nowadays ample and developed theory of constitutional pluralism.

174. The basis for this theory is a belief that the EU – being something more than a typical international organisation, yet something less than a federation of states – a hierarchical system of the sources of law as proposed by Hans Kelsen may not suffice to describe our legal reality. Each of the legal systems – national and European – has different sources for its legitimisation (they are different but have many tangent points). It is thus impossible to completely subordinate one system to another – as impossible as completely separating them.
175. It led MacCormick to believe that not all legal problems may be resolved through legal tools (N. MacCormick, *Maastricht Urteil: Sovereignty Now*). In order to avoid conflict that could destroy the peculiar construct of European legal system, the EU and its Member States should mutually respect themselves and remain open to withdraw some of their actions if they would too much interfere in the areas reserved for the other party – even if both of the parties would believe that there are some legal grounds for action. Thus, one of the main principles is self-restraint – resulting from mutual trust, that is a condition for each and every community. This balance in the European Union that has been constructed carefully for years should never be disturbed.
176. The right to introduce its own sovereign institutional solutions concerning the judiciary is a pillar of each national constitutional system in Europe. The Polish reforms of the judiciary implement this right – they have been carried out in a way that takes into account the need to remedy the defects of the domestic judicial system, and at the same time does not diverge in a significant way from solutions that are universally applied in the European Union countries.
177. As has already been mentioned before, the new Polish regulations cannot be an exact copy of the legislation of other EU member states. It is obvious that there are differences in legal systems within the EU, this follows from separate constitutional identities of individual states, and this diversity is protected by the Treaty on European Union.

178. Consequently, even though the Polish reforms are not an identical copy of the solutions that are in place in other countries, this analysis shows that **there are many significant similarities between them. What's even more important, the analysis shows that the reforms carry no risk for the rule of law, due to the fact that there is a number of several strong guarantees of judicial independence in the Polish system.**
179. The way in which the judiciary is organized differs across member states. The differences regard i.a. the degree of influence of representatives of other branches on the judicial appointment process, professional promotion of judges, appointing judges to particular posts in the courts, or retirement. A thorough analyses of the provisions in each member state would no doubt allow us to say that some of them enhance the rule of law, and others affect it negatively, but **these regulations as a whole have never been challenged by EU institutions.**
180. A certain tension between the executive, the legislative and the judiciary lies in the very nature of democratic systems. The judiciary always functions in the realm of rules created by the legislator and concerning the organisation of court system, rules of professional liability and retirement age. Naturally, it leads to clashes that practically all democratic states have to deal with, not only in the European Union.
181. A German example with disputes about the issue of judicial self-governance is particularly worth noting. The resolution by the Federal Assembly of the German Union of Judges of 2007 called for the creation of elements of judicial self-governance in order to enhance the independence and boost the effectiveness of the German judiciary. Under the resolution, the self-government should be based on a two-pillar model involving the Judicial Election Commission (composed of 9 deputies of a given Landtag, 7 judges specializing in particular areas, 2 public prosecutors and a chairperson who would be the chairperson of a Landtag) and the Judicial Administrative Council (4 judges and presidents elected by the Election Commission)⁶⁷. The call to create a real judicial self-governance in 2010 that would take responsibility for managing the judiciary was repeated – also to no avail;

⁶⁷ Bundesvertreterversammlung des Deutschen Richterbundes (DRB), Forderung 27 April 2007, <http://www.drb.de/cms/index.php?id=111> [available: 28.2.2018].

the legislative branch has not yet implemented the changes proposed by the judiciary.

182. In its resolution of 2009, the Parliamentary Assembly of the Council of Europe also urged Germany to introduce elements of self-governance, and to establish a judiciary council modelled on the councils that exist in the vast majority of European states. So far, none of this has materialized, and most of judicial appointments in Germany are decided by commissions composed solely or in a majority of politicians.

Resolution no (1685) 2009 of the Parliamentary Assembly of the Council of Europe on allegations of politically motivated abuses of the criminal justice system in Council of Europe member states⁶⁸

"5.4.1. The Assembly calls on Germany to consider setting up a system of judicial self-administration, taking into account the federal structure of the German judiciary, along the lines of the judicial councils existing in the vast majority of European states, as a matter of securing the independence of the judiciary in future."

183. However, tensions between the executive and judicial branches or the occasional escalation of such tensions cannot be considered as a threat to the rule of law. As long as judges have guarantees of irrevocability and independence – and the latter has been enhanced in Poland as a result of the changes (random allocation of cases, prohibition of judicial transfers between court divisions) – the separation of powers is not endangered. Least of all by the changed procedure for electing the National Council of the Judiciary: it is created within the spirit of the Venice Commission's opinions quoted in this document, and continues to grant the judicial community a decisive say on the Council's composition.

⁶⁸ Resolution 1685 (2009) Allegations of politically motivated abuses of the criminal justice system in Council of Europe member states

ACCOUNTING FOR THE TOTALITARIAN PAST

184. Common European values are also expressed through the need to hold persons accountable for offences committed during totalitarian dictatorships.
185. As it was already mentioned in this document it was the experience of birth and demise of fascism, Nazism and communism that was one of the most important reasons for European integration. Every of these regimes violated the rule of law also by exercising control over the judicial system. Judges often applied unbearably unjust statutes – to use the famous formula created by the German philosopher of law Gustav Radbruch. Very often **they did not check the executive branch of government, were not independent of it, and did not guard civil liberties or human rights – on the contrary, their actions represented a *de facto* extension of total control exercised by state organs over the people.**
186. Article 2 of the Treaty on the European Union provides that the rule of law represents one of the European Union's fundamental values. One can hardly disagree with the argument that the rule of law is the foundation of modern-day democracies, but also one of the most important accomplishments of the European civilisation.
187. A condition and the absolute basis for this accomplishment was (and still is) holding totalitarian and authoritarian legal systems accountable by European nations. It meant that elementary justice is restored to the victims of these totalitarian systems – and solely for this reason it represented one of the most important European values, such as, the rule of law, democracy and respect for human rights. Lack of accountability would be totally against to these values.
188. There can be no doubt that the profession of a judge is one of the most important professions of public trust and the judge's prestige is the foundation of the rule of law. **The guardian of the rule of law – and that is the role judges play – cannot be exercised by people who are entangled in dishonorable service to totalitarian or authoritarian systems, if only out of respect for the victims of these regimes.**
189. This is exactly why the reforms that cut down the long shadow of communism in the Polish justice system are in line with European standards and embrace the values on which the European Union is founded. **Not consenting to the**

evil of 20th century totalitarianisms is also an insuperable element of the Polish constitutional identity.

Preamble to the Polish Constitution

*"Having regard for the existence and future of our Homeland, Which recovered, in 1989, the possibility of a sovereign and democratic determination of its fate, We, the Polish Nation - all citizens of the Republic (...) **mindful of the bitter experiences of the times when fundamental freedoms and human rights were violated in our Homeland** (...) establish this Constitution of the Republic of Poland as the basic law for the State, based on respect for freedom and justice, cooperation between the public powers, social dialogue as well as on the principle of subsidiarity strengthening the powers of citizens and their communities."*

Article 13 of the Polish Constitution

*"**Political parties and other organizations whose programs are based upon totalitarian methods and the modes of activity of Nazism, fascism and communism**, as well as those whose programs or activities sanction racial or national hatred, the application of violence for the purpose of obtaining power or to influence the State policy, or provide for the secrecy of their own structure or membership, **shall be prohibited.**"*

190. It is a fact that the process of accounting for the past is carried on even after many years have passed, but it is still necessary. As it has already been mentioned before, there are still sitting Supreme Court (and common court) judges with various degree of involvement in communism. They are comparatively few, but they still have considerable influence on jurisprudence, as evidenced by the already mentioned 2007 resolution of the Supreme Court which absolved judges from responsibility for political rulings delivered during martial law in the 1980s.
191. After the collapse of communism, the only court that was subject to personal changes was the then Supreme Court. 80% of its judges were dismissed; following verification performed by the National Council of the Judiciary which

was appointed at the time. This figure shows the scale of involvement of judges from communist Poland in the totalitarian regime.

192. This verification had not been carried out extensively enough. It was a result of a political compromise and limited to removal of some of the most compromised judges of the Supreme Court. The “new” Supreme Court was, however, never free from members involved in communism – that was the effect of no de-communisation of the judiciary as a whole. This issue was also raised in 2014 by another previous President of the Constitutional Tribunal (currently also rather critical of the reforms), judge Jerzy Stępień.

“Fresh blood is not welcome in courts”, M. Kryszkiewicz interviews J. Stępień, *Dziennik Gazeta Prawna*, 1 XI 2014⁶⁹

*“In my opinion this time [between 1989 and 2014] was completely wasted. After 1989 nothing positive was done in this scope. There was no real will to reform the judiciary. Not even a basic, rudimentary thought about who the judge in a modern, democratic state should be. And that should have been the first step to solve all the problems. We have left the judges aside, taking care solely that they are remunerated enough ... **Unfortunately, I must say that the 3rd Republic [i.e. Poland after 1989] has not done much to improve the common judiciary. There was no verification of judges whatsoever.**”*

193. It is true – no verification was performed with regards to common court judges. The only reason for not performing it was lack of political will. The law that would make possible disciplinary liability of judges who broke judicial independence during communism was passed only after 8 years, on 3 December 1998. But then another obstacle appeared: peer solidarity: **even though a few hundred motions to dismiss judges were introduced under the law, only 30 reached the Supreme Court, and only four trials, each for one judge, were held. Almost all cases ended with acquittal⁷⁰,** and judges involved in communism could continue adjudicating and administering justice unhindered in a democratic state. Only one judge was dismissed – and he was already retired at the time⁷¹.

⁶⁹M. Kryszkiewicz „W sadach nie chcą świeżej krwi”, *Dziennik Gazeta Prawna*, 1 września 2014

⁷⁰ E. Siedlecka, *Jak to sędziowie się samoczyszczali*, *Gazeta Wyborcza*, 26 September 2016

⁷¹ SN judgment of z 12 March 2007, case file No. SNO 10/07.

194. Despite the fact that 29 years have passed since the collapse of communism, the Polish society has not accepted this situation. This was one of the reasons why it endorsed the current parliamentary majority in the 2015 elections. De-communizing courts has always been a part of its programme with respect to the reform of the judiciary, and now this programme is being implemented.
195. In this case the Polish reform is not a precedent in the European Union. We should quote here once again **the case of Spain, where the law regulating the organization of the judiciary and lowering retirement age to 65 years was passed in 1985, 10 years after the death of the Spanish dictator General Franco.** This was possible only after the socialist party came to power in 1982, so also in this case political will played an important role. This is a completely natural and desirable phenomenon; this is how the society communicates its will to the legislative authorities, and this will should be implemented in line with the fundamental values of the western civilization.
196. The process of holding to account judges who were involved in a totalitarian regime was even longer in the Federal Republic of Germany. According to some estimates, as late as the early 1960s there were still approx. 800 judges adjudicating in Germany who prior to 1945 had adjudicated in extraordinary courts, i.e. those most implicated in Nazi crimes. In the Federal Ministry of Justice itself, until 1973 over half of all managerial positions were filled with former NSDAP members (in 1957 their share was over 70%).⁷²
197. The fact that it was forsaken in West Germany for several decades, was one of the reasons why in 1990, after the reunification of Germany, a decision was made to hold the communist judiciary accountable. Initially, all 1,580 judges from the former German Democratic Republic were allowed to continue adjudicating, but only until being positively vetted by a judicial commission. Berlin was an exception – all judges were put on so called “standby” and could only resume their work after being vetted.
198. The commissions were composed of six representatives of *Landtags* and four representatives of judges and were chaired by the Minister of Justice from a given federal state, albeit without the right to vote. Decisions of the commissions were binding on the Minister of Justice only if they were

⁷² <https://diepresse.com/home/zeitgeschichte/5099217/NaziJuristen-dominierten-nach-1945-deutsches-Justizressort>
[available: 28.2.2018].

negative; in the case of a positive result of vetting, the minister still had the final say. The vetted judges had the right to appeal against the minister's or the commission's decision to an administrative court.

199. 1,889 judges and prosecutors of the former German Democratic Republic underwent such procedure, with only 58% vetted positively. In Berlin, which as the capital city had symbolic meaning to the whole East Germany, only 15% of judges were vetted positively. The process of accounting for the past was carried out through political influence on the judiciary; it was necessary and warranted by the protection of fundamental democratic values.⁷³
200. These examples prove that **other European countries also held to account people who were involved in totalitarian regimes and that they did it not always directly after the collapse of those regimes.** Due to the fact that judges play a key role in democratic states as guardians of human rights and civic freedoms, the passage of time alone can in no way be an argument against holding them to account, provided that the rule of law and their own rights are respected. Such is the case with Polish reform – and for this reason as well the allegations made in this scope are also groundless.

⁷³ Data concerning vetting of judges of the former German Democratic Republic based on: K. Kinkel, *20 Jahre Auf- und Ausbau einer rechtsstaatlichen Justiz in den neuen Bundesländern*, http://www.drj.de/fileadmin/docs/20_jahre_rede_kinkel.pdf [available: 28.2.2018].

VII. CONCLUSIONS

202. All issues that have been described above prove that Polish reforms are justified by the problems that our judiciary has been dealing with for years. At the same time, they do not differ from the European standards of protection of the rule of law – and each of the new solutions has its counterpart in other EU countries or is very similar to the solutions that have been in place there for years and that have never been questioned by the Commission.
203. Polish judicial reforms are inspired by solutions that are in place in other European legal systems, both in terms of organizing the judicial appointment process, promotions, relations between judges and judicial administration, retirement age, as well as accounting for the communist past.
204. It should be emphasized once again that:
- regulations relating to the National Council of the Judiciary ensure that **members of the judicial community sitting on it have a decisive voice** (judges account for 2/3 of its members, they are elected from among candidates endorsed by other judges and they cannot be dismissed after election);
 - due to such composition of the National Council of the Judiciary, **there is no risk of influencing politically the Supreme Court** – either the way its judges are elected (the Council is the only body that can recommend them), or the way they adjudicate (they have all guarantees of independence);
 - **the independence of individual judges vis-à-vis court presidents (and thus, indirectly, also vis-à-vis the executive power) is not weakened, but strengthened** – among others by introducing a prohibition to transfer a judge to another division or a random allocation of cases; if the reform aimed at influencing the rulings, these guarantees would not be added, as they make such influence much more difficult;
 - **the independence of trainee judges is also guaranteed, to the same extent as the independence of judges that were appointed for life;**

the existing ECHR jurisprudence shows that even a smaller degree of these guarantees would not breach the European Convention on Human Rights;

- independence is to no degree threatened by the procedure of appointing court presidents; **it gives the National Council of the Judiciary a possibility to block each decision to dismiss a president;** compared to the rules in place in Poland in 2012, this increases the influence of the judicial community on this process;
- the way in which the changes have been introduced so far proves that the aim of the reform is not to make staff purges in the judiciary – **only over a dozen percent of court presidents and vice-presidents have been dismissed;**
- another proof of a proper quality of the Polish judiciary is the way the Constitutional Tribunal is operating; **despite allegations of making the Tribunal politicised, the benches are to a great extent composed of judges elected by previous terms of Sejm** (these judges were in a majority in over 42% cases);
- the composition of the Tribunal is also correct and in line with the law. The dispute which started with incorrect and ineffective resolutions of **the 7th Sejm that was seeking to elect 1/3 of the Constitutional Tribunal judges without having competence to do so (objectively, it was uncertain at the point when the term will come to an end)** should be considered as terminated, especially since the Tribunal acts in a way to ensure a proper review of constitutionality and adjudicating pluralism;
- the provisions regulating the retirement age reflect the principle of checks and balances of different branches of power, as they allow representatives of other authorities (the President or the Minister of Justice) to **make their independent assessments to decide whether a judge should continue working as a judge; this solution is also in place in other countries and has not generated reservations so far**, also because judges who are at the peak of their careers are rarely susceptible to any pressures.

205. The post-war history of Europe tells us that we need to include a political factor with a democratic mandate in order to restore the authority of judges as guardians of the rule of law in countries that had experienced authoritarian or totalitarian rule, sometimes many years after the collapse of communism. Accounting for the legacy of communism in the Polish judiciary means implementing European values, as was the case with accounting for Nazism or fascism by other European countries.
206. The European legal system is founded on the recognition of constitutional pluralism enshrined in Article 4 of the Treaty on European Union which also guarantees that each member state may shape its own judicial system in a sovereign manner, as long as it does not threaten judicial independence.
207. Tensions between the executive and the judiciary lie in the nature of democratic systems, yet their very existence does not mean that judicial independence is endangered. The Treaty on European Union safeguards constitutional identity of the member states as their exclusive national competence, which means that reforms of the judiciary should be assessed at the national level by competent authorities.
208. This is not to say that Article 7 of the Treaty on European Union does not apply to judicial reforms in the Member States. **Violation of judicial independence is a red line that cannot be crossed when it comes to the principle of the rule of law understood as an element of European values.**
209. Polish judges enjoy a very strong guarantee of said independence; one of the strongest in Europe. Therefore, one cannot agree that Poland violates Article 2 of the Treaty on European Union. **For this reason, we believe that the European Commission's decision to trigger Article 7 of the Treaty is completely unfounded in these circumstances.**
210. It should also be emphasized that if we allow this procedure to continue, it might create a dangerous precedent from the point of view of the "checks and balances" between the competences of member states and European institutions. **Declaring that there is a risk of breaching the rule of law by Poland, whereas the Polish law is significantly similar to other Member States' legal systems can lead to abuse of the procedure – and to using this precedent with respect to other member states in the future.**
211. Such actions might be risky themselves for one more reason: **they may strengthen anti-European sentiment that has been more and more**

apparent for the last years. It can further lead to growth of populist political forces, seeking to dismantle or weaken one of the biggest successes in post-war Europe that is the European Union. The purpose of European institutions should always be shaping the common policy so that these tendencies do not increase – and if some of the EU Citizens would deem there is a risk of their rights being infringed by these institutions could lead to such a growth.

212. For this reason as well, we ask you to read our arguments thoroughly, to analyse and verify them, and if need be, to address our government with any comments, questions or requests that you might consider relevant. We urge the European Commission, the Parliament and all the Member States to do so. We shall do our best to address your doubts properly. We remain assured that further dialogue will lead to have all controversies explained without resorting to resolutions that would weaken the European Union.