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Judicial Independence and Accountability: Withstanding Political Stress in Poland

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ARTICLE
JUDICIAL INDEPENDENCE AND
ACCOUNTABILITY:
WITHSTANDING POLITICAL STRESS IN POLAND

Fryderyk Zoll & Leah Wortham**+*

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I. INTRODUCTION

For democracy and the rule of law to function and flourish, important actors in the justice system need sufficient independence from politicians in power to act under rule of law rather than political pressure. The court system must offer a place where government action can be reviewed, challenged, and, when necessary, limited to protect constitutional and legal bounds, safeguard internationally-recognized human rights, and prevent departures from a fair and impartial system of law enforcement and dispute resolution. Courts also should offer a place where government officials can be held accountable. People within and outside a country need faith that court decisions will be

made fairly and under law. Because the Council of Europe's Group of States against Corruption ("GRECO") deems judicial independence critical to fighting corruption, GRECO makes a detailed analysis of their members' judicial system part of their member review process.¹ This Article is a case study of the performance of Poland's mechanisms for judicial independence and accountability since 2015, a time of extreme political stress in that country. Readers will see parallels to comparable historical and current events around the world.

Similar concerns arise regarding independence of other parts of the legal community from political control: lawyers (meaning a legal profession that can represent and advocate for clients including in matters versus the state),² prosecutors, and the law faculties and professors who educate legal professionals.³ For all these legal actors,

1. The Council of Europe established GRECO in 1999 to monitor the forty-nine member states' compliance with the organization's anti-corruption standard. Membership comprises forty-eight European countries and the United States. *What is Greco?*, COUNCIL OF EUROPE, <https://www.coe.int/en/web/greco/about-greco/what-is-greco> [<https://perma.cc/CG2D-K6GR>] (last visited Oct. 10, 2018); see *infra* notes 74-135 and accompanying text for discussion of GRECO's recent conclusions and concerns about Poland.

2. For historical reasons Poland has two separate bars of practicing lawyers: legal advisors and advocates. Izabela Kraśnicka, *Polish Legal Education in the Light of the Recent Higher Education Reform*, 2012 MICH. ST. L. REV. 691, 701-03 (2012) (explaining the five Polish apprenticeship tracks as well as similarities and differences between the legal advisor and advocate professions). On September 18, 2018, the Polish legal advisors' profession changed their name to attorney-at-law, see OIRPWARSZAWA, https://www.oirpwarszawa.pl/wp-content/uploads/2018/09/uchwa%C5%82a-102_2018-KRRP.pdf [<https://perma.cc/9WJS-93Y5>] (last visited Feb. 10, 2019). Concerning the differences between the US single legal profession system and the system of multiple professions in European countries, see Laurel S. Terry, *An Introduction to the European Community's Legal Ethics Code—Part 1: An Analysis of the CCBE Code of Conduct*, 7 GEO J. LEGAL ETHICS 1, 10-11 (1993); *infra* notes 13 & 14 and accompanying text.

3. The *Mount Scopus International Standards of Judicial Independence* ("Mount Scopus Standards") are an effort by a global group of academics and judges to formulate judicial independence standards applicable across legal and governmental systems and applicable to judges on both national and international tribunals. They seek to set minimum guarantees for the independence that both individual judges and a system's judiciary need while also articulating appropriate mechanisms for democratic accountability of the judiciary. Although focused on judicial independence, Article 9 of the Mount Scopus Standards recognizes the significant roles that lawyers, legal education, bar associations, and education of the public play in assuring appropriate judicial independence. INTERNATIONAL ASSOCIATION OF JUDICIAL INDEPENDENCE AND WORLD PEACE, *Mount Scopus International Standards of Judicial Independence* (Mar. 19, 2008), <https://www.jiwp.org/mt-scopus-standards> [<https://perma.cc/H6GG-YQN9>]; Shimon Shetreet, *Creating a Culture of Judicial Independence: The Practical Challenge and the Conceptual and Constitutional Infrastructure*, in *THE CULTURE OF JUDICIAL INDEPENDENCE: CONCEPTUAL FOUNDATIONS AND PRACTICAL CHALLENGES* 17, 22 (S. Shetreet & C. Forsyth eds., 2012) (on the importance of an independent legal profession in creating an independent judiciary in post-communist societies).

individually and in the collective bodies they form, independence from government control (at least meaning ruling political officials) is justified by the important public functions that independence serves. Unfettered professional independence, however, can cross a line to guild protection, self-service, arrogance, and forgetting the societal reasons for independence. Hence, the concern to balance independence with accountability.⁴

This Article offers a cautionary tale about how attempts by political leaders to control the courts can be couched in accountability terms, while in practice operating as instruments of political control.⁵ Governmental structure alone does not guarantee judicial independence.⁶ The legitimate functioning of governmental structures, e.g., a National Judiciary Council, depend on a country's culture and the respect of its officials for often unwritten and unspoken bounds separating the branches of government.⁷

In US courts, separation of powers and checks and balances offer one model for judicial independence, although federal and multiple state courts vary in whether elected officials play a role in the selection and retention of judges and prosecutors, as well as with regard to matters such as court structure and budget.⁸ With the interaction in state and federal governments in the US federal system, one level of government sometimes checks the other's power, e.g., when state and local government officials challenge federal actions.⁹

4. DAVID KOSAŘ, PERILS OF JUDICIAL SELF-GOVERNMENT IN TRANSITIONAL SOCIETIES: HOLDING THE LEAST ACCOUNTABLE BRANCH TO ACCOUNT 2 (2016) (describing the inevitable clash of these two principles such that “[a]ll democratic countries . . . have to find the right equilibrium” between them).

5. *Id.* at 7, 9, 13, 16, 57, 68 (terming abuses of accountability mechanisms “perversions” of accountability); *id.*, ch. 6, at 236-333 (discussing such abuses in Slovakia).

6. *See generally id.* (comparing the Czech experience with the Ministry of Justice model of judicial independence and accountability with the Slovakian National Judiciary model).

7. *See infra* notes 17, 376-379, and 381 and accompanying text.

8. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., FAQs: JUDGES IN THE UNITED STATES (2014), available at http://iaals.du.edu/sites/default/files/documents/publications/judge_faq.pdf [<https://perma.cc/GDS3-36RL>]; *see generally* David J. Barron, *Judicial Independence and the State Court Funding Crisis*, 100 KY. L.J. 755 (2011).

9. *See generally*, Claire McCusker, *The Federalism Challenges of Impact Litigation by State and Local Government Actors*, 118 YALE L.J. 1557 (2009); Sadurski, Wojciech, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding* (63 Sydney Law School Research Paper No. 18/01, 2018), <https://ssrn.com/abstract=3103491> [<https://perma.cc/5V53-UKAU>] (discussing the weakness of Polish institutions in withstanding “anti-constitutional populist backsliding” and pointing out federalism as a “veto point” in systems with that form of government).

This Article considers the Polish case regarding the delicate balance between judicial independence and accountability. Poland's judicial structure follows the National Judiciary Council model, one of the two principal models for judicial governance that are common in civil law countries with parliamentary governments.¹⁰ A National Judiciary Council with overall authority in judicial appointment, retention, discipline, budget, and court management provides a structure meant to secure the judiciary's place as a separate, co-equal branch of government.

The path to the judiciary and its relationship to the other legal professionals in many civil law countries is quite different from that in the United States.¹¹ Most civil law judges enter the judiciary track in a national system immediately after completing their academic legal education and remain there, perhaps advancing to be the president of a court, to a higher court, or to a more desirable city.¹² This differs greatly from the US system where the juris doctor ("JD") and a state bar exam are the usual single point of entry to all future careers in the law.¹³ US lawyers may take positions as prosecutors or judges at some point in their legal careers and then move on to another type of job.¹⁴ Lawyers normally become judges only after a number of years practicing law, whether in private practice, as in-house counsel, prosecution, another government position, public defense, or a nongovernmental organization. Many state and federal judges do not seek to move beyond the bench to which they were appointed or elected. If a US judge moves to a higher court, this usually is through an election or

10. KOSAŘ, *supra* note 4 at 131-35 (discussing five models of European court administration with the Ministry of Justice model as the "longest-standing one" and the judicial council model now common in Central and Eastern Europe).

11. *Id.* at 12, 118-19

12. In Poland, law graduates now usually enter this track through the Szkoła Sądownictwa i Prokuratury ("SSIP"), the school for judges and prosecutors, which provides classroom instruction combined with apprenticeship in the courts. Kraśnicka, *supra* note 2, at 704; Fryderyk Zoll, *The System of Judicial Appointment in Poland—A Question of the Legitimacy of the Judicial Power*, in THE CULTURE OF JUDICIAL INDEPENDENCE, *supra* note 3, at 301, 308-09.

13. Bureau of Labor Statistics, U.S. Dep't of Labor, *Lawyers*, in OCCUPATIONAL OUTLOOK HANDBOOK, available at <https://www.bls.gov/ooh/legal/mobile/lawyers.htm> [https://perma.cc/J5N3-LRE6].

14. *Professional Legal Ethics: A Comparative Perspective*, CEELI CONCEPT PAPER SERIES, 2-6 (2002), available at https://www.americanbar.org/content/dam/aba/directories/roli/misc/professional_legal_ethics_con_paper.authcheckdam.pdf [https://perma.cc/8VC3-HNPM] (central difference in US legal profession from European ones of a unitary rather than divided legal professions).

appointment system in which judicial peers and superiors play little or no role.¹⁵ Unlike Poland and some other civil law systems, the US practicing bar and public often have a significant role in judicial selection and retention while fellow judges have little or no role.¹⁶

Part II provides the reader background on the pre-2015 framework for judicial independence in Poland, as well as the Authors' critique of it; the dramatic changes since 2015; and the pushback among Polish, international, and European institutions to those changes.

Part III presents this Article's thesis. In 1989, the Solidarity Roundtable negotiators pressed for a system in which appointment, performance assessment, court administration, promotion, discipline, and indeed most aspects of a judge's career and the judicial system, would be self-governed by the judiciary through the National Judiciary Council structure and general governance system for the courts. The Solidarity negotiators' design has provided some important defenses to withstand the recent assaults on the Polish judiciary.

Part IV briefly identifies issues that Poland will face in undoing the damage done since late 2015 and reviews modifications of the pre-2015 judicial system that should be considered when calmer times return. The conclusion reminds readers that Poland is not the only nation whose judiciary faces political headwinds. Considering how Poland's institutions have (and have not) withstood political stress, and the assistance that regional, international, and civil society organizations have provided, as well as the limits of their influence, is a useful case study for other countries as well. The Polish experience also demonstrates how accountability mechanisms can become weapons of destruction without widely accepted and shared cultural norms on "judicial virtue," the role of the judiciary versus other

15. INST. FOR THE ADVANCEMENT OF THE AM. LEGAL SYS., *supra* note 8 (ways US state and federal judges are selected, evaluated, and retained).

16. *Id.* at 4 (discussing state judicial selection where attorneys and laypersons serve along with judges on commissions recommending judicial appointments to governors including those in which lay members are the majority); 7-8 (how state judges are reappointed or retained); 9-10 (judicial performance evaluation systems for state judges including questionnaires to attorneys, jurors, litigants, witnesses, and court staff, as well as other judges); 11-14 (path to the bench and retention of federal judges); James J. Alfini & Jarrett Gable, *The Role of the Organized Bar in State Judicial Selection Reform: The Year 2000 Standards*, 106 DICK. L. REV. 683, 684-91 (2002).

branches of government, and bounds, if crossed, that threaten democracy and the rule of law.¹⁷

Since this Article's first presentation at the Fordham Stein Center's December 2017 international legal ethics conference,¹⁸ the European Union has become an increasingly important actor in the struggles regarding judicial independence and accountability in Poland.¹⁹ Hence, it is fitting that this Article appears in the *Fordham International Law Journal* issue focusing on EU law and commemorating Professor Roger Goebel's years of significant contributions to the *Journal*.²⁰ This Article was updated on Polish events and the European and international actors reacting to them through January 30, 2019 and does not address subsequent events.

II. BACKGROUND

Section A provides a capsule history of Poland's complex history since the nation's sovereignty was restored a century ago, focusing in particular on how and why the Solidarity Roundtable process, when negotiating the transition from communism, insisted on a strong form of judicial independence.²¹ Section B.1 considers actions of the government since the Prawo i Sprawiedliwość party (the Law and Justice party, commonly referred to by its Polish acronym PiS) returned to power in 2015. PiS "reforms" of the judicial system have been multi-front, complex, contentious, and in the forefront of much of the international attention focused on Poland. When PiS came back to power in 2015, their leaders understood that bringing the judicial

17. KOSAŘ, *supra* note 4, at 19, 428 (describing the importance of "accountability-as-a-virtue," including a "well-developed sense among academics, lawyers, and judges themselves of how judges ought to behave, what it means to be a good judge"); *infra* note 381 (discussing the guardrails of democracy).

18. *Regulation of Legal and Judicial Services Conference*, FORDHAM U. SCH. OF L., https://www.fordham.edu/info/26666/regulation_of_legal_and_judicial_services_conference [<https://perma.cc/M9L3-L8GY>] (last visited Jan. 7, 2019).

19. See *infra* notes 228-325 and accompanying text.

20. Deborah L. Rhode, *International Legal Ethics: The Evolution of a Field*, 42 FORDHAM INTL. L. J. 218, 225 (2018) (reference to the Stein Center's October 10-11, 1991 conference on Internationalization of the Practice of Law and Professor Goebel's book on international legal practice co-authored with the then Stein Center Director Mary Daly). Attending the 1991 Fordham conference referenced in this Article sparked Co-Author Wortham's interest in international legal ethics.

21. For an excellent summary of Polish history, economics, and politics since the end of Communist rule and the PiS party's return to power in 2015, see *Change of State*, THE ECONOMIST, Apr. 21, 2018, at 43-45.

system under political control was crucial to the success of their other policy aims.²² PiS's philosophy and policy aims have been consistent since the party's founding.²³ Section B.2 reviews expressions of PiS's view that courts should not stand in the way of a popularly-elected government, albeit one elected by a relatively modest portion of the eligible electorate,²⁴ and a majority government's view of the national interest.

Section B.3 reviews the campaign that the PiS government has waged against the Polish judiciary. Recent PiS statements talk about judiciary reform in terms of increased accountability, responsiveness to the public, reduced delay, greater efficiency, and so on. These, however, are not the objectives of their dismantling of the existing system. Rather than an effort to improve the judicial system's functioning, PiS initiatives are based in an ideological view that courts should not stand in the way of a majoritarian will.²⁵ The PiS changes, if fully implemented, will give the political branches effective control of the courts.

Section C's account of international, European, and civil society concerns about Poland points out the substantive areas in which Polish government has moved, e.g., treatment of nongovernmental organizations, control of public media, loosening environmental regulations, politicization of the civil service and military. Section D reviews past proposals for improving the Polish judicial system and discusses ways that the system's functioning may have left Polish judges and courts vulnerable to attack.

A. Polish Judicial Independence and Institutions in Historical Context

When Poland regained independence in 1918 after almost 125 years of partition, the country inherited five legal systems (Austrian,

22. See *infra* Part II.B.2.

23. *Party History*, PiS, <http://pis.org.pl/partia/historia-partii> [<https://perma.cc/N2Z9-SNR5>] (last visited July 31, 2018).

24. Sadurski, *supra* note 9, at 2 (PiS received 37.5% of the vote with a turnout of 59.9%, 18% of those eligible to vote), 60 (15% of votes cast were "wasted" because they were cast for parties that did not meet the 5% threshold for a party to be represented in the Polish parliament).

25. Cf. KENNETH P. MILLER, *DIRECT DEMOCRACY AND THE COURTS* 82 (2009) (quoting Hamilton's *Federalist* 78 on the "counter-majoritarian function" of the courts, a "necessary check on the people themselves" and a guard against "serious oppressions of the minor party in the community").

Hungarian, German, Polish-French, and Russian).²⁶ At independence, the court systems of the previous ruling empires (Austria-Hungary, Russia, and Germany) were in place.²⁷ In the period until Polish independence ended with the German invasion of Poland in 1939, the country worked on developing a unification of law and the judicial systems.²⁸ The May Coup of 1926 by Józef Piłsudski pushed the fledgling republic toward a more authoritarian system, including efforts for the state to control the judiciary.²⁹

During World War II, Germany annexed large parts of Polish territory while the Soviet Union invaded other parts of the country.³⁰ People in those territories became subject to the German and Soviet legal and judicial systems.³¹ The remaining portion of the interwar Polish nation was under Nazi control in the “*General Gouvernement*,” although this area was not formally incorporated into the German Reich.³² In this *General Gouvernement* area, the Polish Supreme Court was abolished, but lower Polish courts continued to function to some degree regarding matters among Poles, though as a practical matter, under the full control of the German authorities.³³

After World War II, a communist government took power in Poland under significant Soviet influence.³⁴ In the period of Stalinist

26. ADAM ZAMOYSKI, *POLAND: A HISTORY* 307 (2009) (referring to four legal systems without naming them, but this does not take into account the differing Austrian and Hungarian roots of the legal system of the Austro-Hungarian Empire, which ruled part of the divided Poland).

27. NORMAN DAVIES, *GOD’S PLAYGROUND—A HISTORY OF POLAND: VOL. II 1795 TO THE PRESENT* 298 (revised ed. 2015) (three legal codes in place).

28. Adam Lityński, *History of the Supreme Court of the Republic of Poland*, THE SUPREME COURT OF THE REPUBLIC OF POLAND (June 6, 2018, 01:06 PM), <http://www.sn.pl/en/about/SitePages/History.aspx> [https://perma.cc/25QF-DSBM] (discussing the 1921 constitution based on the Montesquieu principle of three separate powers and the period until the unification of the common courts in 1929).

29. Grzegorz Ławnikowicz, *Sędziowie w autorytarnej Polsce [The Judges in Authoritarian Poland]*, (31) 2 KWARTALNIK KRAJOWA RADA SĄDOWNICTWA 14 (2016), e.g., the following quote: “Teraz już w przypadku wszystkich sądów decyzja o tym, kto zostanie sędzią i kto awansuje, należała do ministra.” [“From that point, the decision as to who should be appointed a Judge, and who is to be promoted rested upon the minister”] (available in Polish, translated by co-author Zoll).

30. ZAMOYSKI, *supra* note 26, at 315; DAVIES, *supra* note 27 at 324.

31. ZAMOYSKI, *supra* note 26, at 315.

32. *Id.* at 316-17.

33. JULIUSZ BARDACH, BOGUSŁAW LEŚNODORSKI, & MICHAŁ PIETRZAK, *HISTORIA USTROJU I PRAWA POLSKIEGO [THE HISTORY OF POLISH LAW AND POLITICAL SYSTEM]* loc. 1546 – 48 (2009) (ebook).

34. ZAMOYSKI, *supra* note 26 at 332-36.

sway in Poland (1947-56), communist authorities almost completely controlled the Polish government, of which the judiciary was an integral part.³⁵ For example, the communist party ultimately directed and ordered outcomes in criminal prosecutions.³⁶ Some space for judicial independence opened in the post-Stalinist thaw beginning in 1956 and continued until the imposition of martial law in 1981.³⁷ During this period, the mechanisms for state control persisted, but communist authorities varied in their choice to exercise them. Some Polish judges became experts in working within open spaces.³⁸ Under martial law, the state reasserted political control of the judiciary in seeking to control outcomes in political trials. Some judges and prosecutors sought to go as far as they could in their positions to avoid or mitigate this political influence while staying in their positions.³⁹ Many Polish judges, however, resigned in reaction, and some became advocates (that being the Polish legal profession authorized to appear in court representing criminal defendants).⁴⁰

In the 1980s, the unicameral Parliament of the communist government (“the Sejm”) amended the Polish constitution to create three institutions normally associated with democratic government and the rule of law: the Superior Administrative Court (1980), which has the authority to review administrative decisions;⁴¹ a Constitutional

35. *Id.* at 346.

36. *Id.* at 351 (noting that during this period, “the criminal justice system was geared not so much to delivering justice as to protecting the social, economic and political order”).

37. For references to the “thaw,” see ZAMOYSKI, *supra* note 26, at 359; DAVIES, *supra* note 27, at 437.

38. ADAM LITYŃSKI, *HISTORIA PRAWA POLSKI LUDOWEJ* [HISTORY OF THE LAW IN THE PEOPLES REPUBLIC OF POLAND] 44-45 (2010) (Communist leaders put pressure on judges in some cases but the “majority of judges” had the ability to maintain independence but for a few instances of “telephone justice” in Poland.). Telephone justice refers to informal influence or pressure exerted on the judiciary, a common term referring to the way regimes deal with the judiciary. See, e.g., Alena Ledeneva, *Telephone Justice in Russia*, 24 J. POST-SOVIET AFF. 324 (2008).

39. LITYŃSKI, *supra* note 38 at 45 (after introduction of martial law, one judge was arrested, and others were detained, investigated, or subject to search of their apartment or removed); ADAM STRZEMBOSZ & STANISŁAW ZAKROCZYMSKI, *MIĘDZY PRAWEM I SPRAWIEDLIWOŚCIĄ* [BETWEEN LAW AND JUSTICE] 145 (2017) (on judges’ difficult decisions whether to remain in their positions).

40. STRZEMBOSZ & ZAKROCZYMSKI, *supra* note 39, at 145 (large number of resignations after martial law ended).

41. Artykuł 1 i 2 ustawy z dnia 31.01.1980 o Naczelnym Sądzie Administracyjnym oraz o zmianie ustawy – Kodeks postępowania administracyjnego [Law on the Superior Administrative Court], Dz. U. 1980 nr. 4 poz. 8 (Pol.).

Tribunal (1982);⁴² and an Ombudsman (1987).⁴³ The Sejm adopted laws implementing the operation of the Constitutional Tribunal (1985)⁴⁴ and Ombudsman (1987).⁴⁵ Although the government's intention may have been propaganda, the institutions rather quickly began taking some actions to protect citizens' rights.

With the practical collapse of the Polish economic system in the late 1980s, communist rulers became open to sharing power (and responsibility for the problem) with the Solidarity-based opposition.⁴⁶ A negotiation process on sharing power commenced, and "the Roundtable" process proceeded from February 6 until April 5, 1989.⁴⁷ The future status and operation of the judiciary was an important element of these negotiations.⁴⁸

The Roundtable process led to an election in June 1989 with free voting for one-third of the Sejm, which was now the lower chamber of a bicameral Parliament.⁴⁹ The remaining voting was restricted to

42. Ustawa z dnia 26.03.1982 o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej [Law on the Amendment of the Constitution of the Polish People's Republic], Dz. U. 1982 nr. 11 poz. 83 (Pol.).

43. Ustawa z dnia 15.07.1987 o Rzeczniku Praw Obywatelskich [Law on the Ombudsman], Dz. U. 1987 nr. 21 poz. 123; DAVIES, *supra* note 27, at 500 (referring to appointment of ombudsman and stating, "[b]ut there were no citizens' rights worth speaking of.") (Pol.).

44. Ustawa o Trybunale Konstytucyjnym z 29 kwietnia 1985 [The April 25, 1985 Law on the Constitutional Tribunal], Dz. U. 1985, poz. 98, [g.ekspert.infor.pl/p_dane/akty_pdf/DZU/1985/22/98.pdf#zoom=90](https://perma.cc/7DY8-FKQY) [https://perma.cc/7DY8-FKQY] (Pol.).

45. Ustawa z 15 lipca 1987 o Rzeczniku Praw Obywatelskich [The July 15, 1987 Law on the Ombudsman], Dz. U. 1987, poz. 123 (current version Dz. U. 2017, poz. 958), <https://www.rpo.gov.pl/pl/content/ustawa-o-rzeczniku-praw-obywatelskich> [https://perma.cc/YFD9-7QHP] (Pol.).

46. Marek Dobrowolski, *Ustrój państwa w porozumieniu Okrągłego Stołu* [Poland's Political System in the Round Table Agreement], (92) 2 PRZEGLĄD SEJMOWY 77, 78-80 (2009); JERZY LUKOWSKI & HUBERT ZAWADZKI, A CONCISE HISTORY OF POLAND 314, 316 (2d ed. 2006); DAVIES, *supra* note 27, at 493-94 (describing the deterioration of the Polish economy).

47. Brian Porter, *The 1989 Polish Round Table Revisited: Making History*, 6 J. INT'L INST 1 (1999), available at <https://quod.lib.umich.edu/j/jii/4750978.0006.301?rgn=main;view=fulltext> [https://perma.cc/3YK4-MPBC]; Co-author Zoll's father, Andrzej Zoll, was Solidarity's legal expert in the 1989 Roundtable negotiations as well as a Judge of the Constitutional Tribunal (1989-1997), Tribunal President (1993-1997), and Polish Commissioner for Citizens' Rights (Polish Ombudsman) (2000-2006). Regarding the Roundtable process, see also DAVIES, *supra* note 27, at 501-03; LUKOWSKI & ZAWADZKI, *supra* note 46, at 317; ZAMOYSKI, *supra* note 26 at 381-82; TINA ROSENBERG, THE HAUNTED LAND: FACING EUROPE'S GHOSTS AFTER COMMUNISM 232-36 (1995).

48. ZAMOYSKI, *supra* note 26, at 381-82 (Roundtable agreement "guaranteed . . . the independence of the judiciary").

49. Regarding the 1989 election, see ZAMOYSKI, *supra* note 26, at 382, 384; DAVIES *supra* note 27, at 504; LUKOWSKI & ZAWADZKI, *supra* note 46, at 317-18.

selecting among names offered by the Communist party (Polska Zjednoczona Partia Robotnicza) and two of its satellite parties, Zjednoczone Stronnictwo Ludowe (Agrarian Party) and Stronnictwo Demokratyczne (Democratic Party) in a formula such that the communist party could not achieve an absolute majority. Because the Solidarity-backed opposition overwhelmingly carried the “free” one-third voting, the Solidarity-based opposition was able to form a coalition government with the Agrarian and the Democratic parties, and take power from the communists.

The Roundtable agreement created the Polish Presidency. In one of the Roundtable compromises, the Parliament elected communist leader Wojciech Jaruzelski to the position.⁵⁰ Under the agreement, control of the police, under the Ministry of Internal Affairs, and of the military remained under communist party control.⁵¹ Solidarity negotiators insisted on a strong form of judicial independence as a counterbalance to government control of the police and military.⁵² In practice, however, President Jaruzelski generally did not impede the shaping of the government in to democratic form.⁵³

The newly-formed 1989 Parliament moved quickly in several respects important to the judiciary including the addition of a constitutional provision declaring that “the Polish Republic is a democratic country observing the rule of law and implementing the principles of social justice.”⁵⁴ Six new judges were elected to the then-twelve-member Constitutional Tribunal (“Tribunal”), which meant that six pre-transition judges remained. The newly-constituted Tribunal

50. ZAMOYSKI, *supra* note 26, at 384.

51. DAVIES *supra* note 27, at 504; LUKOWSKI & ZAWADZKI, *supra* note 46, at 318; ROSENBERG, *supra* note 47, at 238.

52. Krzysztof Grajewski, *Postulat utworzenia rady do spraw sądownictwa podczas obrad Okrągłego Stołu [A Proposal for the Establishment of a National Judiciary Council during the Round Table Proceedings]*, (36) 3 KWARTALNIK KRAJOWA RADA SĄDOWNICTWA 25 (2017); Andrzej Friszke, *Przy Okrągłym Stole. O Polskę— demokratyczne państwo prawa [By the Round Table: For Poland -Toward A Rule of Law Country]*, 37 KWARTALNIK KRAJOWA RADA SĄDOWNICTWA 29 (2017).

53. DAVIES, *supra* note 27, at 506 (Jaruzelski’s agreement to shorten his presidential term); TIMOTHY GARTON ASH, *THE POLISH REVOLUTION: SOLIDARITY* 362 (3d ed. 2002) (describing his “place of honor in Polish history for the way he initiated and then presided over the transition to democracy from 1989 to 1991,” as weighed regarding the imposition of martial law in 1981); *id.* at 363 (describing Jaruzelski’s role in peaceful changes in Poland); *id.* at 372 (describing a “model of self-restraint”).

54. LESZEK GARLICKI, *POLSKIE PRAWO KONSTITUCYJNE [POLISH CONSTITUTIONAL LAW]* 76 (2017) (Pol.).

commenced interpreting the previously-quoted language in concretizing the Polish rule of law framework.⁵⁵

In a Roundtable agreement, all sitting Supreme Court judges were terminated by a 1989 law.⁵⁶ Twenty-two of the 111 then sitting were reappointed to a fifty-seven-member bench.⁵⁷ Generally, judges in the lower courts remained in place subject to a required lustration certification.⁵⁸

Between 1989 and 2005, eleven people served as Prime Minister of Poland. Parliamentary leadership switched among the parties rooted in the Solidarity movement versus those with ties to the previous communist regime.⁵⁹ Neither the Solidarity movement nor the post-communist parties had a unified political philosophy and both, to some degree, included a broad spectrum of political interests from right, left, labor, and so on.⁶⁰

In 2005, the PiS party candidates received a quarter of the vote, sufficient for a plurality in the parliament and the capacity to form a coalition government.⁶¹ A PiS leader, Lech Kaczyński, was elected President. The PiS coalition government collapsed in 2007.⁶²

In 2007, Platforma Obywatelska (Citizen Platform with the Polish acronym “PO”) received a plurality in the parliamentary election and created a coalition with the Polskie Stronnictwo Ludowe (the previously-mentioned Polish agrarian party’s return to their previous

55. See Leszek Garlicki, *Pierwsze Orzeczenie Trybunału Konstytucyjnego—Refleksje 15 Lat Później* [The First Judgment of the Polish Constitutional Tribunal—Remarks 15 Years Later], in TRYBUNAŁ KONSTYTUCY KSIĘGA 15-LECIA [THE CONSTITUTIONAL TRIBUNAL—THE BOOK OF 15 YEARS] 32 (2001), available at http://trybunal.gov.pl/fileadmin/content/dokumenty/pierwsza-rozprawa/Leszek_Garlicki_Pierwsza_rozprawa.pdf [https://perma.cc/34AC-US7Q] (describing the first Constitutional Tribunal case of May 26, 1986, which set limits on the executive branch’s scope to implement statutes and on retroactive application of law).

56. Lityński, *supra* note 28.

57. *Id.*

58. Lustration laws have been defined as “special public employment law that regulates the process of examining whether a person holding certain higher public positions worked or collaborated with the repressive apparatus of the communist regime.” See Roman David, *Lustration Laws in Action: The Motives and Evaluation of Lustration Policy in the Czech Republic and Poland (1989-2001)*, 28 LAW & SOC. INQUIRY 387, 388 (2003).

59. ZAMOYSKI, *supra* note 26, at 389-94; LUKOWSKI & ZAWADZKI, *supra* note 46, at 320-23; DAVIES, *supra* note 27, at 512-13.

60. ZAMOYSKI, *supra* note 26, at 397, 398.

61. THE ECONOMIST, *Change of State*, *supra* note 21, at 29, 30; LUKOWSKI & ZAWADZKI, *supra* note 46, at 340.

62. ZAMOYSKI, *supra* note 26, at 395-96.

name) to form a government.⁶³ In 2010, President Lech Kaczyński led a delegation of ninety-six prominent Poles to Smolensk, Russia to commemorate the murder of more than 20,000 Polish officers by the Soviet secret police in Katyń Forest in 1940.⁶⁴ The plane crashed, killing everyone on board.⁶⁵ Under Polish law, Bronisław Komorowski, the Speaker of the Sejm, assumed the duties of the president until an election could be held.⁶⁶ At his death, Lech Kaczyński was ending his presidential term and had indicated he would seek a second term.⁶⁷ With his death, his twin brother, Jarosław Kaczyński, became the PiS candidate for President against Komorowski, who was the PO candidate.⁶⁸ Komorowski narrowly prevailed after two rounds of voting.⁶⁹ In 2011, PO remained in power in the same coalition, the first reelection of a government in the post-communist period.⁷⁰

In the May 2015 Presidential election, the PiS party candidate, Andrzej Duda, was elected. In the October 2015 parliamentary election, PiS achieved an absolute majority in the Parliament.⁷¹ The PiS

63. *Id.* at 396.

64. Nicholas Kulish, Ellen Barry & Michal Piotrowski, *Polish President Dies in Jet Crash in Russia*, N.Y. TIMES (April 10, 2010), <https://www.nytimes.com/2010/04/11/world/europe/11poland.html?module=inline>.

65. *See id.*; *see also* Anne Applebaum, *A Warning from Europe*, ATLANTIC MONTHLY, Oct. 2018, at 53, 59-60 (on the lingering effect of the Smolensk crash on Polish politics).

66. Nicholas Kulish, *Amid Uncertainty, Poland Shows Political Resilience*, N.Y. TIMES (April 11, 2010), <https://www.nytimes.com/2010/04/12/world/europe/12poland.html>.

67. Luke Harding, *Polish President and Leading Advisers Among Victims of Smolensk Plane Crash*, THE GUARDIAN (April 10, 2010), <https://www.theguardian.com/world/2010/apr/10/polish-president-kaczynski-killed-crash> [<https://perma.cc/8PL9-ADQT>].

68. Matthew Day, *Twin Brother of Dead Polish President to Run for Office*, THE TELEGRAPH (Apr. 26, 2010), <https://www.telegraph.co.uk/news/worldnews/europe/poland/7635252/Twin-brother-of-dead-Polish-president-to-run-for-office.html> [<https://perma.cc/7BWY-Z488>].

69. Nicholas Kulish, *Acting President in Poland Wins a Narrow Victory*, N.Y. TIMES (July 4, 2010), <https://www.nytimes.com/2010/07/05/world/europe/05poland.html>.

70. Nicholas Kulish, *Poland's Centrist Leader Secures A Second Term*, N.Y. TIMES (Oct. 10, 2011), <https://www.nytimes.com/2011/10/11/world/europe/donald-tusk-wins-second-term-as-polish-prime-minister.html>.

71. *Change of State*, *supra* note 21. Although PiS parliamentary candidates received only 37.58% of the votes cast, this was a sufficient plurality to form a government without a coalition. The Polish Constitution has a 5% threshold such that parties receiving less than 5% cannot be seated in Parliament. PiS received a ruling majority with the votes of 18.5% of eligible voters. Rozmawiała Agnieszka Kublik, *Prof. Markowski: Demokracja się obroni, ale Wersalu nie będzie*, [Professor Markowski: Democracy will defend itself, but there will be no Versailles], WYBORCZA.PL (Oct. 28, 2015, 1:00 AM), wyborcza.pl/1,75398,19099177,prof-markowski-demokracja-sie-obroni-ale-wersalu-nie-bedzie.html [<https://perma.cc/M9FN-XTCW>]; PAŃSTWOWA KOMISJA WYBORCZA [NATIONAL ELECTORAL COMMISSION], *Wybory do Sejmu*

party does not have the two-thirds majority required to make constitutional changes but has adequate voting power to make changes in law.

*B. PiS Government Initiatives with Regard to the Judicial System
2015-2018*

Subsection II.B.1 identifies the most significant and damaging changes to the Polish judicial system since 2015.⁷² Subsections II.B.2 and II.B.3 review quotes from the PiS platform and leaders that evidence their objectives with regard to the judicial system. Subsection II.C reviews some of the dizzying number of reports and actions on the Polish situation by regional, international, and nongovernmental organizations. Finally, Subsection II.D discusses changes to the pre-2015 judicial system that the Authors have proposed in the past and believe should be considered in the future if the Polish political and legal systems again were proceeding on a rational basis in conformity to the Polish constitution and international norms.

1. Changes to the Polish Judicial System since 2015

The following lists the serious current problems in the Polish judicial system while omitting detail on the complex path that brought them about including multiple amendments, court challenges, President Andrzej Duda's summer 2017 veto of two of three major pieces of legislation concerning the judiciary, the slightly amended versions that passed soon after, and a myriad of later amendments.⁷³ The following summary relies considerably on the June 2018 reports from the UN Special Rapporteur on the Independence of Judges and Lawyers and GRECO's March and June 2018 reports. These reports

i Senatu Rzeczypospolitej Polskiej 2015 [Elections to the Sejm and the Senate of the Republic of Poland 2015] (2015), http://parlament2015.pkw.gov.pl/349_wyniki_sejm [<https://perma.cc/7JSC-FSX7>].

72. European Commission Press Release IP/17/5367, Rule of Law: European Commission Acts to Defend Judicial Independence in Poland (Dec. 20, 2017), available at http://europa.eu/rapid/press-release_IP-17-5367_en.htm [<https://perma.cc/6NNL-K4NR>].

73. For detailed information through the fall of 2017, see Dariusz Mazur & Waldemar Żurek, *So Called "Good Change" in the Polish System of the Administration of Justice*, https://www.jura.unibonn.de/fileadmin/Fachbereich_Rechtswissenschaft/Einrichtungen/Lehrstuehle/Sanders/Dokumente/Good_change_-_7_October_2017_-_word.pdf, (last visited Jan. 31, 2019); see also *infra* Part II.D and sources cited there.

are recent assessments by outside bodies following on-site reviews.⁷⁴ This Part provides an overview of the state of play at the end of summer 2018. For more recent events, see sources cited in II.C on reports by international, European, and nongovernmental bodies, some of which were issued in late 2018. As Professor Wojciech Sadurski cautions, though, it is important to recognize regarding post-2015 changes to the Polish legal system that “the sum is more than its parts.”⁷⁵ One must look at the “*comprehensiveness and the cumulative effect*” of the changes in Poland, the “functional connections” of the “individual elements.”⁷⁶

74. UN Special Rapporteur on Judicial Independence, Diego Garcia-Sayan (Comm’r for Human Rights of the Republic of Pol.), *Report of the Special Rapporteur on the Independence of Judges and Lawyers on his Mission to Poland*, U.N. DOC.A/HRC/38/38/Add.1 (April 5, 2018) [hereinafter UNSR]; *supra* note 1 and accompanying text (information about GRECO); COUNCIL OF EUROPE, GROUP OF STATES AGAINST CORRUPTION [GRECO], FOURTH EVALUATION ROUND: CORRUPTION PREVENTION IN RESPECT OF MEMBERS OF PARLIAMENT, JUDGES AND PROSECUTORS. ADDENDUM TO THE SECOND COMPLIANCE REPORT— POLAND (2018) 11, available at <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/16808b7688> [<https://perma.cc/48YQ-2GZT>] [hereinafter GRECO June 2018]; GRECO, AD HOC REPORT ON POLAND (RULE 34) (2018) 1, available at <https://rm.coe.int/ad-hoc-report-on-poland-rule-34-adopted-by-greco-at-its-79th-plenary-m/168079c83c> [<https://perma.cc/HW46-WBW6>] [hereinafter GRECO March 2018]. The March and June 2018 GRECO reports are under an ad hoc procedure that can be triggered when GRECO has reliable information that a member State may be “in serious violation of a council of Europe anti-corruption standard.” See GRECO, *Ad Hoc Procedures (Rule 34)*, available at <https://www.coe.int/en/web/890recoo/ad-hoc-procedure-rule-34-> [<https://perma.cc/3YWP-NLG>]. In addition to these reports on Poland, GRECO published a 2012 evaluation report, GRECO, FOURTH EVALUATION ROUND: CORRUPTION PREVENTION IN RESPECT OF MEMBERS OF PARLIAMENT, JUDGES AND PROSECUTORS. EVALUATION REPORT— POLAND (2012), available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c7b1d> [<https://perma.cc/PYW5-EZ84>] [hereinafter GRECO 2012 Report], a 2014 compliance report, GRECO, FOURTH EVALUATION ROUND: CORRUPTION PREVENTION IN RESPECT OF MEMBERS OF PARLIAMENT, JUDGES AND PROSECUTORS. COMPLIANCE REPORT— POLAND (2014), available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=09000016806c7b20> [<https://perma.cc/TAL5-GUZK>], and a 2017 compliance report, GRECO, FOURTH EVALUATION ROUND: CORRUPTION PREVENTION IN RESPECT OF MEMBERS OF PARLIAMENT, JUDGES AND PROSECUTORS. SECOND COMPLIANCE REPORT – POLAND (2017), available at <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680702abf> [<https://perma.cc/943E-TWKT>].

75. Sadurski, *supra* note 9, at 5.

76. *Id.* at 5, 17-45 (detail on the “capture and transformation” of the Constitutional Tribunal, assault on the “regular” judiciary, and the law on the Public Prosecutor’s office as well as their interconnectedness), 70 (“the small details . . . which jointly render the picture diametrically different from that mandated by the constitution”).

a. Merging the Minister of Justice and the General Prosecutor

One of the PiS government's first initiatives, adopted in January 2016 and in force from March 2016, was the merger of the Office of the Public Prosecutor General with the Minister of Justice.⁷⁷ Zbigniew Ziobro, the current Minister of Justice, also held that office in the 2005-07 PiS government. When the PO government assumed power, they took the first steps toward a procedure before the Polish Tribunal of State that could have resulted in criminal and non-criminal sanctions against Ziobro.⁷⁸ The Parliament eventually desisted in pursuing charges against Ziobro.⁷⁹ Then Prime Minister Donald Tusk said he did not consider it appropriate for the governing party to institute criminal proceedings against leaders of the opposition party.⁸⁰ In 2010, however, the PO coalition government split the Prosecutor General function from the Minister of Justice with the stated purpose of reducing the possibility of political influence in prosecutions.

Under the 2016 remerger of the functions, the Minister of Justice has not only supervisory powers over the organization of prosecution but also authority to intervene in particular prosecutions and give orders to the inferior prosecutors regarding their action in prosecutions. This creates the possibility of directly or indirectly influencing the outcome of cases. An American might question why this is problematic in that the US Attorney's Office, which houses federal prosecutors, functions within the Department of Justice. The US Attorney General, unlike the combined Polish Minister of Justice and Prosecutor, has little role in who becomes a judge in the United States and how judges fare in their careers while the extensive post-2015 legislative changes in Polish law give the Polish Minister of Justice extensive control of most aspects of a judge's career.⁸¹ Hence, the Polish Minister of Justice has

77. See *id.* at para. 14; GRECO June 2018, *supra* note 74.

78. Maxim Tomoszek, *Polityzacja Instytutu Ustawnej Odpowiedzialności Jako Jedna z Przyczyn Současné Ustavní Krize v Polsku*, [*Transformation of Constitutional Accountability into Political Weapon as One of the Causes of the Current Constitutional Crisis in Poland?*], 2 ČASOPIS PRO PRÁVNÍ VĚDU A PRAXI 241, 247-50 (2017) (concluding that Ziobro's tenure as minister and prosecutor general from 2005-07 evidenced abuse of power for political gains, describing a highly visible and highly publicized raid on the home of politician Barbara Błida resulting in her death, and discussing the charges against Ziobro in the impeachment and constitutional accountability proceedings).

79. *Id.* at 251.

80. *Id.* at 252.

81. STEFAN BATORY FOUNDATION & EUROPEAN STABILITY INITIATIVE, WHERE THE LAW ENDS: THE COLLAPSE OF THE RULE OF LAW IN POLAND - AND WHAT TO DO 8-12 (2018), available at <http://citizensobservatory.pl/wp-content/uploads/2018/06/ESI-Batory->

extensive power over both those who prosecute and those who hear the cases prosecuted.

Under recent legislative changes regarding the court system, the Minister of Justice has considerably expanded power in such matters as selection of court presidents and judicial discipline.⁸² The June 2018 GRECO report refers to the merger of the office of Prosecutor General with the Minister of Justice as a factor giving “rise to particular concern in terms of its effects on the separation of powers and the independence of courts and judges.”⁸³

b. The Polish Constitutional Tribunal

The UN Special Rapporteur (“UNSP”) devotes seventeen of the eighty-two paragraphs of his April 2018 report, which was presented in June 2018 to the UN Human Rights Council, to the CT saga of the Constitutional Tribunal (“CT” or “Tribunal”).⁸⁴ The UNSP describes the PiS government’s actions with regard to the judiciary as having two phases, the first being “bringing the Constitutional Tribunal under its control.”⁸⁵ Mr. García-Sayán concludes from his detailed report on moves against the CT that the government was able to reduce the CT to a “politically pliant body” and that enabled moving on to other parts of the judiciary.⁸⁶ The UNSP concludes that the “legitimacy and independence” of the Tribunal are now so undermined as to “cast serious doubts over its capacity to protect constitutional principles and to uphold human rights and fundamental freedoms.”⁸⁷ The UNSP report focuses on three clusters of action versus the CT: conflict over appointment of the justices including the Court President; refusal to

Poland-and-the-end-of-the-Rule-of-Law-29-May-2018.pdf [https://perma.cc/4VLE-QD2K] (tracing the ways the Minister of Justice can now exert significant control of who becomes a judge, judicial education, the trajectory of a judge’s career, the threat of discipline, and even extension of retirement age).

82. See, e.g., *infra* notes 104-107, 132-135 and accompanying text.

83. GRECO June 2018, *supra* note 74, at para. 56.

84. Mr. Diego García-Sayán, Special Rapporteur, Presentation on the Independence of Magistrates and Lawyers at the 38th Session of the Human Rights Council (June 22, 2018), available at http://ap.ohchr.org/documents/dpage_e.aspx?si=A/HRC/38/38/Add.1 [https://perma.cc/U6ZU-FS8R]; STEFAN BATORY FOUNDATION & EUROPEAN STABILITY

INITIATIVE, *supra* note 81, at 4-6 (discussing the events regarding the Constitutional Tribunal).

85. UNSR, *supra* note 74, at para. 15.

86. *Id.*

87. *Id.* at para. 73.

publish and implement CT rulings; and adoption of “remedial statutes” aimed at crippling the Tribunal’s effectiveness.”⁸⁸

In October 2015, the PO-led government appointed five judges to replace five retiring judges.⁸⁹ A subsequent CT ruling held that this Parliament had the right to appoint three of the judges, but the expiration date of the terms for the other two made this action by the PO-government illegal.⁹⁰ Nonetheless, President Duda refused to swear in any of the five judges.⁹¹ The new PiS-controlled government appointed five new judges and passed a resolution purporting to nullify the appointments of the PO-appointed five.⁹² For a period, there were three “double-judges”—the three PO appointments ruled by the CT to be legitimate and three others made by the PiS government.

The subsequent tangle of events included December 2015, March 2016, and December 2016 amendments to legislation on CT operation, parts of which were declared unconstitutional by the CT in March and August 2016.⁹³ The Venice Commission of the Council of Europe⁹⁴ adopted opinions saying that the Polish Parliament’s actions reached beyond their legislative authority requiring only a simple majority to constitutional changes requiring a two-thirds majority, which the ruling government does not have.⁹⁵

A new President of the CT was appointed with a procedure deemed questionable by the Venice Commission.⁹⁶ The saga also includes the government’s refusal to accept the validity of some CT judgments and publish those opinions.⁹⁷ After extreme criticism,

88. *Id.* at para. 22.

89. Piotr Czarny, *Der Streit um den Verfassungsgerichtshof in Polen 2015-2016* [*The Struggle over the Constitutional Court in Poland 2015-2016*], 64 OSTEUPARECHT 5, 6 (2018); Andrzej Dziadzio, *Quis custodiet ipsos custodes? Die Auseinandersetzung um den Verfassungsgerichtshof in Polen (2015-2016)* [*Who Will Supervise the Supervisors? The Conflict over the Constitutional Court in Poland (2015-2016)*], 64 OSTEUPARECHT 21, 30 (2018).

90. Czarny, *supra* note 89, at 7.

91. Dziadzio, *supra* note 89, at 26.

92. Czarny, *supra* note 89, at 17.

93. GRECO June 2018, *supra* note 74, at para. 12.

94. The European Commission for Democracy through Law (commonly called the Venice Commission) is the Council of Europe’s advisory body on constitutional matters. See THE VENICE COMMISSION OF THE COUNCIL OF EUROPE, *For democracy through law*, http://www.venice.coe.int/WebForms/pages/?p=01_Presentation [<https://perma.cc/W8NH-3J47>].

95. GRECO June 2018, *supra* note 74, at para. 12.

96. GRECO March 2018, *supra* note 74, at paras. 11, 13.

97. UNSR, *supra* note 74, at para. 35.

including that of the Venice Commission, for “pick[ing] and choos[ing] which judgments of a court are to be published,” the government published twenty-one judgments with a notation they were in “breach of the provisions of the act of the Constitutional Tribunal of 25 June 2015” and persisted in its refusal to publish other opinions, saying they were based on “normative acts that had ‘ceased to have effect.’”⁹⁸

c. The Polish Supreme Court

Unfortunately, little of the complexity and nuance of post-2015 changes in Polish law and legal system makes its way into the US mainstream press. On July 4, 2018, however, the front page of the *New York Times* featured a large photograph of thousands of Poles in front of the Supreme Court in Warsaw protesting the forced retirement of twenty-seven of the seventy-two Polish Supreme Court judges, including the First President, Małgorzata Gersdorf. A new law on the Supreme Court lowered the retirement age from seventy to sixty-five, including for sitting judges whose terms had not expired.⁹⁹ Affected judges could apply to the President for extension, but more than a dozen affected, including Judge Gersdorf, declined to do so, saying that their removal from office before completion of their terms was unconstitutional. Judge Gersdorf vowed to continue coming to work, saying that, shortening of her term both as First President and as a judge while still in office was unconstitutional.¹⁰⁰ The post-July events triggered by the attempted retirement of sitting Supreme Court judges are described in Subsection C of this Part.

As summarized in the June 2018 GRECO report, other provisions of the new Supreme Court law have also been of considerable concern within Poland and to international bodies, particularly the creation of

98. *Id.* (government publication of the opinions under pressure from European institutions but with statement that the judgments are not valid); Ustawa o zmianie ustawy - Przepisy wprowadzające ustawę o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym oraz ustawę o statusie sędziów Trybunału Konstytucyjnego [Law of April 12, 2018 on Amending the Law Provisions Introducing the Law on Organization and Procedure at the Constitutional Tribunal and the Law on the Status on the Judges of the Constitutional Tribunal] Dz. U. 2018 poz. 849, available at prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000849/O/D20180849.pdf [https://perma.cc/99WF-YUE6] (Pol.).

99. Marc Santora, *Poland Purges Its Supreme Court, and Protesters Take to the Streets*, N.Y. TIMES (July 3, 2018), <https://www.nytimes.com/2018/07/03/world/europe/poland-supreme-court-protest.html>.

100. THEMIS ASSOCIATION OF JUDGES, *Alarming Revolution within the Polish Supreme Court* (July 2, 2018), <http://themis-sedziowie.eu/materials-in-english/alarming-revolution-within-the-polish-supreme-court/> [https://perma.cc/AQ9B-QDMH].

two new chambers of the Supreme Court: one with new powers and procedures regarding disciplinary proceeding and another creation of the Chamber for Extraordinary Control and Public Affairs with jurisdiction over “extraordinary appeals” that could overturn existing court judgments.¹⁰¹

The December 2017 Supreme Court Law makes many changes to the previous disciplinary process for Supreme Court judges. The judges in the disciplinary chamber are paid a forty percent higher salary,¹⁰² and proceedings include participation of lay judges elected by the Senate.¹⁰³ The Polish President and Minister of Justice are given considerable powers to direct the process. The President may appoint a judge as an extraordinary disciplinary prosecutor, taken not only from the Supreme Court (as in the past), but also from the ordinary courts or military courts.¹⁰⁴ If the disciplinary offense satisfies the elements of an intentional crime or intentional tax crime, the President also may appoint, instead of a judge, a prosecutor from the staff of the highest level of the national prosecution office.¹⁰⁵ Once such a disciplinary prosecutor is appointed, a disciplinary proceeding must commence.¹⁰⁶ If the President has knowledge of such crimes and does not appoint an extraordinary disciplinary prosecutor within thirty days, the Minister of Justice has the authority to notify the President that the Minister intends to appoint such a disciplinary prosecutor, and if the President does not act within thirty days, to do so.¹⁰⁷

The government also proposed legislation allowing reopening of past judgments without limitation to discovery of new facts.¹⁰⁸ This generated much concern about retroactivity and stability of the legal order. Extraordinary appeals could be made by the Prosecutor General

101. GRECO June 2018, *supra* note 74, at para. 30.

102. *Id.* at para. 31 with Polish government response at note 16; Artykuł 48 ¶7 ustawy o Sądzie Najwyższym z dnia 8.12.2018, Dz. U. 2017 poz. 5 [Law on the Supreme Court, Art. 48, ¶7 (December 8, 2017)] (Pol.).

103. Artykuł 73 ¶1 pkt 1 & 2 ustawy o Sądzie Najwyższym z dnia 8.12.2018, Dz. U. 2017 poz. 5 [Law on the Supreme Court, Art. 48, ¶7.1 & 7.2 (December 8, 2017)] (Pol.).

104. Artykuł 76 ¶8 ustawy o Sądzie Najwyższym z dnia 8.12.2018, Dz. U. 2017 poz. 5 [Law on the Supreme Court, Art. 48, ¶7 (December 8, 2017)] (Pol.).

105. GRECO June 2018, *supra* note 74, at para. 31.

106. *Id.*

107. Artykuł 76 ¶9 ustawy o Sądzie Najwyższym z dnia 8.12.2018, Dz. U. 2017 poz. 5 [Law on the Supreme Court, Art. 48, ¶7 (December 8, 2017)] (Pol.).

108. GRECO June 2018, *supra* note 74, at para. 31.

(Minister of Justice) and the Ombudsman.¹⁰⁹ Lay judges would serve in these matters as well.

GRECO's June 2018 report concludes that concerns about these two new chambers are compounded "by the relatively large involvement of the executive in the internal proceedings of the SC," including enhanced power in selecting the First President and presidents of chambers.¹¹⁰ GRECO recommended reconsideration of the establishment of the two new chambers and reduction in the executive's involvement in the Supreme Court.¹¹¹ The UNSR's summary of concerns about these new chambers includes the jurisdiction of the Chamber for Extraordinary Control and Public Affairs with regard to "political sensitive cases" including electoral disputes and validation of elections and referendums."¹¹²

d. The National Council on the Judiciary

As previously discussed, one compromise of the Solidarity Roundtable negotiations was the creation of a strong National Judiciary Council ("NJC") to balance retention of the Ministry of Internal Affairs and the military under the control of President Jaruzelski and the communist party.¹¹³ The April 1989 constitution provided for creation of the NJC.¹¹⁴ Implementing legislation in December 1989 stated the

109. *Id.* at para. 30, n.13. To respond, albeit in a limited way, to European criticism the Polish parliament narrowed the entities empowered to bring an "extraordinary appeal" after the GRECO report's submission in April 2018. *See* Law on the System of Common Courts, the Act on the Supreme Court and Some Other Acts, art. 115 (May 10, 2018 amendment), available at <https://www.infor.pl/aktprawny/DZU.2018.105.0001045,ustawa-o-zmianie-ustawy-prawo-o-ustroju-sadow-powszechnych-ustawy-o-sadzie-najwyzszym-oraz-niektorych-innych-ustaw.html> [<https://perma.cc/7CGX-BMGM>].

110. GRECO June 2018, *supra* note 74, at para. 33; *see also* UNSR, *supra* note 74, at paras. 59-62 (referring to the creation of these new chambers).

111. GRECO June 2018, *supra* note 74 at paras. 31, 33, 35.

112. UNSR, *supra* note 74, at para. 62.

113. Grajewski, *supra* note 52; Friszke, *supra* note 52.

114. Artykuł 1 ustęp 17 Ustawy z dnia 07.04.1989 o zmianie Konstytucji Polskiej Rzeczypospolitej Ludowej, Dz. U. 1989, nr19 poz. 101 [Law on amending the Constitution of the People's Republic of Poland, Art. 1, section 17 (April 7, 1989)] (Pol.).

NJC's mission to safeguard the independence of courts and judges.¹¹⁵ This language is now part of the Polish constitution.¹¹⁶

The current Polish constitution also provides that fifteen of the twenty-five members of the National Judiciary Council should be chosen from judges of the Supreme Court, common courts, administrative courts, and military courts.¹¹⁷ The remaining ten members are the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court, an appointee of the Polish President, and six members of Parliament (four elected by the Sejm and two by the Senate).¹¹⁸

Since its creation, the NJC's functions have included selecting candidates for positions for the first instance courts, appeals courts, and Supreme Court for a final decision by the Polish President.¹¹⁹ NJC powers also include filing motions with the Constitutional Tribunal regarding the constitutionality of laws on courts and judges, adopting the judicial code of ethics, and giving opinions on draft laws concerning the judiciary.¹²⁰

Until the December 2017 amendments to the Law on the National Council of the Judiciary, the fifteen judicial representatives were elected by various subparts of the judiciary.¹²¹ Those amendments changed the selection method for judicial members to election by the Sejm with a new procedure for their nomination.¹²² The new law also provided that the term for the fifteen current judge members would end

115. Artykuł 1 ustęp 2 ustawy z dnia 20.12.1989 o Krajowej Radzie Sądownictwa, Dz.U. 1989, nr 73 poz. 435 [Law on National Judiciary Council, art. 1, sec. 2 (December 20, 1989)] (Pol.).

116. Artykuł 186 ustęp 1 Konstytucji Rzeczypospolitej Polskiej z dnia 02.04.1997 [Republic of Poland Const. art. 186., sec. 1 (April 2, 1997)] (National Judiciary Council as guardian of court and judicial independence) (Pol.).

117. Artykuł 187 ustęp 1 pkt 2 Konstytucji Rzeczypospolitej Polskiej z dnia 02.04.1997 [Republic of Poland Const. Art. 187, section 1.2, (April 2, 1997)] (composition and mode of election of the National Judiciary Council) (Pol.).

118. *Id.*

119. GRECO March 2018, *supra* note 74, at para. 24.

120. *Id.*

121. Artykuł 11 ustawy z dnia 12.05.2011 o Krajowej Radzie Sądownictwa, (Dz.U) nr 126 pos 714, 5.12.2011 [Law on the National Council of the Judiciary, Chapter 1 Gen. Regs., (May 12, 2011)] (Pol.). From their membership, the Polish Supreme Court elected two representatives, the Supreme Administrative Court two; two from the Circuit Court of Appeals judges; one from the Military Courts, and eight elected by the local assemblies of the full court system. One rationale the PiS government has used for the change in selection of judicial members of the NJC was underrepresentation of the judges from the lowest courts. *See* GRECO June 2018, *supra* note 74, at para. 26.

122. GRECO June 2018, *supra* note 74, at para. 26.

in February 2018 regardless of where they were in the four-year terms provided in Article 187 of the Constitution.¹²³

The PiS government does not have a sufficient majority to change the Polish constitution. The Polish Ombudsman and the Helsinki Foundation for Human Rights are among those challenging the law changing the method of selection of the judges as unconstitutional.¹²⁴

Given a boycott by most of the judiciary, only eighteen judges stood for election for the fifteen slots.¹²⁵ Most were judges who had been working in the Ministry of Justice on secondment.¹²⁶ The GRECO June 2018 conclusion is that “effectively 21 of the 25 members of the NJC are now elected by Parliament (a majority of which by the ruling party).”¹²⁷ GRECO cites their standard that at least half of the members of a National Judiciary Council should be elected by judges from their peers.¹²⁸

e. The Ordinary Courts

Acting under a new law on the ordinary courts in July 2017, the Minister of Justice quickly moved to dismiss 160 presidents and vice-

123. *Id.* at para. 27.

124. Commissioner for Citizen’s Rights, *Opinion of the Commissioner for the Draft Amendment to the Act on the National Council of the Judiciary*, RPO (Feb. 2, 2017), <https://www.rpo.gov.pl/pl/content/opinia-rpo-do-projektu-nowelizacji-ustawy-o-krajowej-radzie-s%C4%85downictwa> [<https://perma.cc/8RWN-PM92>]; HELSINKI FOUNDATION FOR HUMAN RIGHTS, *The Proposed Changes to the National Judiciary Council Violate the Constitution - The HFHR Opinion*, HFHR (July 12, 2017), <http://www.hfhr.pl/projektowane-zmiany-w-krs-naruszaja-konstytucje-opinia-hfhr/> [<https://perma.cc/Q2KB-NK6A>]. This background section focuses on entities outside the Polish government, e.g., the European Union, international organizations, and nongovernmental entities that have documented and challenged governmental changes to the judicial system as well as the activities of the judges themselves. The current Polish Ombudsman, Adam Bodnar, was appointed by the previous government in September 2015. His office’s prodigious efforts regarding the judiciary are beyond the scope of this article. They were recognized by the Norwegian Rafto Foundation with their 2018 Laureate Human Rights Defender award, *see* RAFTO FOUNDATION, *The 2018 Rafto prize to Ombudsman Adam Bodnar*, <https://www.rafto.no/news/the-2018-rafto-prize-to-ombudsman-adam-bodnar> [<https://perma.cc/GJ5A-JFE5>]; Camilla Knudsen, *Polish Ombudsman Wins Norwegian Human Rights Award*, REUTERS (Sept. 27, 2018), <https://www.reuters.com/article/us-poland-politics-norway/polish-ombudsman-wins-norwegian-human-rights-award-idUSKCN1M718A> [<https://perma.cc/6FQ4-4WCA>] (pointing out that four past Rafto laureates, later won the Nobel Peace Prize).

125. GRECO June 2018, *supra* note 74, at para. 27.

126. *Id.*

127. *Id.* at para. 29.

128. *Id.*

presidents of courts below the Supreme Court, “ordinary courts.”¹²⁹ Affected judges were given no reason or opportunity to appeal.¹³⁰ The retirement age for judges was lowered.¹³¹ The Ministry of Justice was given the power to extend service beyond retirement analogous to the power given to the President with regard to the Supreme Court.¹³² GRECO comments that the expanded power of the Minister of Justice should be seen in context of this office having assumed the functions of the Prosecutor General and the increase in the powers of this office.¹³³ Those expanded powers include selecting judges for disciplinary courts for all ordinary court judges and the disciplinary commissioners who act as prosecutors.¹³⁴

While recognizing a legitimate role for a Justice Minister in court administration in matters like budgeting, the GRECO team that visited Poland in May 2018 expressed concern about the risk of “overreach” in the current system given the “extensive powers on the executive (who is at the same time the Prosecutor General).”¹³⁵

2. The PiS Vision of Law and Justice

Following the 2015 election, PiS immediately moved to implement its concept of “law and justice,” the English translation of the party’s name Prawo i Sprawiedliwość.¹³⁶ Before turning to post-2015 PiS government actions with regard to the judicial system, this Subsection reviews PiS statements on the party’s view of law and justice.

The 2005 “Trawny case” on return of Polish property to a by-then-German citizen was prominently in the press at the time and is still

129. *Id.* at para. 45. For a report of the process of these dismissals and their aftermath, see HELSINKI FOUNDATION FOR HUMAN RIGHTS, IT STARTS WITH THE PERSONNEL: REPLACEMENT OF COMMON COURT PRESIDENTS AND VICE PRESIDENTS FROM AUGUST 2017 TO FEBRUARY 2018 (2018), available at www.hfhr.pl/wp-content/uploads/2018/04/It-starts-with-the-personnel.pdf [https://perma.cc/SA6B-FR9C].

130. GRECO June 2018, *supra* note 74, at para. 45.

131. *Id.* at para. 41.

132. *Id.* at para. 41.

133. *Id.* at para. 42.

134. *Id.* at para. 50.; Artykuł 110(a) ¶1 and 112 ¶3 ustawy prawo o ustroju sądów powszechnych from 27.7.2001, Dz. U. 2001, nr 98, poz. 1070 [Law on the Ordinary Courts, Art. 110(a), ¶1 and 112 ¶3 (July 27, 2001)] (Pol.); Tekst jednolity z dnia 14 grudnia 2018, Dz. U. 2019 poz. 52 [Consolidated text, Official Journal 2019, position 52 (Dec. 14, 2018)] (Pol.).

135. GRECO June 2018, *supra* note 74, at para. 51.

136. *Infra* subsection II.B.2.

referred to by PiS Party Chairman Jarosław Kaczyński.¹³⁷ Kaczyński's comments on the matter were early salvos in what later became a full-scale attack on the Polish court system.¹³⁸ Ms. Trawny was a Polish citizen living in the Mazury region of Poland in the mid-1970s.¹³⁹ She moved to Germany for better economic opportunity, was divested of her Polish citizenship by Polish government, and divested of her property in Poland.¹⁴⁰ Ms. Trawny became a German citizen in the 1970s.¹⁴¹ In the mid-2000s, she sought return of her property in the Polish courts.¹⁴² The Polish Supreme Court affirmed a lower court decision holding her loss of citizenship illegal and returning some property in the Mazury region to Ms. Trawny, hence requiring the Poles occupying the property to leave.¹⁴³ The Court also awarded compensation for additional property that could not be returned.¹⁴⁴ Kaczyński criticized the decision, saying, "In the post-German property cases, the courts should observe the Polish *raison d'État* and the Polish national interest."¹⁴⁵ Recently Kaczyński has labelled judges

137. For background on the Trawny case and Jarosław Kaczyński's recent comments on it, see *Za co Kaczyński zaatakował sędziów w Olsztynie*, [Instead Kaczyński Attacked the Judges], WYBORCZA.PL (September 24, 2018, 4:45 PM), <http://olsztyn.wyborcza.pl/olsztyn/7,48726,23958052,za-to-kaczynski-zaatakowal-sedziow-w-olsztynie.html>.

138. *Jarosław Kaczyński: German claim due to Polish policy of apologizing*, WPROST (May 17, 2008, 7:04 PM), <https://www.wprost.pl/129945/J-Kaczynski-niemieckie-roszczenie-efektem-polityki-przepraszania.html> [<https://perma.cc/3Q53-M4GD>].

139. *Polish court evicts families from house owned by German*, DW (Dec. 11, 2009), <https://www.dw.com/en/polish-court-evicts-families-from-house-owned-by-german/a-4912979> [<https://perma.cc/VBY3-3WZN>].

140. *Id.*

141. *Id.*

142. *Id.*

143. Judgement of the Polish Supreme Court from the 13th of December 2005, IV CK 304/05 (Pol.); Julika Makaro, *Swoi i obcy w dyskursie prasowym na przykładzie wypowiedzi prasowych dotyczących Agnes Trawny*, ["We" and "They" in the press discourse by the example of press statements concerning Agnes Trawny], 1 STUDIA MIGRACYJNE – PRZEGLĄD POLONIJNY at 55 (2016).

144. Makaro, *supra* note 143, at 56.

145. The Polish Supreme Court decided two cases in Ms. Trawny's favor: return of the property confiscated by the communists and compensation for the usage of her property without title. This generated numerous critical statements from the PiS as well as other parties like the SLD – Alliance of the Democratic Left. *Jest odwołanie od wyroku w sporze z Agnes Trawny*, [Appeal from judgment in dispute regarding Agnes Trawny], LEX (July 6, 2018, 10:32 AM), <http://www.lex.pl/czytaj/-/artykul/jest-odwolanie-od-wyroku-w-sporze-z-agnes-trawny> [<https://perma.cc/ME9M-CVWT>]; *Wyrok ws. Agnes Trawny źle świadczy o polskich sądach* [The Agnes Trawny verdict shows what is wrong with the Polish courts], WP WIADOMOŚCI (Dec. 18, 2009, 11:45 AM), <https://wiadomosci.wp.pl/wyrok-ws-agnes-trawny-zle-swiadczy-o-polskich-sadach-6032760428679809a> [<https://perma.cc/KV43-9D8R>]. On the famous comment of J. Kaczyński, see *SN uchylił wyrok ws. majątku "późnych przesiedleńców"*, [The Supreme

who would decide in this way as *oikofobic*, harboring a hatred of their native country.¹⁴⁶ PiS Party Chairman Kaczyński has often stated his view that judges should be a part of the apparatus of the state, fulfilling the political objectives of the ruling majority, identified with the interests of the state.¹⁴⁷ In Kaczyński's eyes, observance of the law should not justify a judicial decision if it differs from the interest of the nation.¹⁴⁸ This explains the name of the party: Law and Justice. In this name, justice questions the value of the law by exalting other more metaphysical categories, which are necessary to legitimize the law. The justice component takes on a nationalist perspective—the law cannot produce effects against the interest of the nation, as defined by the governing party. With comments on the Trawny case, Kaczyński also seeks to reactivate anti-German resentments in Poland,¹⁴⁹ as a kind of Euro-skeptical vehicle for political purposes. The courts and judges are also the victims of such perception of the law and political goals.

Court overturned the verdict on the property of „late displaced persons”], LEX (July 15, 2010), www.lex.pl/czytaj/-/artykul/sn-uchylil-wyrok-ws-majatku-poznych-przesiedlencow [<https://perma.cc/S36V-NGPN>]; see also Andrzej Mężyński, *Kaczyński: Niech Tusk Odkupi Ziemię od Niemców*, [Kaczyński: Let Tusk by the land from the Germans], DZIENNIK.PL (June 7, 2010, 4:16 PM), wiadomosci.dziennik.pl/polityka/artykuly/71466,kaczynski-niech-tusk-odkupi-ziemie-od-niemcow.html [<https://perma.cc/9XZA-BKZF>].

146. Magdalena Nowicka-Franczak, *Niemilość narodowa* [National Non-Love], 1 TYGODNIK POWSZECHNY, at 87 (2019); *Za co Kaczyński zaatakował sędziów w Olsztynie*, [What Kaczyński attacked the judges for in Olsztyn], WYBORCZA.PL (Sept. 24, 2018, 4:45 PM), <http://olsztyn.wyborcza.pl/olsztyn/7,48726,23958052,za-to-kaczynski-zaatakowal-sedziow-w-olsztynie.html>.

147. On October 17, 2018, GAZETA WYBORCZA published a special issue of their newspaper called *Czarna księga: trzech lat rządów PiS* [The Black Book: Three Years of PiS Rule]. See *Black is Black. PiS's Black Book of Government and Konstytucja poster on Wednesday with Wyborcza*, WYBORCZA.PL (October 12, 2018, 2:16 PM), <http://wyborcza.pl/7,95791,24031318,czarna-ksiega-rzadow-pis-w-srode-z-wyborcza.html>. The Black Book has thirty-two chapters addressing various aspects of the country's situation, published among borders with a timeline of events. While the entire issue is not available for download, Chapter 2 by University of Warsaw professor Marcin Matczak, which describes PiS's philosophy of government and actions with regard to the courts, is available at Marcin Matczak, *The end of separation of powers*, WYBORCZA.PL (Oct. 17, 2018, 12:57 AM), <http://wyborcza.pl/7,166575,24049890,koniec-trojpodzialu-wladzy.html> <https://perma.cc/AD3E-UYPR>.

148. *Id.* (discussing the flaw in equating a “party leader's intuition” with a determination of the nation's will) (available in Polish, translated by Frydeyrk Stanisław Zoll).

149. On the symbolic relevance of the Agnes Trawny case in the Polish internal debate on the proprietary relationships related to the previous German population of the former German territories, irrespective of the fact that the Trawny case is rather specific and not representative of the majority of the Polish-German proprietary relationships, see Julita Makaro, *Swoi i obcy w dyskursie prasowym na przykładzie wypowiedzi prasowych dotyczących Agnes Trawny* [“We” and “They” in the press discourse by the example of press statements concerning Agnes Trawny], 1 STUDIA MIGRACYJNE – PRZEGLĄD POLONIJNY, at 56-66 (2016).

This seed of unhappiness with the court system blossomed fulsomely in the PiS 2009 Program section on “legal impossibilism,” a concept often invoked by PiS Party Chair Kaczyński and others in the PiS party.¹⁵⁰ The 2009 program defines the legal impossibilism as “the programmatic inability of the State to undertake many actions necessary for the protection of its interests and the wellbeing of its citizens.”¹⁵¹ In addition to limiting things the state “needs to do,” the concept also is described as “petrifying a post-communist status quo,” meaning collusion among government officials and business people who profit from the collusion.¹⁵² The program says that the “ideology and practice” of legal impossibilism not only “helps to maintain post-communist social relationships but also results from the reluctance of some Polish elites to have a strong state.”¹⁵³ The program elaborates, saying that Poland, in wishing to avoid the totalitarianism of the past, now has a government with “excessive restriction of the democratic state’s actions to benefit its citizens” and an “over-idealistic understanding of the division and balance of power among the branches of government.”¹⁵⁴ The program describes “the hyperactivity of the Constitutional Tribunal” as one of the manifestations of impossibilism.¹⁵⁵ The program decries court decisions that overturn

150. PRAWO I SPRAWIEDLIWOŚĆ, PiS 2009 PROGRAM (2009), <http://old.pis.org.pl/dokumenty.php?s=partia&idoc=148> [<https://perma.cc/7P42-N74A>] (last visited July 31, 2018) (available in Polish, translated by Co-author Zoll). Kaczyński uses “Impossibilismus” as a combat term to undermine democracy in Poland. See Christian Esch, *Ich Bin das Volk: Ein Autoritärer Herrschaftstypus Verändert die Welt. Wie Erklärt Sich der Erfolg von Putin, Trump, Erdoğan, Xi? Die Spiegel-Titelstory*, SPIEGEL (June 8, 2018, 3:39 PM) <http://www.spiegel.de/plus/xi-jinping-wladimir-putin-donald-trump-erdogan-ich-bin-das-volk-a-00000000-0002-0001-0000-000157769149> [<https://perma.cc/6EVC-NS2L>]; Marc Santora, *The Roots of Poland’s Defiance of the European Union*, N.Y. TIMES (Dec. 25, 2017), <https://www.nytimes.com/2017/12/25/world/europe/poland-eu-judicial-laws.html>; Roger Cohen, Opinion, *How Democracy Became the Enemy*, N.Y. TIMES (Apr. 6, 2018), www.nytimes.com/2018/04/06/opinion/sunday/orban-hungary-kaczynski-poland.html (terming legal impossibilism as the counterbalancing power vested in an independent constitutional judiciary); see Matczak, *supra* note 147 on PiS’s views on impossibilism.

151. PiS 2009 PROGRAM, *supra* note 150, at 13.

152. *Id.*

153. *Id.* at 14.

154. *Id.*; see also Michael Meyer-Resende, *Is Europe’s Problem Illiberal Majoritarianism or Creeping Authoritarianism?*, CARNEGIE EUROPE, <https://carnegieeurope.eu/2018/06/13/is-europe-s-problem-illiberal-majoritarianism-or-creeping-authoritarianism-pub-76587> [<https://perma.cc/4XC9-HY8A>].

155. PiS 2009 PROGRAM, *supra* note 150, at 14.

“acts expressing the will of the majority and the result of the arduous work of democratically-elected state bodies.”¹⁵⁶

Since taking power in 2015, PiS government officials describe the objectives of court “reform” in neutral terms like enhanced efficiency and accountability, combined with allusions to corruption and lingering communist taint.¹⁵⁷ Generally, government officials no longer refer to removing judicial obstacles to the government’s policy initiatives and to PiS’s view of the country’s best interests.¹⁵⁸ In a July 2018 interview, however, PiS Party Chairman Jarosław Kaczyński said, “The European Commission will not break the Polish will to complete the reform, because it is either-or. If the judiciary is not reformed, other reforms have little sense, because sooner or later they will be through such courts as we have, negated, withdrawn.”¹⁵⁹ Here, he explicitly says that success in the PiS government’s initiatives, presumably including such matters as the manner of election to the European Parliament, the law governing public demonstrations, control of public media, compliance

156. *Id.*

157. See generally The Chancellery of the Prime Minister, *White Paper on the Reform of the Polish Judiciary* (2018), available at https://www.premier.gov.pl/files/files/white_paper_en_full.pdf [<https://perma.cc/D7P7-J3BG>]; Mateusz Morawiecki (*Opinion*), WASHINGTON EXAMINER, (Dec. 13, 2017), <http://www.washingtonexaminer.com/prime-minister-mateusz-morawiecki-why-my-government-is-reforming-polands-judiciary/article/2643279> [<https://perma.cc/PYB4-37RX>]. For a detailed response to the Polish government’s White Paper by Iustitia, one of the two major Polish judges’ associations, see *Iustitia’s March 16, 2018 paper and supplement: Response to the White Paper Compendium on the Reforms of the Polish Justice System*, IUSTITIA (Mar. 16, 2018), <http://www.iustitia.pl/informacje/2172-response-to-the-white-paper-compedium-on-the-reforms-of-the-polish-justice-system-presented-by-the-government-of-the-republic-of-poland-to-the-european-commission> [<https://perma.cc/222S-3ZG5>].

158. PiS had learned some lessons from their 2005-07 time in power when initiatives were blocked in the courts. See INT’L BAR ASS’N HUM. RTS INST., JUSTICE UNDER SIEGE; A REPORT ON THE RULE OF LAW IN POLAND 5 (2007), available at <https://www.ibanet.org/Document/Default.aspx?DocumentUid=06d75809-1dce-49e3-97f4-8de8d4d454ff> [<https://perma.cc/AT64-4P94>] (report of a September 2007 fact-finding mission to Poland by the IBA’s Human Rights Institute and the Council of Bars & Law Societies of Europe in which they describe PiS as then “embark[ing] on a campaign to gain control over the entire judicial system”).

159. Dominika Sitnicka, *Jarosław Kaczyński wyjawia całą prawdę o reformie sądownictwa* [*Jarosław Kaczyński reveals the whole truth about reform of the judiciary*], OKO PRESS (July 9, 2018), <https://oko.press/jaroslaw-kaczynski-wyjawia-cala-prawde-reformie-sadownictwa/> [<https://perma.cc/H7LP-28EW>]; *In the New “Network”: A Unique Interview With the PiS President*, SIECI PRAWDY (July 8, 2018), <https://www.wsieciprawdy.pl/w-nowym-sieci-wyjatkowy-wywiad-z-prezesem-pis-pnews-3668.html> [<https://perma.cc/LR7E-5FZ8>] (“Jeśli nie zreformuje się sądownictwa, inne reformy mają mały sens, bo prędzej czy później zostaną przez takie sądy, jakie mamy, zanegowane, cofnięte”) (available in Polish, translated by Co-author Zoll).

with environmental regulations, treatment of civil society organizations, and so on, depend on having courts compliant with the government's wishes.¹⁶⁰

3. The PiS Campaign against the Judiciary

Diego García-Sayán, the UN Special Rapporteur on the Independence of Judges and Lawyers (“Special Rapporteur”), visited Poland in October 2017 in preparation for a June 2018 presentation to the Human Rights Council of the UN General Assembly. His April 2018 report, prepared for the June UN Human Rights Council session, describes the September 2017 “Fair Courts” campaign of the Polish National Foundation, an organization funded by seventeen state-owned companies “with the official aim of promoting large-scale reform of the judiciary.”¹⁶¹ The Special Rapporteur’s report describes the campaign’s billboards, television and social media advertisements, and dedicated portal as providing a “distorted image of the judiciary, depicting judges as ‘the enemy’ of Polish people and an evil in Polish society.”¹⁶² The Special Rapporteur characterized the effort as a “large-scale propaganda attack against the judiciary, who are depicted by the ruling majority as a ‘caste,’ a ‘State within the State’, an entirely self-governing corporation which aims solely at defending its interests and is not accountable to the society.”¹⁶³ The Special Rapporteur describes the campaign as making “instrumental use of a few and isolated cases in which judges had been involved in illicit activities to demonize the judiciary as a whole.”¹⁶⁴

The Helsinki Foundation for Human Rights (“HFHR”) in Poland submitted a report to the Special Rapporteur during his October 2017 visit. The HFHR report describes the Fair Courts campaign as a

160. *Za co Kaczyński zaatakował sędziów w Olsztynie*, [Instead Kaczyński Attacked the Judges], *GAZETA WYBORCZA* (Sept. 24, 2018, 16:45), <http://olsztyn.wyborcza.pl/olsztyn/7,48726,23958052,za-to-kaczynski-zaatakowal-sedziow-w-olsztynie.html>.

161. UNSR, *supra* note 74, at paras. 17-19.

162. UNSR, *supra* note 74, at para. 19. For a detailed response to the Fair Courts campaign’s allegations by the National Judiciary Council then still in office, see *Kampania Billboardowa: a Prawda Jest Taka* [The Billboard Campaign: And the Truth is This], KRAJOWA RADA SĄDOWNICTWA, <http://krs.pl/pl/rzecznik-prasowy/a-prawda-jest-taka> [https://web.archive.org/web/20180418050443/http://krs.pl/pl/rzecznik-prasowy/a-prawda-jest-taka], cited in ANNA WÓJCIK, FREEDOM HOUSE, *NATIONS IN TRANSIT 2018 - POLAND 13* (2018), https://freedomhouse.org/sites/default/files/NiT2018_Poland_0.pdf [https://perma.cc/R79F-LHKU].

163. UNSR, *supra* note 74, at para. 19.

164. *Id.*

response to the Free Courts slogan of the July 2017 massive Polish street protests regarding the judiciary.¹⁶⁵ They report the Polish National Foundation spent almost PLN19 million (almost US\$5.5 million) on the campaign.¹⁶⁶ On October 31, 2017, the Polish television channel TVN24 reported that the Polish National Foundation had retained the Washington D.C. consulting firm, White House Writers Group, for an English-language campaign with five objectives including to

Explain that the reform of the judiciary in Poland is crucial for the elimination of corruption, impunity and delays, which make access to justice difficult for thousands of Polish citizens every year. It is also designed to restore the checks and balances, eliminated by the Soviet-style judiciary, which the newly independent Poland inherited over a quarter of a century ago.¹⁶⁷

The information reported came from the Foreign Agent Registration Act (“FARA”) filing made by the D.C. firm, which included the contract with the Polish National Foundation at a rate of US\$45,000 per month plus reasonable expenses up to ten percent of the fee with a three-month advance.¹⁶⁸ On December 31, 2018, the Polish National Foundation filed the 2016 and 2017 substantive and financial activity reports, which Polish law requires with regard to foundations.¹⁶⁹ The reports confirmed nearly half of the Foundation’s 2017 budget was spent on the campaign.¹⁷⁰

As in the 2009 platform, PiS officials continue referring to a communist taint allegedly hanging over the judiciary. For example, in an April 2017 interview, Minister of Justice Zbigniew Ziobro, said:

165. HELSINKI FOUNDATION FOR HUMAN RIGHTS, CONSTITUTIONAL CRISIS IN POLAND – ATTACKS ON THE INDEPENDENCE OF THE CONSTITUTION 33 (2017).

166. *Id.*

167. *The Polish National Foundation to Launch its “Fair Courts” Campaign Abroad*, TVN24 (Oct. 31, 2017, 10:39 AM), <https://www.tvn24.pl/tvn24-news-in-english,157,m/the-polish-national-foundation-to-launch-its-fair-courts-campaign-abroad,786067.html>. [<https://perma.cc/J4TB-CALZ>].

168. *Id.*

169. *8,4 mln złotych na “Sprawiedliwe Sądy”, pół miliona na pensje zarządu. Znamy finanse PFN* [8.4 million zlotys for “Fair Courts,” half a million for the board’s salaries. We know PFN’s finances], TVN24 (Jan. 1, 2019), <https://konkret24.tvn24.pl/polska,108/8-4-mln-zlotych-na-sprawiedliwe-sady-pol-miliona-na-pensje-zarzadu-znamy-finanse-pfn,897127.html> [<https://perma.cc/D8D8-2Z6C>] (including reporting on conflicting statements on the PNF’s relationship to the government, investigations and court decisions on legal issues related to the campaign).

170. *Id.*

The judiciary had 25 years to purify itself and elaborate conduct standards. And, they have done nothing so they lost their opportunity. Today the democratically-elected politicians need to change it. Repair of the judicial system is the most important issue for which the voters elected us. I will not retreat in the battle for justice and fairness in Poland, and I will fulfil the program whose objective is that the justice system is more protective of honest people.¹⁷¹

In a December 13, 2017 opinion piece in a conservative on-line newsmagazine, Polish Prime Minister Mateusz Morawiecki charged that the Roundtable Talks allowed General Jaruzelski to “nominate an entirely new bench of Communist-era judges to staff the post-communist courts.”¹⁷² In his study of post-communist judicial self-government in Central and Eastern Europe, Czech scholar David Kosař refers to Poland as an exception to the region’s common pattern of “rebuild[ing] their judiciaries with essentially the same personnel” because “most judges of the Polish Supreme Court (not of the lower courts) were removed from office.”¹⁷³ With the government transition in Poland having occurred almost thirty years ago, most lower court judges who were in office then likely have retired.¹⁷⁴

171. Zbigniew Ziobro: *Nie cofnę się w walce o sprawiedliwość*, [Zbigniew Ziobro: *I will not turn back in the fight for justice*], WMP.PL PARLAMENTARNY, <https://www.wmp.pl/parlamentarny/ludzie/zbigniew-ziobro-nie-cofne-sie-w-walce-o-sprawiedliwosc,22183.html> [https://perma.cc/E4T9-PNYR] (last visited Feb. 10, 2019) (available in Polish, translated by Co-author Zoll).

172. Mateusz Morawiecki (*Opinion*), *supra* note 157; *see supra* notes 56 and 57 and accompanying text for numbers of Polish Supreme Court judges replaced.

173. Kosař, *supra* note 4, at 3 n.11.

174. The current heated climate on new Supreme Court appointments has included debate regarding PiS allegations that sitting Supreme Court judges made dishonorable decisions in the martial law period from 1981-1983. *Premier o “haniebnym wyrokach”. Ilu sędziów Sądu Najwyższego orzekło w stanie wojennym?* [Prime Minister About “shameful sentences”. How many Supreme Court judges ruled during martial law?], TVN24 (July 9, 2018, 8:04 AM), <https://www.tvn24.pl/wiadomosci-z-kraju,3/ktorzy-sedziowie-sadu-najwyzszego-orzekali-w-stanie-wojennym,851747.html> [https://perma.cc/UXF9-JDRF]; “Pamiętam jeden wyrok”. *Pozostałe “były ze świadomością, że będzie amnestia”* [“I remember one sentence”. The others “were aware that there would be an amnesty”], TVN24 (July 16, 2018, 5:15 PM), <https://www.tvn24.pl/wiadomosci-z-kraju,3/sedzia-jozef-iwulski-a-procesy-stanu-wojennego,854167.html> [https://perma.cc/3A5B-RA95]; Jacek Gądek, *Józef Iwulski do dymisji. Jak najszybciej. Nie ma moralnego prawa być najważniejszym sędzią* [Józef Iwulski to resign as soon as possible. There is no moral right to be the most important judge], GAZETA.PL (July 17, 2017, 4:20 PM), <http://wiadomosci.gazeta.pl/wiadomosci/7,161770,23683378,jacek-gadek-sedzia-jozef-iwulski-do-dymisji-jak-najszybciej.html> [https://perma.cc/8SQQ-4KG9].

PiS also rails about corrupt judges, although their documents have provided very few examples.¹⁷⁵ GRECO, in their Fourth Evaluation Round report in 2012, cited a Eurobarometer survey with thirty-two percent of Polish respondents saying corruption in the judiciary was widespread.¹⁷⁶ GRECO noted that this is identical to the European average, expressed concern about public trust in the institution, and made recommendations directed toward improved public perception.¹⁷⁷ The 2012 report notes that those to whom their team spoke—inside the government and out—“generally concurred that corruption within the judiciary was not a widespread phenomenon.”¹⁷⁸ In attempting to explain why the perception of corruption might be significantly higher than the reality, GRECO reported suggestions received during their site visit: weak understanding in the public of the legal system, lack of transparency,¹⁷⁹ “hermetic” judicial disciplinary proceedings, and Poland’s broad form of judicial immunity.¹⁸⁰

*C. Reports and Actions of International, European, and
Nongovernmental Bodies regarding Polish Government Actions since
2015*

While it may seem that the historic launching of the first EU Article 7 proceeding is the most momentous external event in the Polish judicial independence saga, the complementary functions of the other parts of this Subsection should be seen in conjunction with the Article 7 proceeding. These are the Polish government actions that are now freed to go forward with neutered courts; the prodigious efforts by

175. See *Iustitia’s response to Government White Paper*, *supra* note 157.

176. GRECO 2012 Report, *supra* note 74, at para. 15.

177. *Id.* at para. 15 and 224, vii-xi.

178. *Id.* at 15; see also European Network of Councils for the Judiciary, *Position Paper of the Board of the ENCJ on the membership of the KRS of Poland*, para. 4.1, (August 16, 2018), available at <https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/News/ENCJ%20Board%20position%20paper%20on%20KRS%20Poland.pdf> (on the lack of evidence supporting the Polish government’s allegations of corruption and communist taint in the Polish judiciary).

179. Kosař, *supra* note 4, at 15 (commenting that civil law judicial systems generally are less transparent than those in common law countries).

180. GRECO 2012 Report, *supra* note 74, at para. 15, 224, vii-xi (GRECO recommendations for improvement regarding the asset declaration process and conflict of interest guidance, which seem directed toward improving the public perception of the judiciary rather than a GRECO finding of serious or widespread judicial corruption to be “rooted out”); see also *supra* notes 333-335 and accompanying text with the authors’ suggestions on reasons the public might be frustrated with the courts and identify corruption as the reason even if that were not the case.

nongovernmental and international organizations to document the constantly-changing situation in Poland; and the Court of Justice of the European Union (“CJEU”) front, which has opened alongside the Article 7 proceeding.

1. PiS Initiatives beyond Judicial “Reform”

The November 2017 European Parliament (“EP”) resolution,¹⁸¹ European Commission’s December 2017 Reasoned Proposal in accordance with Article 7,¹⁸² and many reports and statements by major non-governmental organizations and regional and international entities describe issues beyond judicial independence that are of concern in Poland.¹⁸³ These include a multi-front effort to destabilize non-governmental organizations and organize counter “government-organized-governmental organizations;”¹⁸⁴ government actions with regard to the public media;¹⁸⁵ changes in criminal, police, civil service,

181. EUR. PARL. DOC. (P8_TA 2017/0442) (2017).

182. *Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland*, EUR. PARL. DOC. (COM 835) (2017). The European Parliament had commenced a similar procedure but withdrew its application to avoid duplication. See *European Parliament to Vote on ‘Nuclear Option’ Against Poland*, EURACTIV (Jan. 31, 2018), <https://www.euractiv.com/section/central-europe/news/european-parliament-to-vote-on-atomic-option-against-poland/> [<https://perma.cc/392C-3XX9>]; Alice Cuddy, *What is ‘Article 7’ and Why Was it Triggered Against Poland?*, EURONEWS (Dec. 20, 2017), www.euronews.com/2017/12/20/what-is-article-7-and-why-was-it-triggered-against-poland [<https://perma.cc/TE8M-8UW2>]; Rafał Badowski, *Parlament Europejski wycofuje procedurę ws. artykułu 7, ale PiS i tak nie ma się z czego cieszyć* [*European Parliament is withdrawing the Article 7 procedure, but PiS is not happy about it anyway*], NA:TEMAT (Poland), (Jan. 16, 2018), <http://natemat.pl/227539,parlament-europejski-wycofuje-procedure-ws-artykulu-7-ale-pis-i-tak-nie-ma-sie-z-czego-cieszyc> [<https://perma.cc/EJZ5-F8J9>].

183. *Poland 2017/2018*, AMNESTY INT’L, <https://www.amnesty.org/en/countries/europe-and-central-asia/poland/report-poland/> [<https://perma.cc/6JWZ-GFAW>] (last visit July 6, 2018).

184. *Poland’s Right-Wing Government Takes Steps to Control NGO Funding*, DEUTSCHE WELLE (Sept. 15, 2017), <https://www.dw.com/en/polands-right-wing-government-takes-steps-to-control-ngo-funding/a-40535610> [<https://perma.cc/4JYV-PMCR>].

185. Jan Cieński, *New Media Law Gives Polish Government Fuller Control*, POLITICO (Feb. 17, 2017), <https://www.politico.eu/article/poland-crisis-constitution-kaczynski-duda/> [<https://perma.cc/V3RB-6UE7>].

and counter-terrorism law;¹⁸⁶ a law limiting the right of assembly;¹⁸⁷ Poland's refusal to implement a European Court of Justice order on logging in a UNESCO World Heritage site and European Court of Human Rights issues regarding return of asylum-seekers to Belarus;¹⁸⁸ issues regarding women's reproductive health;¹⁸⁹ change in laws regarding domestic violence;¹⁹⁰ media reports of police surveillance of opposition and civil society leaders;¹⁹¹ and the November 11, 2017 march by far-right groups termed "xenophobic and fascist" by the November 15 European Parliament resolution.¹⁹² As described in Subsection II.C.2 on the PiS vision of law and justice, one of PiS's founding tenets is frustration at court actions their leaders see as thwarting policies PiS deems to protect the interests of the Polish nation and its citizens.¹⁹³ Many of the previously-listed initiatives presumably would be seen by PiS as such interests.

186. Ruaidhrí Giblin, *High Court Judge Seeks EU Ruling on Effect of Polish Law Changes*, THE IRISH TIMES (Mar. 12, 2018), <https://www.irishtimes.com/news/crime-and-law/courts/high-court/high-court-judge-seeks-eu-ruling-on-effect-of-polish-law-changes-1.3424530> [<https://perma.cc/6TX6-7XUU>].

187. Rick Lyman & Joanna Berendt, *Protests Erupt in Poland Over New Law on Public Gatherings*, N.Y. TIMES (Dec. 13, 2016), <https://www.nytimes.com/2016/12/13/world/europe/poland-protests.html>; AMNESTY INTERNATIONAL, THE POWER OF 'THE STREET': PROTECTING THE RIGHT TO PEACEFUL PROTEST IN POLAND (2018), available at https://www.amnesty.be/IMG/pdf/poland_report_final_for_upload.pdf [<https://perma.cc/G85T-6T42>].

188. *Bistieva et al. v. Poland*, App. No. 75157/14, available at <http://hudoc.echr.coe.int/eng/?i=001-182210> [<https://perma.cc/T9K8-BBBS>]; Arthur Neslen, *Poland Violated EU Laws by Logging in Białowieża Forest, Court Rules*, THE GUARDIAN (Apr. 17, 2018), <https://www.theguardian.com/world/2018/apr/17/poland-violated-eu-laws-by-logging-in-bialowieza-forest-says-ecj> [<https://perma.cc/29R3-KF2N>].

189. Lydia Smith, *Poland abortion ban: Thousands of women take to streets across country to demand reproductive rights*, INDEPENDENT (July 6, 2018, 2:15 PM), <https://www.independent.co.uk/news/world/europe/poland-women-abortion-ban-march-strike-protest-reproductive-rights-polish-government-latest-a8163281.html> [<https://perma.cc/FD6A-PBQJ>].

190. Agnieszka Bielecka, *Poland No Friend to Women*, HUMAN RIGHTS WATCH (July 6, 2018, 2:27 PM), <https://www.hrw.org/news/2017/12/03/poland-no-friend-women> [<https://perma.cc/A3NU-83GD>].

191. *Police target Opposition politicians and NGO activists*, HELSINKI FOUNDATION FOR HUMAN RIGHTS (July 6, 2018, 2:30 PM), www.hfhr.pl/en/police-target-opposition-politicians-and-ngo-activists/ [<https://perma.cc/4D4B-UYDW>].

192. EUR. PARL. DOC. (P8_TA 2017/0442) (2017), para. 18; *Rule of law and democracy in Poland at risk: Parliament ready for next steps*, EUR. PARL. (July 6, 2018, 2:35 PM), www.europarl.europa.eu/news/en/press-room/20171110IPR87824/rule-of-law-and-democracy-in-poland-at-risk-parliament-ready-for-next-steps [<https://perma.cc/6CGJ-MCK4>].

193. *Supra* notes 137-56 and accompanying text.

2. Nongovernmental and International Organization

Over the two years this Article was in process, many reports and statements by nongovernmental and international organizations reacted to the torrent of legislative change by the post-2015 Polish government, actions by the government's political leaders, and changes the government's new appointees in the judicial system started to take.¹⁹⁴ Some significant NGO reports are mentioned in the text, but the list is not comprehensive.¹⁹⁵ The Helsinki Foundation for Human Rights ("HFHR") in Poland submitted a thirty-three-page report on justice system issues during the October 2017 visit of the UN Special Rapporteur on the Independence of Judges and Lawyers.¹⁹⁶ Also in October 2017, Human Rights Watch published *Eroding Checks and Balances: Rule of Law and Human Rights Under Attack in Poland*.¹⁹⁷ Amnesty International submitted *Poland: Dismantling Rule of Law?* to the UN Human Rights Council's Universal Periodic Review in April/May 2017.¹⁹⁸ As the title suggests, Human Rights First's August 2017 report, *Poland's New Front: A Government's War Against Civil Society*, focused in large part on actions regarding nongovernmental

194. See, e.g., Mikołaj Pietrzak, *The Foundation for Law, Justice & Society, The Constitutional Court of Poland: The Battle for Judicial Independence* (2017), <https://www.fljs.org/sites/www.fljs.org/files/publications/The%20Constitutional%20Court%20of%20Poland.pdf> [<https://perma.cc/HE78-AP6B>] (describing new laws on public media, surveillance and antiterrorism, and "reorganization" of the prosecution system, which a neutering of the Constitutional Tribunal permitted); examples cited in *supra* notes 184-192 and accompanying text; Sadurski, *supra* note 9, at 49-55 (right of assembly, freedom of speech, counter-terrorism measures, electoral law)..

195. In addition to the reports mentioned in the text, see, e.g., AMNESTY INTERNATIONAL, *supra* note 187; HUMAN RIGHTS FIRST, JUSTICE PURGED: POLAND POLITICIZES ITS JUDICIARY (June 2018), <https://www.humanrightsfirst.org/resource/justice-purged-poland-politicizes-its-judiciary> [<https://perma.cc/Q3NS-H497>]; AMNESTY INTERNATIONAL, POLAND: UPDATE ON THE "REFORM" OF THE JUDICIARY, (Dec. 6, 2018) <https://www.amnesty.org/en/documents/eur37/9457/2018/en/> [<https://perma.cc/9VND-3UQ2>].

196. HELSINKI FOUNDATION FOR HUMAN RIGHTS, CONSTITUTIONAL CRISIS IN POLAND: ATTACKS ON THE INDEPENDENCE OF THE CONSTITUTIONAL TRIBUNAL (2017), *available at* http://www.hflr.pl/wp-content/uploads/2017/10/HFHR_independence-of-justice-system_October-2017.pdf [<https://perma.cc/5JYD-5PB6>]; *supra* note 74 (report of the Special Rapporteur's visit).

197. HUMAN RIGHTS WATCH, *ERODING CHECKS AND BALANCES: RULE OF LAW AND HUMAN RIGHTS UNDER ATTACK IN POLAND* (2017), *available at* <https://www.hrw.org/report/2017/10/24/eroding-checks-and-balances/rule-law-and-human-rights-under-attack-poland> [<https://perma.cc/BBW9-MKE8>].

198. AMNESTY INTERNATIONAL, POLAND, DISMANTLING RULE OF LAW? AMNESTY INTERNATIONAL SUBMISSION FOR THE UN UNIVERSAL PERIODIC REVIEW—27TH SESSION OF THE UPR WORKING GROUP, APRIL/MAY 2017, *available at* <https://www.amnesty.org/en/documents/eur37/5069/2016/en/> [<https://perma.cc/T6FJ-44S2>].

organizations, in what the report describes as a “slide toward . . . illiberalism,” in the “dismantl[ing] of the country’s Constitutional Tribunal, ensuring that it is unable to check the power of the executive or legislature” as well as referring to other actions with regard to the justice system.¹⁹⁹ The Stefan Batory Foundation issued a number of reports including a May 2018 report titled *Where the law ends—The collapse of rule of law in Poland—and what to do*,²⁰⁰ *Report of the Stefan Batory Foundation Legal Expert Group on the impact of the judiciary reform in Poland in 2015-18*,²⁰¹ and *Devastation of Poland’s Supreme Court and judicial independence: the situation now*.²⁰² Poland is prominently featured in Freedom House’s report, *Nations in Transit 2018, Confronting Illiberalism*.²⁰³ Freedom House’s annual country reports, including their annual Democracy Score rating, featured concerns about the judiciary, and Freedom House also published *Hostile Takeover: How Law and Justice Captured Poland’s Courts*.²⁰⁴

The European Network of Councils for the Judiciary (“ENCJ”) issued numerous statements calling on the Polish executive and parliament to reconsider legislation the ENCJ deems would bring the Polish judiciary under the control of the political branches of

199. HUMAN RIGHTS FIRST, POLAND’S NEW FRONT: A GOVERNMENT’S WAR AGAINST CIVIL SOCIETY (2017), available at <https://www.humanrightsfirst.org/sites/default/files/Poland-Report-August-2017.pdf> [<https://perma.cc/WW9L-FMFS>].

200. STEFAN BATORY FOUNDATION, *supra* note 81.

201. STEFAN BATORY FOUNDATION LEGAL EXPERT GROUP, REPORT OF THE STEFAN BATORY FOUNDATION LEGAL EXPERT GROUP ON THE IMPACT OF THE JUDICIARY REFORM IN POLAND IN 2015-2018 (2018), available at http://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/Batory%20Foundation_Report%20on%20the%20judiciary%20reform%20in%20Poland.pdf [<https://perma.cc/A6Q2-LZ75>]. Co-Author Zoll is a member of the legal experts group.

202. MARIA EJCHART-DUBOIS, ET AL., STEFAN BATORY FOUNDATION, DEVASTATION OF POLAND’S SUPREME COURT AND JUDICIAL INDEPENDENCE: THE SITUATION NOW (2018), available at <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Devastation%20of%20PL%20Supreme%20Court.pdf> [<https://perma.cc/B7C8-LV99>].

203. NATE SCHENKKAN, FREEDOM HOUSE, NATIONS IN TRANSIT 2018: CONFRONTING ILLIBERALISM (2018), available at <https://freedomhouse.org/report/nations-transit/nations-transit-2018#key-findings>. [<https://perma.cc/W5WR-C9TF>].

204. ANNA WÓJCIK, FREEDOM HOUSE, POLAND (2018), available at <https://freedomhouse.org/report/nations-transit/2018/poland> [<https://perma.cc/5J6C-8HSX>]; CHRISTIAN DAVIES, FREEDOM HOUSE, HOSTILE TAKEOVER: HOW LAW AND JUSTICE CAPTURED POLAND’S COURTS (2018), <https://freedomhouse.org/report/special-reports/hostile-takeover-how-law-and-justice-captured-poland-s-courts> [<https://perma.cc/82NQ-SGX9>].

government.²⁰⁵ On September 17, 2018, the ENCJ General Assembly suspended the Polish National Judicial Council (the Polish acronym being KRS) from the ENCJ, saying that the KRS could no longer fulfill the requirement that ENCJ members be “independent of the executive and legislation and ensure the final responsibility for the support of the judiciary in the independent delivery of justice.”²⁰⁶

The UN Special Rapporteur on the Independence of Judges and Lawyers visited Poland on October 23-27, 2017, after which he issued a preliminary statement.²⁰⁷ His official report was made to the UN Human Rights Council on June 25, 2018. Subsection II.B.1 cites a number of his factual findings. He termed Poland’s efforts to reform the judiciary as “planning a clear out of senior judges to be replaced by magistrates recommended by a council of mostly political appointees of the current ruling majority.”²⁰⁸

Responding to 2016 and 2017 changes in Polish law regarding the judiciary, GRECO commenced a Rule 34 ad hoc procedure to consider whether Poland is in serious violation of GRECO’s anti-corruption standards governing member states.²⁰⁹ In March 2018, GRECO adopted an ad hoc Report with recommendations and sent an on-site evaluation team to Poland on May 15-16, 2018.²¹⁰ That visit culminated in adoption of a June 2018 Addendum to Poland’s 2012 Fourth Evaluative Report on compliance with GRECO membership standards.²¹¹ Subsection I.B.1 of this Article cites a number of factual

205. ENCJ Position Paper, *supra* note 178, at point 3 (“*General Assembly and the Board of the ENCJ time and again made statements about the then draft law concerning the KRS. . . .*”); EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY, POSITION PAPER OF THE BOARD OF THE ENCJ ON THE MEMBERSHIP OF THE KRS OF POLAND para. 3 (2018), *available at* <https://pgwrk-websitemedia.s3.eu-west-1.amazonaws.com/production/pwk-web-encj2017-p/News/ENCJ%20Board%20position%20paper%20on%20KRS%20Poland.pdf> [<https://perma.cc/DFT8-F2EA>].

206. EUROPEAN NETWORK OF COUNCILS FOR THE JUDICIARY, *ENCJ Suspends Polish National Judicial Council - KRS*, <https://www.encj.eu/node/495> [<https://perma.cc/2ZML-3SHD>].

207. Diego García-Sayán, *Preliminary observations on the official visit to Poland: United Nations Special Rapporteur on the independence of judges and lawyers*, OFF. OF THE HIGH COMMISSIONER FOR HUM. RTS. (Oct. 2017), <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=22313&LangID=E> [<https://perma.cc/3XF7-YAEG>].

208. *Poland: Reforms a Serious Blow to Judicial Independence*, SCOOP (June 26, 2018), <http://www.scoop.co.nz/stories/WO1806/S00138/poland-reforms-a-serious-blow-to-judicial-independence.htm> [<https://perma.cc/72QZ-775D>].

209. GRECO June 2018, *supra* note 74, at paras. 2-8.

210. *Id.* at para. 7.

211. *Id.* at paras. 7, 9.

findings from the March and June GRECO documents. The June GRECO resolution directs Polish authorities to respond by March 31, 2019 to items deemed problematic under GRECO's anti-corruption system, which include the following.²¹² The new NJC composition does not meet the GRECO standard that half of the members be judges appointed by their peers.²¹³ With regard to the Polish Supreme court, the new extraordinary appeals and disciplinary chambers of the Polish Supreme Court should be reconsidered; the executive should reduce involvement in the court's organization; and the new retirement age should not be applied to sitting judges.²¹⁴ GRECO expressed concerns about new disciplinary procedures for both supreme and ordinary court judges that allow for the undue influence from the political branches.²¹⁵ GRECO also raised undue influence of the executive on appointments of the presidents and vice-presidents of the ordinary courts.²¹⁶

The European Commission for Democracy through Law (commonly called the Venice Commission) is the Council of Europe's advisory body on constitutional matters.²¹⁷ The Venice Commission issued opinions on Polish legislation in the five areas that were necessary to take political control of the judicial system: the Constitutional Tribunal,²¹⁸ the Public Prosecutor's office,²¹⁹ the National Council of the Judiciary,²²⁰ the Supreme Court,²²¹ and the Ordinary Courts.²²² These Venice Commission Opinions are cited

212. *Id.* at paras. 57-58.

213. *Id.* at para. 57, subpart i.

214. *Id.* at para. 57, subpart ii.

215. *Id.* at para. 57, subpart iii.

216. *Id.* at para. 57, subparts iv, v, and vi.

217. See THE VENICE COMM'N OF THE COUNCIL OF EUR., *supra* note 94.

218. European Commission for Democracy through Law (VENICE Commission), Opinion 833/2015 on the Amendments to the Act of 25 June 2015 on the Constitutional Tribunal adopted by the Venice Commission at its 106th Plenary Session, CDL-AD(2016)001. (March 11-12, 2016); European Commission for Democracy through Law (VENICE Commission), Opinion 860/2016 on the Act on the Constitutional Tribunal adopted by the Venice Commission at its 108th Plenary Session, CDL-AD(2016)026. (Oct. 14-15, 2016).

219. European Commission for Democracy through Law (VENICE Commission), Opinion 892/2017 on the Public Prosecutor's Office as Amended adopted by the Venice Commission at its 113th Plenary Session, CDL-AD(2017)028, December 8-9 2017.

220. European Commission for Democracy through Law (VENICE Commission), Opinion 904/2017 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, CDL-AD(2017)031, (Dec. 8-9, 2017).

221. *Id.*

222. *Id.*

repeatedly in the GRECO and UN Special Rapporteur reports, by the European Parliament and European Commission, and in many of the analyses by nongovernmental and other international organizations. The Venice Commission's December 11, 2017 Opinion 904 regarding changes to the National Judiciary Council, Supreme Court, and Ordinary Courts referred five times to similarities to Soviet systems of justice.²²³

The Council of Europe's Parliamentary Assembly Resolution 2188 passed on October 11, 2017. The resolution identifies Poland as one of five countries presenting examples of a "new threat to the rule of law," citing particularly the judiciary's independence, the amendments to the Act on the National Council of the Judiciary, concerns regarding the law on ordinary courts, and failure to implement the Venice Commission's recommendations with regard to the Polish Constitutional Tribunal.

The European Parliament's November 2017 resolution also cited the Organization for Security and Co-operation in Europe's Office of Democratic Institutions and Human Rights ("OSCE/ODIHR") opinions on Polish draft laws regarding the judiciary from May 5, 2017²²⁴ and August 30, 2017,²²⁵ the UN Human Rights Committee report on October 31, 2016,²²⁶ and Canada's intervention on May 9, 2017 at the UN Human Rights Council Universal Periodic Review of Poland.²²⁷

223. Point cited in *WHERE THE LAW ENDS*, *supra* note 81 at 13; VENICE Commission Opinion 904/2017, at paras. 54 (similarity to Soviet system allowing opening of past final judgments), 59 (allowing reopening of past judgments without notifying the parties), 61 (deeming possibility of reversal of old, final judgments worse than the Soviet system), 67 (on lay members to judicial panels), and 89 (on the irony that "reforms" characterized as a "de-communication" have so many resemblances to the Soviet system).

224. OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, *Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland* (Opinion-Nr.: JUD-POL/305/2017-Final [AIC/YM]) (May 5, 2017).

225. OSCE OFFICE FOR DEMOCRATIC INSTITUTIONS AND HUMAN RIGHTS, *Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland* (Opinion-Nr.: JUD-POL/313/2017 [AIC]) (Nov. 13, 2017).

226. Seventh Periodic Rep. of the U.N. Hum. Rts. Committee, U.N. Doc. CCPR/C/POL/7 (Oct. 31, 2016).

227. EUR. PARL. DOC., *supra* note 192, at 4.

3. Three EU Firsts: Invocation of EU Rule of Law Framework, Article 7 Proceeding, and Proposal to Link EU Funding to Rule of Law

In November 2014, the European Commission (“EC” or “Commission”) adopted a new “Rule of Law Framework.”²²⁸ The Framework was adopted to fill a gap in EU remedies to “resolve future threats to the rule of law” before a Member State’s situation reached the level of a “clear risk of a serious breach” of rule of law, which TEU Article 2 lists as one of the common values upon which the EU was founded.²²⁹ TEU Article 7 is the TEU’s remedy for such a “clear risk of a serious breach” of Article 2 values and provides for a possible sanction of suspension of a Member State’s EU rights including voting in the European Council.²³⁰ When the Commission adopted the 2014 Framework document, the TEU Article 7 had never been activated.²³¹

The Framework document notes that the Rule of Law procedure is “without prejudice” to the Commission’s powers to launch an infringement action under Article 258 of the Treaty on the Functioning of the European Union (“TFEU”) to remedy specific situations where a Member States’ law or practices are in violation of EU treaties.²³² The Rule of Law Framework and TEU Article 7, though, are addressed to “systemic threat to rule of law” while an TFEU Article 258 infringement action are launched for a “breach of a specific provision of EU law.”²³³

228. *Rule of law framework*, EUROPEAN COMM’N, https://ec.europa.eu/info/policies/justice-and-fundamental-rights/effective-justice/rule-law/rule-law-framework_en (last visited Jan. 7, 2019) [<https://perma.cc/34FC-64CU>]; EUR. PARL. RES. SERV., Briefing no. PE 573.922, Understanding the EU Rule of Law Mechanisms (2016), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573922/EPRS_BRI\(2016\)573922_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2016/573922/EPRS_BRI(2016)573922_EN.pdf) [<https://perma.cc/QX3K-DZ9J>].

229. *Rule of law framework*, *supra* note 228, at 3 and 6.; Version of the Treaty on European Union, art. 2, Oct. 26, 2012, 2012 O.J. (C 326) [hereinafter TEU].

230. TEU, art. 7.

231. EUROPEAN COMMISSION, COLLEGE ORIENTATION DEBATE ON RECENT DEVELOPMENTS IN POLAND AND THE RULE OF LAW FRAMEWORK: QUESTIONS & ANSWERS (2016), at 4.

232. *Rule of law framework*, *supra* note 228, at 3; Consolidated Version of the Treaty on the Functioning of the European Union art. 258, May 9, 2008, 2008 O.J. (C 115) 47 [hereinafter TFEU]; *Infringement procedure*, EUROPEAN COMM’N, https://ec.europa.eu/info/law/law-making-process/applying-eu-law/infringement-procedure_en [<https://perma.cc/8LU4-EUAR>] (last visited Feb. 4, 2019); European Commission, MEMO/12/12, *Infringements: Frequently Asked Questions*, EUROPEAN COMM’N (Jan. 17, 2012), http://europa.eu/rapid/press-release_MEMO-12-12_en.htm [<https://perma.cc/KLH4-QGAP>].

233. *Rule of law framework*, *supra* note 228, at 3, 5-8.

In January 2016, the European Commission (“EC” or “Commission”) initiated the Rule of Law Framework for the first time—regarding Poland.²³⁴ Acting within the Framework, the EC made Rule of Law Recommendations to Poland on July 27, 2017;²³⁵ December 21, 2016;²³⁶ and July 27, 2016.²³⁷ Finding the Polish government’s response inadequate, the Commission issued a fourth Rule of Law recommendation on December 20, 2017.²³⁸ This time the EC also submitted their Reasoned Proposal for a Decision of the European Council under Article 7(1), the first triggering of the Article 7 proceeding in EU history.²³⁹

An Article 7 proceeding can be triggered by a reasoned proposal of the European Commission, European Parliament, or one third of the Member States.²⁴⁰ As the first such procedure, the process is somewhat uncharted territory and does not come with specific rules and timetables.²⁴¹ A 2016 European Parliament Briefing document describes the EU as having chosen a “political” rather than “legal”

234. *Reasoned Proposal in Accordance with Article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland*, COM (2017) 835 final (Dec. 20, 2017), http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49108.

235. Commission Recommendation Regarding the Rule of Law in Poland Complementary to Commission Recommendations (EU) 2016/1374 and (EU) 2017/146, COM (2017) 5320 final (July 27, 2017).

236. Commission Recommendation Regarding the Rule of Law in Poland Complementary to Commission Recommendation (EU) 2016/1374, COM (2016) 8950 final (Dec. 21, 2016).

237. Commission Recommendation Regarding the Rule of Law in Poland, COM (2016) 5703 final (July 27, 2016).

238. Commission Recommendation Regarding the Rule of Law in Poland Complementary to Commission Recommendations (EU) 2016/1374, (EU) 2017/146, and (EU) 2017/1520, COM (2017) 9050 final (Dec. 20, 2017).

239. *EC Reasoned Proposal*, *supra* note 234.

240. TEU, *supra* note 229, at art. 7(1). The European Parliament apparently deferred to the EC’s lead in triggering Article 7 with regard to Poland, Badowski, *supra* note 182. On March 1, 2018, the EP voted 422 in favor, 147 against, and 48 abstaining on a non-binding resolution to support the EC’s action, *see* Eur. Parl. Press Release 20180226IPR98615, Rule of law in Poland: Parliament supports EU action (Mar. 1, 2018), <http://www.europarl.europa.eu/news/en/press-room/20180226IPR98615/rule-of-law-in-poland-parliament-supports-eu-action> [<https://perma.cc/W5WZ-QTR6>]. On September 12, 2018, the EP triggered an Article 7 proceeding against Hungary, *see* European Parliament Press Release 20180906IPR12104, Rule of law in Hungary: Parliament calls on the EU to act (Sept. 9, 2018), *available at* <http://www.europarl.europa.eu/news/en/press-room/20180906IPR12104/rule-of-law-in-hungary-parliament-calls-on-the-eu-to-act> [<https://perma.cc/U9RQ-Q6JU>].

241. Eszter Zalan, *EU action on Hungary and Poland drowns in procedure*, EU OBSERVER, (Nov. 13, 2018, 09:21 AM), <https://euobserver.com/political/143359>; Eszter Zalan, *EU ministers struggle to deal with Poland and Hungary*, EU OBSERVER (Oct. 16, 2018, 5:18 PM), <https://euobserver.com/justice/143122>.

approach with Article 7.²⁴² The General Affairs Council of the Council of the European Union has held three formal hearings on the Article 7 proceeding against Poland.²⁴³ The European Parliament Committee on Civil Liberties, Justice and Home Affairs made a mission to Poland on September 19-21, 2018²⁴⁴ with a follow-up hearing on November 20, 2018 in Brussels.²⁴⁵

On May 2, 2018, the European Commission presented a proposed European Union budget for 2021-2027.²⁴⁶ With the budget, the Commission also proposed a regulation “on the protection of the Union’s budget in case of generalized deficiencies as regards the rule of law in the Member States.”²⁴⁷ The budget proposal lists components of a Member state’s legal system necessary for the EU to “protect its budget,” assure “sound financial management,” and the “financial interests of the Union.”²⁴⁸ One of those is “effective review by independent courts.”²⁴⁹ The overall explanation for this priority is, “Only an independent judiciary that upholds the rule of law and legal certainty in all Member States can ultimately guarantee that money

242. EUR. PARL. RES. SERV., *supra* note 228, at 3.

243. *General Affairs Council*, EUROPEAN COUNCIL (June 26, 2018), <https://www.consilium.europa.eu/en/meetings/gac/2018/06/26/> [<https://perma.cc/JWW9-5JH7>]; *General Affairs Council*, EUROPEAN COUNCIL (Sept. 18, 2018), <https://www.consilium.europa.eu/en/meetings/gac/2018/09/18/> [<https://perma.cc/26YC-WL38>]; *General Affairs Council*, EUROPEAN COUNCIL (Dec. 11, 2018), <https://www.consilium.europa.eu/en/meetings/gac/2018/12/11/> [<https://perma.cc/QUE9-8S5B>].

244. EUR. PARL. COMM. ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS, *Draft Mission Report Following the Ad Hoc Delegation to Poland on the Situation of the Rule of Law, September 19-21, 2018* (Nov. 19, 2018), EUROPEAN PARLIAMENT (Nov. 19, 2018), http://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2018/12-03/mission_report_Poland_EN.pdf.

245. EUR. PARL. COMM. ON CIVIL LIBERTIES, JUSTICE AND HOME AFFAIRS, *Draft Agenda: Public Hearing on “The Situation of the Rule of Law in Poland, In Particular as Regards the Independence of the Judiciary,”* LIBE_OJ (2018) 1120 (Nov. 20, 2018), EUROPEAN PARLIAMENT (Nov. 20, 2018) http://www.europarl.europa.eu/meetdocs/2014_2019/plmrep/COMMITTEES/LIBE/DV/2018/11-19/Draftprogramme_hearing_rule_of_law_Poland_EN.pdf [<https://perma.cc/Q7AP-RZR6>].

246. European Commission Press Release IP/18/3570, EU budget: Commission proposes a modern budget for a Union that protects, empowers and defends (May 2, 2018), *available at* http://europa.eu/rapid/press-release_IP-18-3570_en.htm [<https://perma.cc/P226-HL6J>].

247. *Proposal for a Regulation of the European Parliament and of the Council on the protection of the Union’s budget in case of generalised deficiencies as regard the rule of law in the Member States*, Com (2018) 324 final (May 2, 2018).

248. *EU Budget for the Future: Sound Financial Management and the Rule of Law*, EUROPEAN COMMISSION (May 2, 2018), https://ec.europa.eu/commission/sites/beta-political/files/budget-proposals-financial-management-rule-law-may2018_en.pdf [<https://perma.cc/3TE6-TNNW>].

249. *Id.*

from the EU budget is sufficiently protected.”²⁵⁰ On January 17, 2019, the European Parliament approved the proposed regulation by a vote of 394 in favor, 158 against, and 69 abstentions.²⁵¹ Final approval must come from the Council.²⁵² European Union money has represented more than sixty-one percent of Poland’s infrastructure spending,²⁵³ and currently Poland is the largest beneficiary of European Union funds, receiving “some 14 billion euro annually.”²⁵⁴ A January 2019 study by the European Parliament’s Policy Department for Citizens’ Rights and Constitutional Affairs considers the various EU mechanisms available to safeguard basic principles and values, reviews the Rule of Law approaches taken with regard to Poland and Hungary, and makes proposals for improving the protection of the rule of law in the EU.²⁵⁵

4. Opening the Court of Justice of the European Union (“CJEU”) Front

While the TEU Article 7 process and proposal to link EU budget funds to rule of law proceed, the CJEU has become a center of action regarding the Polish judiciary.

a. European Commission Article 258 Treaty on the Functioning of the European Union Infringement Proceedings

On the same day the Article 7 proceeding was launched, the Commission broke new ground by bringing the CJEU the first Article 258 TFEU infringement proceeding based on a violation of Article 19(1) of the TEU read with Article 47 of the EU Charter of

250. *Id.*

251. Lili Bayer, *European Parliament backs plan to link EU funds to rule of law*, POLITICO (Jan. 17, 2019, 7:33 PM), <https://www.politico.eu/article/budget-hungary-poland-rule-of-law-european-parliament-backs-plan-to-link-eu-funds/> [<https://perma.cc/Y8LN-FHMJ>].

252. *EU Budget for the Future*, *supra* note 248.

253. Steven Erlanger, *As Poland and Hungary Flout Democratic Values, Europe Eyes the Aid Spigot*, N.Y. TIMES (May 1, 2018), <https://www.nytimes.com/2018/05/01/world/europe/poland-hungary-european-union-money.html>.

254. Slawomir Sierakowski, *The Beginning of the End for Poland’s Populists*, N.Y. TIMES (Nov. 6, 2018) <https://www.nytimes.com/2018/11/06/opinion/the-beginning-of-the-end-for-polands-populists.html>.

255. Eur. Parl., Policy Dep’t for Citizens’ Rights and Const. Affairs, *The EU Framework for Enforcing the Respect of the Rule of Law and the Union’s Fundamental Principles and Values* 31 (2019), [http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608856/IPOL_STU\(2019\)608856_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/STUD/2019/608856/IPOL_STU(2019)608856_EN.pdf) [<https://perma.cc/QN5A-HPYZ>].

Fundamental Rights.²⁵⁶ This infringement action concerned the Polish Law on Ordinary Courts Organisation, the expressed concern being that giving the President discretionary power to extend the term of judges who had reached retirement age endangered judicial independence, which is a necessary element of a right to a fair trial.²⁵⁷

On July 2, 2018, the Commission launched its second TFEU Article 258 infringement regarding judicial independence in Poland by sending a Letter of Formal Notice to Poland regarding the twenty-seven Supreme Court judges who faced retirement the following day.²⁵⁸ On October 2, 2018, the Commission brought the infringement action to the CJEU requesting an interim ruling to suspend the legislation lowering the Supreme Court retirement age with regard to sitting judges, ensure that judges affected could continue to serve, restrain the Polish government from appointing new judges, and order Poland to inform the CJEU regarding compliance.²⁵⁹ The Commission's infringement petition asserted that the new law taking effect July 3 violated the principle of judicial independence, including the "irremovability" of judges, and Poland's obligations under Article 19(1) of the TEU read with Article 47 of the EU Charter of Fundamental Rights, which establishes member states' obligations regarding fair trials."²⁶⁰ The Commission's fall 2018 infringement action concerned lowering the retirement age for sitting judges and the same kind of Presidential discretion power to extend the term that was

256. European Commission Press Release IP/17/5367, Rule of Law: European Commission Acts to Defend Judicial Independence in Poland (Dec. 20, 2017), http://europa.eu/rapid/press-release_IP-17-5367_en.pdf; Dmitry Kochenov, Laurent Pech, & Kim Lane Scheppele, *The European Commission's Activation of Article 7: Better Late than Never*, VERFASSUNGSBLOG (Dec. 23, 2017), <https://verfassungsblog.de/the-european-commissions-activation-of-article-7-better-late-than-never/> (asserting this as the first claim of this kind given that this combination was raised in a December 2015 action against Hungary but dropped before reaching the CJEU).

257. Case C-192/18, Eur. Comm'n v Republic of Poland, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-192/18> (Mar. 15, 2018).

258. European Commission Press Release IP/18/4341, Rule of Law: Commission Launches Infringement Procedure to Protect the Independence of the Polish Supreme Court (July 2, 2018), http://europa.eu/rapid/press-release_IP-18-4341_en.htm.

259. Case C-619/18, Eur. Comm'n v Republic of Poland 2018, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-192/18> (Mar. 15, 2018); European Commission Press Release IP/18/5830, Rule of Law: European Commission Refers Poland to the European Court of Justice to Protect the Independence of the Polish Supreme Court (Sept. 24, 2018), http://europa.eu/rapid/press-release_IP-18-5830_en.htm [<https://perma.cc/5WY7-K9TD>].

260. *Id.*

the basis of the first infringement action with regard to the Ordinary Courts.

On October 19, 2018 the Vice President of the CJEU provisionally granted the European Commission's prayers for relief in the infringement action pending an order on the interim proceedings.²⁶¹ On November 16, 2018, the CJEU President ordered that the matter be determined under the CJEU's expedited procedures.²⁶² Following an oral argument on November 16, on December 17, 2018 the CJEU Grand Chamber adopted the reasoning of the October 2018 Vice President's decision and ordered the Polish government to suspend the pertinent provisions of Polish law, take "all necessary measures" to assure the affected judges could perform as they had prior to April 3, 2018, refrain from appointing judges to fill the relevant positions including that of the office of First President, and notify the European Commission within one month and at regular intervals after about compliance.²⁶³

In response to the Commission's moves on infringement, a senior Polish government official said Poland might ignore a ruling of the CJEU.²⁶⁴ Despite the pending CJEU infringement action, on October 10, 2018, Poland's President swore in twenty-seven new Supreme Court judges.²⁶⁵ On October 24, 2018, PiS Party leader Jarosław

261. Court of Justice of the European Union Press Release 159/18, Poland must immediately suspend the application of the provisions of national legislation relating to the lowering of the retirement age for Supreme Court judges (Oct. 19, 2018), <https://curia.europa.eu/jcms/upload/docs/application/pdf/2018-10/cp180159en.pdf> [<https://perma.cc/KUU8-TEYF>].

262. Court of Justice of the European Union Press Release 204/18, Poland Must Immediately Suspend the Application of the Provisions of National Relating to the Lowering of the Retirement Age for Supreme Court Judges (Dec. 17, 2018), https://curia.europa.eu/jcms/jcms/p1_1534878/en/; Case C-619/18, Eur. Comm'n v Republic of Poland, <http://curia.europa.eu/juris/document/document.jsf?text=&docid=209302&pageIndex=0&doclang=PL&mode=req&dir=&occ=first&part=1&cid=11865245> (Dec. 17, 2018).

263. Case C-619/18, Eur. Comm'n v Republic of Poland 2018, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-619/18%20R> (Dec. 17, 2018); European Commission Press Release IP/18/5830, Rule of Law: European Commission Refers Poland to the European Court of Justice to Protect the Independence of the Polish Supreme Court (Sept. 24, 2018), http://europa.eu/rapid/press-release_IP-18-5830_en.htm [<https://perma.cc/5WY7-K9TD>].

264. Alexandra Brzozowski, *Poland threatens to ignore rulings of EU's top court*, EURACTIV (Aug. 28, 2018), <https://www.euractiv.com/section/central-europe/news/poland-threatens-to-ignore-rulings-of-eus-top-court/> [<https://perma.cc/SUC6-LP67>].

265. Monika Ścisłowska, *Polish leader appoints top court judges, against ruling*, AP NEWS, (Oct. 10, 2018), <https://apnews.com/72f55291a715434bb2e32707f3c0ede9> [<https://perma.cc/76G7-8HP8>].

Kaczyński said Poland would fight the October 19 CJEU order.²⁶⁶ Just the day before, CJEU President Koen Lenaerts told journalists that refusal to comply with an EU order puts the country “outside the legal order.”²⁶⁷ Perhaps because of the PiS party’s poor showing in urban areas in the local elections in October and November 2018,²⁶⁸ on November 21, 2018, the Polish government reversed course with the Sejm’s passage of legislation nullifying the forced retirement for Supreme Court judges.²⁶⁹ After passage, by the Polish Senate, President Duda signed the bill into law on December 10, 2018.²⁷⁰ Poland now asserts that the infringement action should be dropped because Polish law is in compliance.²⁷¹ The European Commission and at least four Member States argue that the questions of European treaty law involved should still be decided.²⁷²

266. Marek Strzelecki & Stephanie Bodoni, *No Polish Wiggle Room on Judges as EU Court Chief Spells Out Law*, BLOOMBERG (Oct 24, 2016, 6:46 AM), <https://www.bloomberg.com/news/articles/2018-10-24/poland-delays-moves-in-eu-court-row-till-after-election-run-off>.

267. *Id.*

268. Sławomir Sierakowski, *The Beginning of the End for Poland’s Populists*, N.Y. TIMES, (Nov. 6, 2018), <https://www.nytimes.com/2018/11/06/opinion/the-beginning-of-the-end-for-polands-populists.html> (scope of election defeat, reporting 80% of Poles support European integration, the highest in Europe); Vanessa Gera, *Major Setback for Poland’s Ruling Populists in Mayoral Races*, AP NEWS (Nov. 5, 2018), <https://www.apnews.com/27508bc038e54ed281034d022eb00020> [<https://perma.cc/YK8Y-PLRM>].

269. Vanessa Gera, *Poland moves to reinstate retired judges to Supreme Court*, AP NEWS, (Nov. 21, 2018), <https://www.apnews.com/9e4251bb43c8422ab1f0bb4d0fb7eea2> [<https://perma.cc/J2NU-3CVX>].

270. Joanna Berendt & Marc Santora, *Poland Reverses Supreme Court Purge, Retreating from Conflict with E.U.*, N.Y. TIMES (Dec. 17, 2018), <https://www.nytimes.com/2018/12/17/world/europe/poland-supreme-court.html>.

271. Maciej Deja, *Wraca sprawa polska w TSUE. Rząd przekazał raport Komisji* [*The Polish CJEU case. The government has forwarded the report to the Commission*], WP WIADOMOŚCI (Jan. 17, 2019), <https://wiadomosci.wp.pl/wraca-sprawa-polska-w-tsue-rzad-przekazal-raport-komisji-6339487785006721a?amp=1>; see *infra* note 272.

272. Łukasz Woźnicki, *Cztery unijne kraje przeciw czystce w polskim Sądzie Najwyższym* [*Four EU countries against purges in the Polish Supreme Court*], WYBORCZA.PL, (Jan. 4, 2019, 7:12 PM) <http://wyborcza.pl/7,75398,24333404,cztery-unijne-kraje-przeciw-czystce-w-polskim-sadzie-najwyzszym.html>. Just as this article was going to press, on February 12, 2019, the CJEU held a hearing on the Commission’s infringement action on the Supreme Court retirements with an announcement that the Advocate General would reach a decision regarding the final ruling in this case by April 11, 2018 with the decision by the CJEU 15-member Grand Chamber by the end of April or May, *infra* note 297.

b. Article 267 TFEU Requests for Preliminary Rulings on Interpretation of EU Treaties as Necessary to Decide Matters in National Courts

In March 2018, Irish High Court Justice Aileen Donnelly stayed the extradition of Artur Celmer, a Polish national accused of drug trafficking, questioning whether independence of the Polish judiciary had so deteriorated that it threatened the mutual trust and recognition among EU jurisdictions upon which the European Arrest Warrant system rests.²⁷³ She ruled that guidance was needed from the CJEU.²⁷⁴ Hence, she made a request for preliminary ruling under Article 267 of the Treaty on the Functioning of the European Union, which permits a Member State court to request a CJEU ruling on the interpretation of EU treaties and acts where such guidance may be necessary to make a decision in the national court.²⁷⁵ Justice Donnelly's ruling cited the European Commission's Reasoned Proposal triggering the Article 7 proceeding²⁷⁶ and opinions of the Venice Commission on Polish legal reforms,²⁷⁷ saying these may, "taken as a whole, breach the common value of the rule of law referred to in Article 2 TEU."²⁷⁸ Attacks on Justice Donnelly for her sexual orientation by conservative Polish press²⁷⁹ drew swift condemnation from the Association of Judges of Ireland.²⁸⁰

273. *Extradition to Poland Case Comes Back Before Judge*, THE IRISH TIMES (Mar. 16, 2018, 1:00 AM), <https://www.irishtimes.com/news/crime-and-law/extradition-to-poland-case-comes-back-before-judge-1.3428657> [https://perma.cc/L23P-HZSE]; *Extraditions to Poland May Be Suspended EU-Wide, Lawyers Say*, THE IRISH TIMES (Mar. 13, 2018), <https://www.irishtimes.com/news/crime-and-law/extraditions-to-poland-may-be-suspended-eu-wide-lawyers-say-1.3425284> [https://perma.cc/Q2FL-747J].

274. *Id.*

275. TFEU, *supra* note 232, art. 267; EUR. PARL. RES. SERV., Briefing no. PE 608.628, *Preliminary Reference Procedure* (2017), [http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608628/EPRS_BRI\(2017\)608628_EN.pdf](http://www.europarl.europa.eu/RegData/etudes/BRIE/2017/608628/EPRS_BRI(2017)608628_EN.pdf) [https://perma.cc/5WM5-44K8].

276. Case C-216/18, *Minister for Justice and Equality v. LM (Deficiencies in the System of Justice)*, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-216/18%20PPU> (June 28), [https://perma.cc/LZ9T-5P2C].

277. *Id.*

278. *Id.*

279. *Polish Right-Wingers Focus Ire on "Irish Lesbian Judge,"* THE IRISH TIMES (Mar. 14, 2018, 4:02 PM), <https://www.irishtimes.com/news/world/europe/polish-right-wingers-focus-ire-on-irish-lesbian-judge-1.3427114> [https://perma.cc/8QHU-2LBQ].

280. *Judges Condemn "Personalised Attacks and Invective" by Polish Media*, THE IRISH TIMES (Mar. 15, 2018, 10:55 AM), <https://www.irishtimes.com/news/crime-and-law/judges-condemn-personalised-attacks-and-invective-by-polish-media-1.3428170> [https://perma.cc/CWZ7-PGZA].

On June 28, 2018, the Advocate General of the Court of Justice of the European Union delivered the CJEU opinion ruling that, to deny extradition, a court must find a real risk of flagrant denial of justice to the particular person involved on account of deficiencies in the system of justice of the Member State requesting extradition.²⁸¹ On July 25, 2018, the Court (Grand Chamber of the CJEU) handed down its decision following the Advocate General’s reasoning in her June 28 decision.²⁸² The Grand Chamber acknowledged the Irish court’s awareness of

“material, such as that set out in the reasoned proposal of the European Commission adopted pursuant to Article 7(1) TEU, indicating that there is a real risk of breach of the fundamental right to a fair trial guaranteed by the second paragraph of Article 47 of the Charter of Fundamental Rights of the European Union, on account of systematic or generalised deficiencies so far as concerns the independence of the issuing Member State’s judiciary”²⁸³

The Court then ruled that, to make a decision on executing the Polish arrest warrant, the Irish court must “determine, specifically and precisely,” whether the person in question will run a risk of denial of a fair trial if surrendered to Poland.²⁸⁴

To make the individual assessment required by the CJEU ruling, Justice Donnelly sought assurances with regard to Mr. Celmer’s ability to get a fair trial based on “Poland’s deputy justice minister [having been] quoted as calling him a ‘dangerous criminal’ connected to a ‘drugs mafia’, despite the presumption of innocence.”²⁸⁵ Judge Joanna Bitner, the President of the Warsaw Regional Court, who had been appointed to the position in the Minister of Justice’s recent round of replacements of court presidents, replied “‘any and all such statements’ by politicians and the media were ‘absolutely irrelevant’ and had no impact on a judge’s decision making process and that Polish judges

281. Deficiencies in the System of Justice Case, *supra* note 278.

282. Case C-216/18, Minister for Justice and Equality v. LM (Deficiencies in the System of Justice), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=204384&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=11867445> (July 25, 2018).

283. *Id.* at para. 79.

284. *Id.* at para. 34.

285. Ruaidhrí Giblin, *Supreme Court to decide on extradition of wanted Polish man*, THE IRISH TIMES (Dec. 10, 2018, 4:39 PM), <https://www.irishtimes.com/news/crime-and-w/courts/supreme-court-to-decide-on-extradition-of-wanted-polish-man-1.3726503> [https://perma.cc/9ETV-RDA9].

“were independent and subject only to the Polish constitution and laws.”²⁸⁶ The original trial judge, Piotr Gąciarek, however, wrote to the High Court that “it was ‘not true’ for his superior to have said the independence of judges and courts in Poland was not presently at risk” but rather that laws of the last three years and their operation by “‘politicians currently in power’ posed ‘very serious threats’ to the Polish justice system.”²⁸⁷

On November 28, 2018, Justice Donnelly ruled that Mr. Celmer could be surrendered but also said there was “at least the possibility of ‘another view prevailing,’” stayed her order, and suggested that the matter should be decided in a “‘leapfrog’ appeal” to the Irish Supreme Court, bypassing the Court of Appeal.²⁸⁸ The Irish Court of Appeal President, supported by the Irish Ministry of Justice, permitted the direct appeal to the Irish Supreme Court” where the matter will be heard.²⁸⁹ On January 4, 2019, a Dutch court decided to temporarily suspend extradition of eleven people with Polish European arrest warrants.²⁹⁰ The court’s statement said that it found the answers to questions the Dutch courts had proffered to Polish courts seeking extradition regarding independence of the Polish judiciary and consequences for the rights of the particular suspects to thus far be “incomplete or requiring further questions.”²⁹¹

Since institution of the Irish case, Polish courts have sent at least nine Article 267 request for preliminary ruling to the CJEU.²⁹² In August 2018, a seven-member panel of Polish Supreme Court judges

286. *Id.*

287. *Id.*

288. Ruaidhrí Giblin, *High Court Permits Appeal Against Decision to Extradite a Man to Poland*, IRISH EXAMINER (Nov. 28, 2018), 5:13PM, <https://www.irishexaminer.com/breakingnews/ireland/high-court-permits-appeal-against-decision-to-extradite-man-to-poland-888566.html> [https://perma.cc/VU6K-ELCA].

289. Giblin, *supra* note 285.

290. *Holenderski sąd: nie będzie ekstradycji do Polski, niezależność sądów zagrożona* [Dutch Court: There will be no extradition to Poland, the independence of the courts is at stake], NIEDZIELA, NL (Jan. 6, 2019), http://www.niedziela.nl/index.php?option=com_content&view=article&id=19162:2019-01-06-10-03-15&catid=77:h [https://perma.cc/9EJR-R4ZB].

291. *Id.*

292. Seven of those cases are discussed below. Two additional Article 267 requests raise issues related to cases discussed. Case C-537/18, Krajowa Rada Sądownictwa, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-537/18> (Aug. 17, 2018); Case C-623/18, Prokuratura Rejonowa w Słubicach, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-623/18> (Oct. 3, 2018) [https://perma.cc/EV24-2JPJ].

referred five questions to the CJEU.²⁹³ The referring judges raised whether the new Supreme court retirement law was consistent with Articles 2, 4, and 19 of the TEU and Articles 21 and 47 of the Charter of Fundamental Rights of the European Union as well as a Council Directive regarding equal treatment in employment.²⁹⁴ Two of the judges on adjudicating panels would be affected by the new provisions.²⁹⁵ The panel suspended the pertinent provisions, and two of the questions to the CJEU concerned the national court's obligation to apply them if doing so would violate EU law.²⁹⁶

This case was set for argument in the CJEU on February 12, 2019 but was removed from the CJEU calendar.²⁹⁷ The Polish government's repeal of the retirement provisions with regard to sitting judges was described previously in the Subsection on the European Commission's Article 258 infringement action with regard to them.²⁹⁸ The Polish press reports that, in early January 2019, the CJEU requested the Polish Supreme Court to respond by January 28 as to whether the Court still thinks it necessary for the CJEU to respond to the referral for preliminary ruling in this matter.²⁹⁹ Terminating the August 2018 Article 267 preliminary ruling, however, would not in itself dispose of

293. Case C-522/18, *DŚ v. Zakład Ubezpieczeń Społecznych Oddział w Jaśle*, Request for a Preliminary Ruling, (Aug. 9, 2018), <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:62018CN0522&from=EN> [<https://perma.cc/4Q7Q-FXWT>].

294. *Id.*

295. Case C-522/18, *DŚ v. Zakład Ubezpieczeń Społecznych Oddział w Jaśle*, Request for a Preliminary Ruling, Order of the President of the Court, paras. 6-7 (Sept. 26, 2018), <http://curia.europa.eu/juris/document/document.jsf?text=&docid=206423&pageIndex=0&doclang=PL&mode=req&dir=&occ=first&part=1&cid=11869258>.

296. *Id.* at para. 14.

297. *TSUE odwołał rozprawę w sprawie pytań prejudycjalnych Sądu Najwyższego*, [*The CJEU cancels the hearing on the Supreme Court's request for ruling on preliminary questions*] POLSKIE RADIO.PL, (Jan. 15 2019, 1:16 PM), <https://www.polskieradio.pl/5/1223/Artykul/2246394,TSUE-odwolal-rozprawe-w-sprawie-pytan-prejudycjalnych-Sadu-Najwyzszego> [<https://perma.cc/J2YZ-YP9U>]. Argument on the European Commission's Article 258 infringement matter regarding the Supreme Court was argued on February 12, 2019 instead, see *supra* notes 258-272 and accompanying text. An opinion by the CJEU's Advocate General in that case is expected on April 11, 2019 with the final ruling by the CJEU 15-member Grand Chamber by the end of April or May. Tomasz Bielecki, *Po rozprawie w TSUE. Skutek uboczny sporu o Sąd Najwyższy? KRS też idzie pod lupę* [*After the CJEU Hearing. A side effect of the Supreme Court dispute? The NJC goes under the microscope*], WYBORCZA.PL (Feb. 12, 2019, 2:38 PM), <http://wyborcza.pl/7,75399,24451612,po-rozprawie-w-tsue-skutek-uboczny-sporu-o-sad-najwyzszy-kr.html> [<https://perma.cc/EXJ9-EZXG>] (argument in Article 258 infringement matter also raised whether the NJC in its current form can protect judicial independence).

298. *Supra* notes 264-272 and accompanying text.

299. POLSKIE RADIO, *supra* note 297.

the Article 258 infringement case brought by the European Commission.³⁰⁰ Belgium, the Netherlands, Latvia, and Denmark filed comments saying the Article 267 matter should still be decided by the CJEU.³⁰¹

In other Article 267 matters, two judges from the ordinary courts raised whether the new disciplinary court structure and procedure raised threats to judicial independence for judges ruling in cases where the government is a party given the nature of the new disciplinary procedure that the government has created.³⁰² While their request for a temporary ruling was denied on October 1, 2018 with regard to the standards for expedited ruling, the October decision did not address the substantive questions presented and are still pending in the CJEU.³⁰³

In three additional cases, the Polish Supreme Court questioned whether the legitimacy of the newly-constituted National Judiciary Council and judges appointed by it must be decided before they could hear the matters before them.³⁰⁴ One of the cases was brought by a Supreme Administrative Court judge who had sought extension of retirement at 65, received a negative opinion from the NJC, and argued he should retain the right to appeal to the Labor Chamber of the Supreme Court as prior law had provided.³⁰⁵ Under new law, appeal would go to the Disciplinary Chamber of the Supreme Court with newly-appointed judges closely linked to the Minister of Justice.³⁰⁶ The

300. Piotr Bogdanowicz and Maciej Taborowski, *Why the EU Commission and the Polish Supreme Court Should not Withdraw their Cases from Luxembourg*, VERFASSUNGSBLOG (Dec. 3, 2018), <https://verfassungsblog.de/why-the-eu-commission-and-the-polish-supreme-court-should-not-withdraw-their-cases-from-luxembourg/> [<https://perma.cc/C86Y-3QTK>].

301. Łukasz Woźnicki, *Cztery unijne kraje przeciw czystce w polskim Sądzie Najwyższym*, [Four EU countries against purges in the Polish Supreme Court], WYBORCZA.PL (Jan. 4, 2019, 7:12 PM), <http://wyborcza.pl/7,75398,24333404,cztery-unijne-kraje-przeciw-czystce-w-polskim-sadzie-najwyzszym.html> [<https://perma.cc/BDC3-NSR7>].

302. C-558/18 Sąd odsyłający: Sąd Okręgowy w Łodzi, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-558/18> (Sept. 3, 2018); C-563/18 Prokuratura Okręgowa w Płocku from Sąd Okręgowy w Warszawie w VIII Wydziale Karnym składzie, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-563/18> (Sept. 5, 2018).

303. C-558/18 Sąd odsyłający: Sąd Okręgowy w Łodzi.

304. Case C-585/18, Krajowa Rada Sadownictwa, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-585/18> (Nov. 26, 2018); Case C-624/18, CP, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-624/18> (Jan. 18, 2019); Case C-625/18, DO, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-625/18> (Jan. 18, 2019). In Joined Cases C-585/18, C-624/18 and C-625/18, Procedure in Accelerated Mode, http://curia.europa.eu/juris/document/document_print.jsf?docid=208542&text=&dir=&doclang=PL&part=1&occ=first&mode=req&pageIndex=0&cid=61%E2%80%A6 (Nov. 26, 2018).

305. See Joined Cases, para. 6.

306. *Id.*, para. 13.

other two appeals were from Supreme Court judges facing retirement at 65.³⁰⁷ They argued that the new NJC is no longer performing its constitutional function to safeguard judicial independence and that a court with judges recommended by the new NJC is not an independent court as required by European law.³⁰⁸ Hence, these two judges contend, that they should retain their right to appeal their employment status to the Polish Supreme Court. In a November 26, 2018 Order, the CJEU President ruled that the three joined cases would be heard under the CJEU's accelerated procedure.³⁰⁹ These cases are reported to be scheduled for hearing on March 19, 2019.³¹⁰

In November 2018, the Polish Supreme Administrative Court also sent an Article 267 request to the CJEU regarding the claims of Polish Supreme Court applicants who were turned down with no reasons given.³¹¹ Current law gives provides no specifics on the process and criteria for judicial selection and no right to appeal to rejected candidates.

307. *Id.*, para. 7.

308. *Id.*, paras. 10-11.

309. *Id.*, un-numbered Ruling paragraph.

310. Łukasz Woźnicki, *TSUE rozbroi izbę dyscyplinarną i KRS? Rozprawa w marcu [CJEU will disarm the disciplinary chamber and the National Judiciary Council? Argument in March]*, WYBORCZA.PL (Dec. 13, 2018, 2:09 PM) <http://wyborcza.pl/7,75398,24274415,tsue-rozbroi-izbe-dyscyplinarna-i-krs-rozprawa-w-marcu.html> [<https://perma.cc/BF6B-ADF2>].

311. Case C-824/18, Krajowa Rada Sądownictwa (Dec. 28, 2018), <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-824/18>; Komunikat w sprawie postanowienia NSA dotyczącego przedstawienia pytań prejudycjalnych do Trybunału Sprawiedliwości Unii Europejskiej (sygn. akt II GOK 2/18) [Announcement regarding the Supreme Administrative Court's decision to submit questions for a preliminary ruling to the Court of Justice of the European Union (file reference II GOK 2/18)], (Nov. 21, 2018), <http://www.nsa.gov.pl/komunikaty/komunikat-w-sprawie-postanowienia-nsa-dotyczacego-przedstawienia-pytan-prejudycjalnych-do-trybunalu-sprawiedliwosci-unii-europejskiej-sygn-akt-ii-gok-2-18,news,4,601.php>; 1SA/Bk 37/09-Wyrok WSA w Białymstoku z 2009-02-25 37/09 <http://orzeczenia.nsa.gov.pl/doc/E3FAD68B4C>; NSA skierował do TSUE pytania prejudycjalne ws. wylaniania sędziów SN [The Supreme Administrative Court referred questions to the CJEU regarding appointment of judges of the Supreme Court], GAZETA PRAWNA.PL (Nov. 22, 2018, 5:59 PM), <https://prawo.gazetaprawna.pl/artykuly/1360451,nsa-skierowal-dotsue-pytania-prejudycjalne-ws-wylaniania-sedziow-sn.html>; NSA wchodzi do gry. Pyta Trybunał Sprawiedliwości UE o KRS [AKTUALIZOWANY] [The Supreme Administrative Court comes into play asking the CJEU about the National Judiciary Council] OKO.PRESS (Nov. 22, 2018), <https://oko.press/nsa-wchodzi-do-gry-pyta-trybunal-sprawiedliwosci-ue-o-krs-aktualizowany/>.

5. Polesxit?

In November 2018, Donald Tusk, Polish Prime Minister from 2007-2014 and now the President of the EU European Council, warned that the quarreling between the European Union and Poland about the judicial system could lead to “Poland stumbling out of the EU by accident.”³¹² The specter of de facto Polesxit through actions with regard to the court system has been raised in at least four contexts: the previously-discussed enforcement of European arrest warrants; Poland’s flirtation with refusing to comply with EU concerns on PiS’s changes to the judicial system, most specifically the orders in the infringement case on Supreme Court retirement; an action that Minister of Justice Ziobro filed in the Constitutional Tribunal to declare that an Article 267 CJEU preliminary ruling is not superior to a Polish court’s finding on what is permitted by the Polish constitution regarding the country’s judicial system; and another pending Constitutional Tribunal matter filed by the National Judiciary Council to seek to ratify their legitimacy.

The Irish and Dutch courts’ extradition concerns show the risk that the Polish judiciary gradually will be excluded from the European justice system. The CJEU’s Grand Chamber decision on December 17, 2018 regarding the European Commission infringement action refers to the Irish Court’s Article 267 request for preliminary ruling as supporting its decision that “the risk of losing confidence in the Polish judiciary is not fictitious or hypothetical, but quite real.”³¹³ The arrest warrant cases could impact the position of the Polish judicial system in the courts of other EU member states, reaching far beyond extradition cases. Some journalists, commenting on the CJEU ruling, suggested it could be a first step in an informal Polesxit—a departure of Poland from the Western legal sphere.³¹⁴ Issues regarding the fairness and

312. James Shotter, *Poland risks falling out of the EU by accident, warns Donald Tusk*, FINANCIAL TIMES (Nov. 5, 2018), <https://www.ft.com/content/e62f4ce4-e142-11e8-a6e5-792428919cee> [<https://perma.cc/5SPE-YVV5>].

313. Case C-619/18R, Eur. Comm’n v Republic of Poland, para. 77, <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-619/18%20R> (Dec. 17, 2018).

314. Bartosz T. Wieliński, *Odpowiedź Trybunału Sprawiedliwości ue udzielona Irlandzkiej sędzi depotracyjnej oznacza, że Polska jest już kroczek poza Unią* [*The response of the Court of Justice of the EU to the Irish judge means that Poland is already a step outside the Union*], WYBORCZA.PL (July 25, 2018), <http://wyborcza.pl/7,7596823715417,odpowiedz-trybunalu-sprawiedliwosci-udzielona-irlandzkiej.html> [<https://perma.cc/XV2W-RPZ4>]; M. Matczak: *Polska w B-klasie praworządności – komentarz do wyroku TSUE w sprawie CELMER* [*Poland in the B Rule of the rule of law—a commentary to the CJUE Ruling in the*

independence of Polish courts, however, may now be raised in every case involving recognition of a Polish judgment.³¹⁵ The CJEU's decision also provides arguments for the European Commission to use in their pending Article 7 proceedings and consideration of linking budget allocation to a Member State's rule of law institutions.

As previously described, the Poland government initially suggested it might not comply with an order in the Article 258 action regarding the Polish Supreme Court retirement law.³¹⁶ This brought a stern rebuke from the CJEU President that this would put Poland outside the EU.³¹⁷

In response to previously-described August 2018 Polish Supreme Court requests to the CJEU Article 267 preliminary ruling on questions related to the Polish Supreme Court Act, Minister of Justice (and Prosecutor General) Ziobro filed an action with the Polish Constitutional Tribunal on August 23, 2018 with an extension of the original request on October 4, 2018.³¹⁸ His petition asked the Polish Constitutional Tribunal to rule that it would be a violation of the Polish Constitution to allow referral from a Polish court to the CJEU for preliminary ruling on matters "pertaining to the design, shape, and organisation of the judiciary as well as proceedings before the judicial organs of a member state."³¹⁹ A flurry of commentary referred to this as another manifestation of Poxxit from the EU legal system.³²⁰

CELMER case], MONITOR KONSTYTUCYJNY (July 25, 2018), monitorkonstytucyjny.eu/archiwa/5154 [<https://perma.cc/7TUA-NDNQ>].

315. Łukasz Rogojsz, *Prof. Kruszyński o decyzji tsue: "To bardzo groźne dla Polskiego wymiaru sprawiedliwości"* [*Prof. Kruszyński on the decision of the CJEU: "It is very dangerous for the Polish judiciary"*], GAZETA.PL (July 25, 2018, 2:54 PM), <http://wiadomosci.gazeta.pl/wiadomosci/7,114884,23715446,decyzja-tsue-oznacza-wystawienie-polski-pozza-nawias-kultury.html> [<https://perma.cc/6P8G-59GZ>].

316. *See supra* notes 264-66 and accompanying text.

317. *See supra* note 267 and accompanying text.

318. Majewski Kacper, *Will Poland, With Its Own Constitution Ablaze, Now Set Fire to EU Law?*, VERFASSUNGSBLOG (Oct. 17, 2018), <https://verfassungsblog.de/will-poland-with-its-own-constitution-ablaze-now-set-fire-to-eu-law/>, DOI: <https://doi.org/10.17176/20181026-150347-0> (citing p. 1 of the petition).

319. *Id.*

320. *See, e.g., id.*; Stanisław Biernat & Monika Kawczyńska, *Though this be Madness, yet there's Method in't: Pitting the Polish Constitutional Tribunal against the Luxembourg Court*, VERFASSUNGSBLOG (Oct. 26, 2018), <https://verfassungsblog.de/though-this-be-madness-yet-theres-method-int-the-application-of-the-prosecutor-general-to-the-polish-constitutional-tribunal-to-declare-the-preliminary-ruling-procedure-unconstitut/>; Tomasz Pietryga, *Ziobro odnawia lęki o poxxit - komentuje Tomasz Pietryga* [*Ziobro renews fears about poxxit - comments Tomasz Pietryga*], RZECZPOSPOLITA (Oct. 18, 2018, 10:08 AM),

In October 2018, Stanisław Biernat, professor of European Law and former Vice-President of the Polish Constitutional Tribunal, listed eight matters brought to the CT by PiS Members of Parliament or Prosecutor General Ziobro as cases “artificially created” for constitutional review to meet an immediate political need of the government.³²¹ The National Judiciary Counsel’s November 27, 2018, request for a ruling on their own constitutionality seems a case of this type.³²² The Constitutional Tribunal’s current president set a panel for the case and hearing date of January 3, 2019 within three days of the matter’s filing.³²³ Without explanation for the reason, however, the hearing was cancelled and has not been rescheduled.³²⁴ One speculated reason is the Polish government’s fear of Polesit accusations in attempting to preempt a CJEU on the conformity of the newly-constituted NJC to EU treaty law.³²⁵

D. Judicial System Reforms for Consideration within International Rule of Law Norms

In a 2012 book chapter, Co-Author Zoll discussed the role that the then recently-created Szkoła Sądownictwa i Prokuratury (School for Judiciary and Prosecutors or “SSIP”) was established to play in enhancing the quality and legitimacy of the Polish judicial system.³²⁶ His chapter considers where democratic legitimacy for judges in civil law countries should lie, acknowledging that, as in Poland, today’s judges often have considerable scope in interpreting the law, which goes beyond the Napoleonic vision of legal codes that provide all

<https://www.rp.pl/Opinie/310179944-Ziobro-odnawia-leki-o-polesit---komentuje-Tomasz-Pietryga.html> [<https://perma.cc/73M6-7SV5>].

321. Biernat & Kawczyńska, *supra* note 320; *see also* Sadurski, *supra* note 9, at 18 (characterizing the CT’s evolution from “paralysis” to “active collaborator.”).

322. Łukasz Woźnicki, *Nowa KRS ponad prawem. Odwołań od decyzji Rady nie będzie* [*Appeal against the decision of the NJC will not be heard*], WYBORCZA.PL (Dec. 16, 2018, 3:36 PM), <http://wyborcza.pl/7,75398,24283186,nowa-krs-ponad-prawem-odwolan-od-decyzji-rady-nie-bedzie.html#nowaZajawkaGlownaMT>.

323. *Id.*

324. Ewa Siedlecka, *Legalizacja KRS w Trybunale Konstytucyjnym odwołana. Ze strachu przed polesitem?* [*Legalization of the National Judiciary Council in the Constitutional Tribunal dismissed. For fear of polesit?*], OKO.PRESS (Jan. 3, 2019), <https://oko.press/legalizacja-krs-w-trybunale-konstytucyjnym-odwolana-ze-strachu-przed-polesitem/>.

325. *Id.*

326. Zoll, *supra* note 12, at 308-09. Co-author Zoll was head of the curriculum committee for the new school.

answers such that judges perform only a mechanical function.³²⁷ The SSIP sought to shift some of judicial local control to choose one's colleagues and replacements to a more national system using merit-based assessments on a range of tasks over time and by multiple assessors. The SSIP curriculum also sought to correct some deficiencies in the entrants' prior legal education. Such initiatives included teaching a uniform method of legal reasoning, education in practice-based legal ethics, and a combined first year for future judges and prosecutors stressing a common ethos regarding values of the legal system and the roles that legal professionals play within it.

Adding the SSIP to the judicial framework sought to shift some power in judicial appointment from a system in which local judicial assemblies had central power in judicial selection, performance review, and promotion.³²⁸ As with the design of the National Judiciary Council, the Solidarity-led transition established strong judicial self-government to protect the judiciary from the political branches of government by vesting considerable power in local judicial assemblies.³²⁹

In the original SSIP design, those going on to judicial apprenticeships entered a fifty-four-month program in which they alternated between study in the judiciary school in Krakow and supervised internships in courts around the country. Both in the first year and after, most of the curriculum in the school was active rather than the passive lecture form common in much of Polish university legal education. The SSIP curriculum featured interactive teaching, hypotheticals, case analysis, research, writing, and simulation.³³⁰ The fifty-four-month period included multiple assessments by the various SSIP faculty as well as judges in the field for a cumulative final judgment of competency to graduate the best candidates.

327. *Id.* at 304-05; KOSAŘ, *supra* note 4, at 21, 36, 59-61 (expanding scope of judges' interpretive powers generally and in Europe specifically).

328. *See* Zoll, *supra* note 12, at 303-09. In the first SSIP admission year, 589 of 1320 candidates advanced to a second stage on the results of a multiple-choice test in designated areas of law. The top 300 candidates from the second stage exam requiring case analysis were chosen for the initial SSIP class. As designed, only about half of that group of 300 were allowed to progress to a judicial or prosecution apprenticeship. *See also* Krašnicka, *supra* note 2, at 704.

329. LITYŃSKI, *supra* note 38, at 45 (terming the creation of the National Judiciary Council as one of the most important aspects of the Roundtable agreement concerning independence of the judiciary); STRZEMBOSZ & ZAKROCZYMSKI, *supra* note 39, at 194-95 (rationale for and history of vesting power in local judicial assemblies in December 1989 legislation).

330. *Id.* at 308.

In addition to a better selection system for those who entered the judiciary, the SSIP sought to make up for shortcomings in Polish legal education. Students spend much of their five years achieving the *magister* degree in law in large lectures on legal codes and theory of the law, which students often are not required to attend but only to pass the exam.³³¹ For many professors and law schools, examination still heavily focuses on memorization of code sections. Many professors do not encourage, or even permit, questions or discussion in lectures. Students also have *ćwiczenia* (exercises) supplementing the lectures, which theoretically are supposed to be practical application of the material but often are just more explanation of the lecture.³³²

As strange as it seems to an American or German, Polish law schools do not teach a common system of legal reasoning analogous to the American Issue-Rule-Application-Conclusion (“IRAC”) or the German *Gutachtenstil* system.³³³ The unpredictability of Polish case law in similar fact patterns, and resulting difficulty in predicting outcomes in litigated matters, may stem in large part from this lack of unified educational standards.³³⁴ People before Polish courts likely often were upset by unpredictable outcomes, processes that spread over long periods of time, and judges and courts that were not user-friendly. It is understandable how corruption could have seemed a reasonable explanation given Poland’s communist history where corruption was a fact of daily life.³³⁵

331. Kraśnicka, *supra* note 2, at 704.

332. *Id.* at 698.

333. Lutz-Christian Wolff, *Structured Problem Solving: German Methodology from a Comparative Perspective*, 14 *LEGAL EDUC. REV.* 19, 29 (2003); Bucierius Law School, *Der Gutachtenstil (Juristische Methodik) [Legal Methodology]*, YOUTUBE (Sept. 12, 2016), <https://www.youtube.com/watch?v=wxGvEYDjQqc> [<https://perma.cc/UQ76-LAPK>] (video explanation prepared by Bucierius University).

334. TYMOTEUSZ ZYCH, W POSZUKIWANIU PEWNOŚCI PRAWA. PRECEDENS A PRZEWIDYWALNOŚĆ ORZECZEŃ SĄDOWYCH W TRADYCJI PRAWA ANGLOSASKIEGO [THE SEARCH FOR CERTAINTY IN LAW. THE PRECEDENT AND PREDICTABILITY OF JUDICIAL DECISIONS IN THE ANGLO-SAXON LAW TRADITION] (2017) (on the lack of unity of the case law of the Polish administrative courts); Wiesława Kuberska & Paweł Sydor, *Prawo, jako targowisko opinii. Jednolitość orzecznictwa czy jego zróżnicowanie [Law as a marketplace of meanings. Consistency of the case law or its differentiation]*, 19 *IUSTITIA* (2015) (on the discrepancies of case law in Polish courts).

335. *See supra* note 74 and accompanying text (regarding the GRECO 2012 Fourth Evaluation finding no evidence of widespread or significant corruption among Polish judges, recognizing a gap in that likely reality and public perception, and making recommendations to improve public trust).

Professor Marcin Matczak makes a related argument that the post-2015 capture of the Polish judicial system may be explained, not only by the strength of the PiS government's attack but also, by "the weakness of the defence" provided by a legal system emphasizing formalism and strict textual interpretation rather than holistic, systemic evaluation of cases in light of constitutional principles and consideration of "real life consequences."³³⁶ Fellow participants in the December 2017 Fordham symposium at which this paper was first presented, also cite as problematic a "formalist, textualist" approach historically predominating in Central and European judiciaries, which is different from the "more dynamic and purpose-oriented reasoning style required by European law."³³⁷ The previously-described emphasis in legal education on memorization rather than argumentation and critical assessment and lack of teaching a common form of reasoning beyond simple text application contribute to overformalism.

In the Authors' view, value-driven jurisprudence also must be evaluated against the fundamental principle of justice that equal situations must be decided in the equal ways. The Authors contend that the problem with Polish case law is not the complete unwillingness to consider values but rather the unpredictability in when and how Polish courts invoke them. Sometimes a statute's wording is clear, and Polish courts inject values in way that trespasses the bounds of the legitimate interpretation. As Professor Matczak points out, in other instances, legal argument concerns only a superficial reading of statutes or even constitutional provisions without considering if the consequences of that interpretation are consistent with the overall purposes of the statute, underlying constitutional principles, or other overarching values. This lack of coherence begins in legal education, which does not teach future judges, lawyers, and prosecutors a common form of legal reasoning.

336. Marcin Matczak, *The Strength of the Attack or the Weakness of the Defence? Poland's Rule of Law Crisis and Legal Formalism*, SSRN, 12-13 (2018), available at <https://ssrn.com/abstract=3121611>; MARCIN MATCZAK, THE FOUNDATION FOR LAW, JUSTICE & SOCIETY, *POLAND'S CONSTITUTIONAL CRISIS: FACTS AND INTERPRETATIONS* 6-7 (2018), available at <https://www.fljs.org/content/poland%E2%80%99s-constitutional-crisis-facts-and-interpretations> [<https://perma.cc/NJA3-N2TU>].

337. James E. Moliterno, Lucia Berdisová, Peter Čuroš & Ján Mazúr, *Independence Without Accountability: The Harmful Consequences of EU Policy Toward Central and Eastern European Entrants*, 42 *FORDHAM INTL. L. J.* 265, 290 (2018).

The American and German common reasoning approaches contribute to a shared form of exposition in judicial opinions and legal argument generally. This predictable form of reasoning renders judicial opinions more accessible to critical assessment, predictable, and understandable to people affected by such judgments.

By having prosecutors and judges together in the first year, the SSIP also sought to instill a common ethos in at least these two groups of legal professionals. Over thirty-seven visits to Poland in twenty-one years, Co-Author Wortham has observed that judges and lawyers do not think of themselves in the same profession in the way that American lawyers do. American judges, of course, play quite a different role than the lawyers in their courtrooms, but almost all US judges were lawyers first and some return to law practice after time on the bench.

American legal education is also quite uniform—especially the first year. American law schools not only instill a common approach to legal reasoning but also a common ethos about the legal system—a system in which legal professionals play varying roles but have a common understanding of the system. After the three-year JD and state bar exam passage, American lawyers take jobs in varying fields, but they do not enter multi-year apprenticeships segregated by legal profession. Polish law students not only split off to judicial or prosecutorial apprenticeships after the five-year university law degree but also splinter further into three other professions: public notaries, advocates, and legal advisors.³³⁸ Upon completion of the apprenticeship and passage of the bar exam, Poles are not generally licensed as “lawyers” but rather as members of the profession in which they apprenticed. Also much legal work done by law graduates in government, nongovernmental organizations, or in-house for corporations does not require a license from any of the professions, so those “lawyers” are not part of any of the five previously-mentioned professions. Only partly in jest, Wortham has observed, “Polish legal professions spend so much time quarreling with each other, they cannot present a united force in opposition to the government.” This contrasts with the United States, in which bar associations, including the American Bar Association, often speak out, on behalf of the single American legal profession regarding perceived threats to judges,

338. *See supra* note 2.

prosecutors, or lawyers being able to perform their roles with adequate independence and freedom from threat or political control.

Both authors, in less stressful political times, favor more input from other Polish legal professions and the public in the way the judicial system functions. Co-Author Zoll's 2012 work suggested that greater representation for the Polish President on the National Judiciary Council should be considered,³³⁹ but that did not mean the twenty-one out of twenty-five now effectively selected by the political party in power.

Polish judicial immunity is considerably broader than the conventional US formulation limiting it to acts done in the judicial capacity.³⁴⁰ Polish immunity extends to a general protection from arrest, detention, and prosecution without a release from the relevant judicial disciplinary authority. This provision also applies after a judge has left active service. This, at first, seems jarring to an American who assumes a judge will be treated like anyone else if the offense involved is unrelated to judicial acts. Given the history in other countries in the region, though, of government using criminal prosecution to target judges—and the specter of what may happen in Poland once the PiS “reforms” of the courts are complete—one can see the plus side of such a broad form of immunity.

The structural shortcomings in the Polish judicial system—beginning with inadequacies in the law schools—contributed to conditions that likely frustrated people with matters before the courts: unpredictable decisions, inefficiency or delay, some judges seemingly arrogant or dismissive. It is beyond the scope of the Article to review the reams of information assessing Polish court performance and

339. Zoll, *supra* note 12, at 306.

340. Article 80 ¶1 of the Law on the Ordinary Courts provides that judges cannot be arrested or prosecuted without the permission of the disciplinary court with jurisdiction, and this provision applies after a judge has reached retirement age and no longer is employed at the courts. *See* Artykuł 80 ¶1 ustawy prawo o ustroju sądów powszechnych from 27.7.2001, Dz. U. 2001, nr 98, poz. 1070 [Law on the Ordinary Courts, 80 ¶1 (July 27, 2001)]; Tekst jednolity z dnia 14 grudnia 2018, Dz. U. 2019 poz. 52 [Consolidated text, Official Journal 2019, position 52 (Dec. 14, 2018)]. For a parallel provision for Supreme Court judges, *see* Artykuł 55 ¶1 ustawy o Sądzie Najwyższym z dnia 8.12.2018, Dz. U. 2017 poz. 5 [Law on the Supreme Court, Art. 48, ¶7 (December 8, 2017)]; GRECO June 2018, *supra* note 74, at para. 161 (describing the Polish system and also noting they were informed of sixty-five cases where immunity was lifted to allow prosecution between 2003-2011).

countering PiS's charges about the judiciary.³⁴¹ PiS's previously-quoted statements about their philosophy of law and justice and the facts of their concerted campaign against the judiciary evidence that their "good changes" are not about making the judicial system function better or be more accountable to the public. Instead, they are aimed to bring the courts within the government's political control so they will not be an obstacle to the policy ends the PiS government seeks to achieve.³⁴²

III. THE SOLIDARITY ROUNDTABLE NEGOTIATORS' FORESIGHT ON JUDICIAL INDEPENDENCE

Ironically, PiS's threat to the judiciary has brought some changes that the Authors have advocated in the past. These include greater cooperation with other legal professions, a more accessible and open public face by judges, and citizen education on the role of the judiciary and the importance of judicial independence.³⁴³ Such initiatives support development of a vision of the judiciary's role in a democratic system under rule of law that is shared not only among the judges but also with members of the other legal professions and the public.

Some of this public outreach, however, has led to disciplinary investigations of participating judges. Amnesty International's December 6, 2018 report, *Poland: Update on the "Reform" of the Judiciary*,³⁴⁴ devotes about half of the text to matters pursued against judges through the new disciplinary apparatus.³⁴⁴ The Iustitia association of Judges and the Polish Ombudsman's office cooperated on a "Pol and Rock" festival aiming to bring the public closer to law

341. See, e.g., *supra* note 157; EWA SIEDLECKA, SĘDZIOWIE MÓWIĄ: ZAMACH PIS NA WYMIAR SPRAWIEDLIWOŚCI [THE JUDGES ARE SPEAKING: THE PIS COUP AGAINST THE JUSTICE SYSTEM] 72-109 (2018).

342. See generally *infra* Subsection II.B.2 and II.C.1.

343. For an example of support from other Polish legal professions, see, e.g., #WeDisagree. *The voice of Polish Lawyers*, YOUTUBE (Mar. 17, 2018), <https://www.youtube.com/watch?v=dD-MCeD6Oec&=sns=em> [<https://perma.cc/98BR-UPWK>].

344. See AMNESTY INTERNATIONAL, *supra* note 195, at 6-9; see also AMNESTY INTERNATIONAL, *supra* note 187, at 31-35; KOMITET OBRONY SPRAWIEDLIWOŚCI (KOS), A COUNTRY THAT PUNISHES. PRESSURE AND REPRESSION OF POLISH JUDGES AND PROSECUTORS (2019), available at http://komitetobronysprawiedliwosci.pl/app/uploads/2019/02/pol_wersja_fin.pdf [<https://perma.cc/JU2F-7EM4>] (report released Feb. 15 2019 by the Committee for the Defense of Justice made up of twelve organizations including the HFHR, Amnesty International, Iustitia, Themis, and Lex super omnia).

with a better understanding of court work.³⁴⁵ The trial simulations in which judges participated were characterized by the disciplinary authorities as parodies with questions raised about whether wearing a judge's robe and the state emblem of the judge at these events was an "offence against the dignity of the office of judge," and participants were brought in for questioning.³⁴⁶ In January 2019, the disciplinary spokesperson for the common courts announced that disciplinary procedures would not be brought against Judges Monika Frąckowiak and Arkadiusz Krupa for their participation in the trial simulations.³⁴⁷ Instead of saying such activities were not disciplinary violations, he said the judges were not aware their actions were violations.³⁴⁸ A week later, though, the disciplinary spokesperson said that Judge Frąckowiak would be prosecuted for her taking excessive time in a number of proceedings.³⁴⁹ Amnesty International has criticized the disciplinary process's apparent pattern of calling judges as witnesses, in that status denying them right to counsel, and using that process to gather information, e.g., three years of back judgments, to later be used in prosecution on other grounds.³⁵⁰

345. Magdalena Gałczyńska, *Sądny rok dla sądów, czyli "ekscesy" rzeczników dyscypliny. Jak i za co rządzący zamierzają karać sędziów?* [Judicial year for courts, or "excesses" of disciplinary spokespersons. How and for what do the authorities intend to punish judges?], ONET.PL (Jan. 2, 2019, 3:07 PM) <https://wiadomosci.onet.pl/tylko-w-onecie/sadownictwo-jak-rzad-zamierza-karac-sedziow/vkq07dd> [<https://perma.cc/W6CN-K95Z>]. Regarding the work of the Ombudsman's office, see *supra* note 124. For more information about public education efforts by judges and lawyers' associations at "Pol and Rock," see Agata Szczeńśniak, *Co sędziowie i adwokaci robili na Pol'and'Rock Festival Jurka Owsiaaka. Ujawniamy!* [What judges and lawyers did on Jurek Owsiaak's Pol'and'Rock Festival. We disclose!], OKO.PRESS (Aug. 5, 2018) <https://oko.press/co-sedziowie-i-adwokaci-robili-na-polandrock-festival-jurka-owskiak-ujawniamy/> [<https://perma.cc/7BMF-8TNB>].

346. Magdalena Gałczyńska, *supra* note 345; see also AMNESTY INTERNATIONAL, *supra* note 186, at 7.

347. Łukasz Woźnicki & Ewa Ivanova, *Rzecznik Ziobry nie będzie ścigać sędziów za Pol'and'Rock* [Ziobro's spokesperson will not be prosecuting judges for Pol' and Rock], WYBORCZA.PL, (Jan. 11, 2019, 2:51 PM), <http://wyborcza.pl/7,75398,24352975,rzecznik-ziobry-nie-bedzie-scigac-sedziow-za-pol-and-rock.html> [<https://perma.cc/2LW2-557M>].

348. *Id.*

349. Mariusz Jałoszewski, *Rzecznik dyscyplinarny stawia zarzuty sędziom, bo krytykowały władzę. "Nie przestraszę się, nie zamilknę"* [The disciplinary spokesperson accuses judges because they criticized the authorities. "I am not afraid. I will not be silent."], OKO.PRESS (Jan. 18, 2019), <https://oko.press/rzecznik-dyscyplinarny-stawia-zarzuty-sedziom-bo-krytykowaly-wladze-nie-przestrasze-sie-nie-zamilkne/> [<https://perma.cc/ZY69-TXY3>] (including the judge's response to the charges).

350. Amnesty International Public Statement, EUR 37/9564/2018, Poland: Judges Who Turned to EU Court of Justice Must Not Be Harassed (Dec. 13, 2018), <https://www.amnesty.org/download/Documents/EUR3795642018ENGLISH.pdf> [<https://perma.cc/L3ZV-RJKY>]; see also two Amnesty International Reports focusing on abuses

Another controversy relates to judges' display of the *Konstytucja* graphic that now appears widely on T-shirts, banners, and stickers throughout Poland.³⁵¹ *Konstytucja* is the Polish word for constitution. In this graphic, the letters TY and JA are highlighted in contrasting colors to stand out. *Ty* in Polish means you, and *ja* means I, hence conveying a message of shared investment in the constitution.³⁵² At a December 2018 meeting, the NJC with its recent new appointees adopted an interpretation of the Polish Code of Ethics for Professional Judges and Assessors saying that "public use of infographics that are clearly identified with political parties, trade unions, as well as social movements" would violate Article 10 of the Code stating that judges should avoid behavior that undermines confidence in their independence and impartiality.³⁵³

The Amnesty International December 2018 report also says that the activities of the new Disciplinary Prosecutor for the common courts "raise concerns over targeting predominantly those judges who have voiced criticism of the government's reform of the judiciary."³⁵⁴ At least two judges summoned for questioning were those who had made Article 267 requests to the CJEU, raising whether the new disciplinary procedure threatened their independence when ruling in the cases before them in which the government was a party.³⁵⁵ Another Amnesty

of the judicial disciplinary process, AMNESTY INTERNATIONAL, *supra* note 187, at 31-35, and *Update on Reform of the Judiciary*, *supra* note 193, at 7-9; Magdalena Gałczyńska, *Sądny rok dla sądów, czyli "ekscesy" rzeczników dyscypliny. Jak i za co rządzący zamierzają karać sędziów?* [*Judicial year for courts, or "excesses" of disciplinary spokespersons. How and for what do the authorities intend to punish the judges?*], ONET.PL (Jan. 2, 2019, 3:07 PM) <https://wiadomosci.onet.pl/tylko-w-onecie/sadownictwo-jak-rzadz-zamierza-karac-sedziow/vkq07dd> [<https://perma.cc/CM4G-VTDD>].

351. Łukasz Woźnicki, *Koszulki z "Konstytucją" nie dla sędziów. Nowa KRS zakazuje symbolu, bo jest "nacechowany politycznie"* [*Shirts with "Constitution" are not for judges. The new NJC prohibits the symbol because it is "politically marked"*], WYBORCZA.PL, (Dec. 13, 2018, 8:59 PM) (photograph of Łódź judges wearing the t-shirts for the 100th anniversary of Polish independence on November 11, 2018), <http://wyborcza.pl/7,75398,24276226,koszulki-z-konstytucja-nie-dla-sedziow-nowa-krs-zakazuje.html> [<https://perma.cc/W6JY-PKR6>].

352. Similarly, the Iustitia judges association has used an image of judges with their mouths blacked out with the caption, "Dzisiaj my, jutro ty," which translates to "Today us, tomorrow you." See IUSTITIA Polish Judges Association (@JudgesSsp), TWITTER (May 18, 2018, 9:04 AM), <https://twitter.com/judgesssp/status/1042036669615140866?lang=ga>.

353. See *supra* note 351.

354. *Id.*

355. *Id.* For other threats to judges, see Christian Davies, 'They're trying to break me': Polish judges face state-led intimidation, THE GUARDIAN (2018), <https://www.theguardian.com/world/2018/jun/19/theyre-trying-to-break-me-polish-judges-face-state-led-intimidation> [<https://perma.cc/Q3CP-ECX9>]; Marc Santora, *supra* note 99 (reports of harassment of

International 2018 report focuses on actions taken toward judges perceived to have treated people protesting government action too leniently and the potential chilling effect on any judge sitting in matters arising from a protest action.³⁵⁶

As described in Part II.D, the Authors have advocated less power in local judicial assemblies as well as initiatives like the previously-described School for Judiciary and Prosecutors system, which was less centrally reliant on existing judges regarding the education, selection, and advancement of new entrants into the judicial track.³⁵⁷ It may be, however, that this local self-government fostered the “solidarity” that provided mutual support in opposing illegal and unconstitutional government initiatives despite the possible dire consequences to those participating.

The overwhelming majority of Polish judges have resisted the ongoing reshaping of the judiciary. So many judges boycotted running for offices on the new, politically-controlled National Judiciary Council that only eighteen people applied for fifteen slots.³⁵⁸ Most of the eighteen applicants were judges seconded to the Ministry of Justice.³⁵⁹ Many judges have withdrawn their applications for promotion by the new Council, deeming it to be illegally constituted. Iustitia has called for everyone eligible for appointment to the Supreme Court to refrain from applying because candidacy amounts to participation in a coup against the independent judiciary.³⁶⁰ Most judges also refused to apply for the forty-four openings announced for the Supreme Court.³⁶¹ Some who did have been termed kamikaze judges, meaning they applied, without expectation of being appointed

Waldemar Zurek, spokesperson for the NJC before the government’s replacement of its members); KOS, *supra* note 344.

356. See AMNESTY INTERNATIONAL, *supra* note 187, at 31-35.

357. See *supra* notes 326-330 and accompanying text.

358. See *supra* note 125.

359. IUSTITIA and THEMIS Association statements, *infra* note 363; *supra* note 126.

360. IUSTITIA and THEMIS Association statements, *infra* note 363.

361. Marc Santora & Joanna Berendt, *Poland’s Leader Finds an Ally in Trump, Even as He Brings Courts to Heel*, N.Y. TIMES (Sept. 17, 2018), <https://www.nytimes.com/2018/09/17/world/europe/poland-courts.html>; Griff Witte, *Judge’s Boycotting Poland’s Supreme Court Posts*, WASH. POST (Aug. 20, 2018), https://www.washingtonpost.com/world/europe/polands-judges-boycott-supreme-court-posts-accusing-the-government-of-a-takeover-bid/2018/08/17/8a9a5590-943a-11e8-818b-e9b7348cd87d_story.html?noredirect=on&utm_term=.8ebc42856185 [<https://perma.cc/BS92-JBTY>] (130 applicants from other legal professions and ministry officials “after the government loosened the eligibility requirements,” many with “close ties to Law and Justice”).

but, so that they would have standing to challenge the appointment process.³⁶²

Judges have organized congresses adopting resolutions against government undertakings and legislative measures.³⁶³ Iustitia and Themis, organizations that together represent the majority of Polish judges, have passed resolutions calling on the whole judicial community to preserve judicial independence generally and, in particular, to refuse to be a candidate for any office that is part of the governmental campaign to suppress the judiciary.³⁶⁴ Both associations have sanctioned judges who participated in the government attack. One of the most visible actions is Iustitia's expulsion of Łukasz Piebiak, the Vice-Minister of Justice, who was once a board member.³⁶⁵

The legitimately-appointed Constitutional Tribunal judges have cited the lack of the competence of the "double-judges" in dissenting

362. Łukasz Woźnicki, *Nowa KRS ponad prawem. Odwołań od decyzji Rady nie będzie* [New National Judiciary Council above the law. No appeals against their decisions], WYBORCZA.PL, (Dec. 16, 2018, 3:36 PM) <http://wyborcza.pl/7,75398,24283186,nowa-krs-ponad-prawem-odwolan-od-decyzji-rady-nie-bedzie.html#nowaZajawkaGlownaMT>; *Poland's judiciary row: administrative court suspends judicial appointment*, POLANDIN, <https://polandin.com/39190749/polands-judiciary-row-administrative-court-suspends-judicial-appointment> [<https://perma.cc/BX42-9A5U>]; *supra* note 311 and accompanying text (Polish Supreme Administrative Court's Article 267 referral to the CJEU of cases from such judges).

363. *Statement of the Association of Polish Judges*, IUSTITIA, (July 14, 2018), <https://www.iustitia.pl/en/118-information/2437-statement-of-the-association-of-polish-judges-iustitia-of-14-july-2018> [<https://perma.cc/EK2B-TXFS>]; *Position of the Association of Judges*, THEMIS (July 22, 2018), <http://themis-sedziowie.eu/aktualnosci/stanowisko-stowarzyszenia-sedziow-themis-z-dnia-22-lipca-2018-roku> [<https://perma.cc/9P6T-BQ2W>]. Two statements were issued by the Extraordinary Congress of Polish judges after a meeting with many voicing criticism and protest, *see Resolution of the Extraordinary Congress of Polish Judges No. 1*, NAT'L COUNCIL OF THE JUDICIARY, <http://krs.pl/pl/konferencje/nadzwyczajny-kongres-sedziow-p,1/4325,uchwala-nadzwyczajnego-kongresu-sedziow-polskich-nr-1> [<https://perma.cc/5JJK-HHJ9>] (last visited July 31, 2018); *Resolution of the Extraordinary Congress of Polish Judges No. 2*, NAT'L COUNCIL OF THE JUDICIARY, <http://krs.pl/pl/konferencje/nadzwyczajny-kongres-sedziow-p,1/4326,uchwala-nadzwyczajnego-kongresu-sedziow-polskich-nr-2> [<https://perma.cc/2857-UT4Y>] (last visited July 31, 2018).

364. *Co mówią o kandydatach do Krajowej Rady Sądownictwa ich dokumenty* [What the National Judiciary Council candidates' documents say about them], TVN24 (Feb. 18, 2018, 9:17 PM), <https://www.tvn24.pl/wiadomosci-z-kraju,3/17-kandydatow-do-krajowej-rady-sadownictwa-co-mowia-ich-dokumenty,815776.html> [<https://perma.cc/WK4T-8QLN>].

365. *Warsaw Branch of the Iustitia Association of Polish Judges Expels Deputy Minister of Justice Łukasz Piebiak at the Request of the Iustitia Board*, IUSTITIA (Sep. 21, 2017), <https://www.iustitia.pl/informacje/1893-wiceminister-lukasz-piebiak-wykluczony-z-iustitii> [<https://perma.cc/Q6UD-D67X>].

opinions.³⁶⁶ In response, the law on the Constitutional Tribunal was amended to forbid dissenting opinions to refer to a judgment's heading, which includes the names of sitting judges, so the legitimacy of a judicial appointment could not be questioned.³⁶⁷ Perhaps the legitimately-elected Constitutional Tribunal judges should have refused to sit in panels with the "double-judges" or resigned. With new appointments to the Supreme Court and ordinary courts, many current judges will face similar dilemmas.

Polish journalist Ewa Siedlecka recently published a more-than-600-page book detailing the history of judicial independence in Poland, analyzing past and current complaints about judges and the judicial system, PiS complaints about and initiatives toward the judiciary, and the current activities in which judges are engaged.³⁶⁸ The final pages provide lists of judges who have made decisions criticized by PiS, are active in the judicial opposition to post-2015 changes, and against whom authorities have moved in some way.³⁶⁹

In January 2017, some Polish prosecutors formed *Lex super omnia* (Law above all) with the stated aim of making the Polish prosecutor's office operate constitutionally.³⁷⁰ On January 26, 2019 100 members of the about 200-member organization attended a meeting at which they unanimously passed a resolution calling on the Association's Board to assess incidents of abuse of power and harassment of prosecutors by the management of the Prosecutor's Office that should be reported as crimes or disciplinary violations.³⁷¹

366. See, e.g., TK: Leo Kieres dissenting to the judgment in the case of the assemblies Kp 1/17, MONITOR KONSTYTUCYJNY (Apr. 25, 2017), <http://monitorkonstytucyjny.eu/archiwa/360> [<https://perma.cc/FCF8-NU79>].

367. Par. 54. 1 regulaminu Trybunału Konstytucyjnego z 27 lipca 2017, Monitor Polski 2017 poz. 76; [Constitutional Tribunal Rules, para. 54, point 1 (July 27, 2017)].

368. Ewa Siedlecka, *supra* note 324; Sędziowie wolności [AKTUALIZOWANA LISTA SIEDLECKIEJ – JUŻ 297 NAZWISK] [Judges of Freedom (Siedlecka's list with 297 names)], OKO.PRESS (Dec 27, 2018), <https://oko.press/sedziow-wolnosc-lista-siedleckiej/> [<https://perma.cc/KFW5-35TA>].

369. *Id.* at 593-619.

370. *O nas*, STOWARZYSZENIE PROKURATORÓW, "LEX SUPER OMNIA," <http://lexso.org.pl/o-nas/> [<https://perma.cc/8SZP-QCTA>] (stated aim and including difficulties presented by Polish authorities with receiving registration including demands by the District Prosecutor in Warsaw for their founding document and list of members)

371. Mariusz Jałoszewski & Bartosz Kocejko, *Jednomyślna uchwała stowarzyszenia prokuratorów: Ziobro musi natychmiast ustąpić*, [Unanimous resolution of the prosecutors' association: Ziobro must give way immediately], OKO.PRESS (Jan. 26, 2019), <https://oko.press/uchwala-stowarzyszenia-prokuratorow-ziobro-musi-natychmiast-ustapic/> [<https://perma.cc/YR26-TZ7E>].

The resolution outlines some pertinent examples including demotion of 113 prosecutors and involuntary transfers to other cities as quasi-disciplinary penalties.³⁷² The assembly, with one dissenting vote, also passed a resolution calling on Minister of Justice and Prosecutor General Ziobro to resign to halt the politicization of the Polish prosecutors' office.³⁷³ In passing the resolutions, prosecutors referred to the judges' example, saying they will defend prosecutorial independence as well, despite the harassment and disciplinary charges that have already occurred and they expect to continue.³⁷⁴ The head of the Iustitia Judges' Association attended the prosecutors' meeting and called on unity among the legal professions in fighting for the rule of law.³⁷⁵

Professor Shimon Shetreet describes judicial independence as a foundational value of a judicial system, a value that must be supported by a *culture* of judicial independence.³⁷⁶ This condition is usually created through a "long and gradual process," with the "political leadership and the professional and legal elite" working together to develop this culture to protect, support, and nurture judicial independence."³⁷⁷ Poland has had less than thirty years to build such a culture in a post-communist society. David Kosař makes a similar point about forging a shared sense of "judicial virtue," meaning a common understanding among at least academics, lawyers, and judges about what a "good judge" is.³⁷⁸ Kosař contrasts the many years that established democracies have had to create this identity with the short

372. *Id.*

373. *Id.*

374. Mariusz Jałoszewski, *Prokuratorzy nie boją się dyscyplinarek i idą na zwarcie ze Zbigniewem Ziobrą* [Prosecutors are not afraid of disciplines and go against Zbigniew Ziobro], OKO.PRESS (Jan. 26, 2019), <https://oko.press/prokuratorzy-nie-boja-sie-dyscyplinarek-i-ida-na-zwarcie-ze-zbigniewem-ziobra/> [<https://perma.cc/2N65-HAEJ>].

375. *Id.*

376. Shetreet, *supra* note 3, at 17 (addressing the importance of an independent legal profession in creating an independent judiciary in post-communist societies); *id.* at 18 (mentioning other important values, such as procedural fairness, efficiency, accessibility, and public confidence in the courts).

377. *Id.* at 20-21 (pointing out that it took 140 years for the US Federal Judiciary to move from administration under a cabinet department in the executive branch to its current self-judicial governance system).

378. KOSAŘ, *supra* note 4, at 19, 430; Sadurski, *supra* note 9, at 57 (limits of structural safeguards, young democracies' propensity for "backsliding," and importance of the people at large valuing democracy).

time since Central and Eastern European countries emerged from communism.³⁷⁹

Polish judges have taken stands that may end their careers and possibly bring worse consequences.³⁸⁰ They have had to think and talk daily about what it means to be a judge. If the light at the end of the tunnel appears, Polish society could emerge with a stronger culture of judicial independence and sense of judicial “accountability-as-a-virtue.” That, however, is a big “if” and one that likely would bring with it a host of difficult legal and political problems such as those identified in Part IV.

The Roundtable political forces, which included current PiS Party Chairman Jarosław Kaczyński in the Solidarity group, insisted on a strong form of judicial independence with considerable insulation of judges from political forces. Perhaps they recognized the “long gradual process” necessary to build a “culture of judicial independence” and sense of “judicial virtue.” They may have anticipated the undemocratic and authoritarian potential of Polish society (not unique to Poland), which under specific circumstances could be awakened.³⁸¹ The Roundtable framework’s bulwarks of judicial independence at least have delayed bringing Polish courts under political control. The judges themselves, in cooperation with lawyers and nongovernmental organizations, have provided much of the information necessary for European and international organizations to issue reports and take action. Thus far, though, it is not clear whether the dismantling of judicial institutions can be halted and the Polish courts’ capacity to review government action impartially without threat can be restored.

379. *Id.* at 428-30.

380. *Supra* notes 344-56 and accompanying text; Mariusz Jałoszewski, *Szykują czwartą dyscyplinarkę dla sędziego Żurka. Ofensywa na nieposłusznych* [*They are preparing a fourth discipline for judge Żurek. Offensive against the disobedient*], OKO.PRESS (Jan. 30, 2019), <https://oko.press/szykuja-czwarta-dyscyplinarka-dla-sedziego-zurka-ofensywa-na-nieposlusznych/> [<https://perma.cc/V3SV-PYHA>] (disciplinary actions and possible other forms of harassment against Waldemar Żurek, spokesperson for the now-dismissed National Judiciary Council and one of the most vocal critics of judiciary “reform”).

381. See STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 97-117 (2018) (discussing how laws, governmental structures, and constitutions alone cannot protect democracy when important actors disregard “guardrails,” the norms and unwritten rules of mutual tolerance and institutional forbearance, which preserve democracy).

IV. THE FUTURE

Given the speed with which the Polish government has acted, effective control of the judiciary may be achieved before action by the European Union, pressure from other external forces, or electoral change can halt the process. A future elected government, willing to reestablish a legitimate framework of rule of law within the Polish Constitution, European law requirements, and international norms, will face grave legal and policy issues.

A recent Stefan Batory Foundation report considers that the three “double judges” sitting on the Constitutional Tribunal were not appointed lawfully, and that the selection process for the current CT President was fatally flawed.³⁸² Hence, the status of cases on which the currently constituted CT rules is uncertain. Furthermore, now Chief Judge Przyłębska regularly changes panel compositions in a way the report considers not to comply with the laws on the Constitutional Tribunal.³⁸³ The unconstitutional composition of the NJC also could be considered to result in wrongful appointment of judges to the Supreme and ordinary courts, which in turn would call into question the entire judicial system’s operation and decisions in this period.³⁸⁴

If opposition parties gain a governing majority, they would likely still not achieve the two-thirds majority necessary for constitutional change. Hence, the restoration of rule of law would have to occur within the existing Constitution. The Constitution’s provisions, however, do not address an emergency restoration of the rule of law;

382. STEFAN BATORY FOUNDATION, ANALIZA DZIAŁALNOŚCI ORZECZNICZEJ TYBUNALU KONSTYTUCYJNEGO W LATACH 2014-2017 [ANALYSIS OF CONSTITUTIONAL TRIBUNAL DECISION-MAKING IN 2014-2017], available at <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Państwo/Raport%20ZEP%20o%20funkcjonowaniu%20TK.pdf> [<https://perma.cc/X44A-B5UA>] (showing this proves also the dramatic drop in efficiency of the “new” Constitutional Tribunal disputing that PiS reforms are aimed at improved functioning of the affected institutions). Co-author Zoll is a member of the Legal Experts Group of the Batory Foundation.

383. Łukasz Woźnicki, *Bunt w TK. Siedmioro sędziów: Julia Przyłębska łamie prawo* [Rebellion in the Constitutional Tribunal. Seven judges: Julia Przyłębska breaks the law], WYBORCZA.PL (Dec. 12, 2018, 3:13 PM), <http://wyborcza.pl/7,75398,24270409,bunt-w-tk-siedmioro-sedziow-julia-przylebska-lamie-prawo.html> [<https://perma.cc/9S6P-QEER>].

384. BATORY FOUNDATION, *supra* note 382; Łukasz Woźnicki, *Profesorowie Strzembosz i Zoll: Decyzje nowej KRS będą nieważne* [Professors Strzembosz and Zoll: New KRS decisions will be invalid], *wyborcza.pl* (Mar. 7, 2018, 4:51 PM), <http://wyborcza.pl/7,75398,23113085,profesorowie-strzembosz-i-zoll-decyzje-nowej-krs-beda-niewazne.html> [<https://perma.cc/DRM4-B8UC>] (warning about invalidity of the newly-constituted NJC actions); see *supra* note 47 regarding Professor Andrzej Zoll’s background and relationship to co-author Fryderyk Zoll.

its provisions on emergency situations and martial law may not match the existing situation.

Restoring rule of law must be guided by two major principles: wrong must be undone but proportional to the remedy needed without causing excessive damage. Although judgments may have been rendered within an unconstitutional, and hence illegal, framework, people will have relied upon them. A new government could be tempted to use a device like the PiS Supreme Court Extraordinary Appeals Chamber to displace and revise grossly illegal judgments, but it would be a mistake to replicate the PiS government's unconstitutional means to restore rule of law.

In addition to the legality questions regarding all judicial appointments made through an illegally-constituted National Judiciary Council, a future democratic regime will have to consider the judges who serve in the new Chamber for Extraordinary Appeals and Public Affairs and the Disciplinary Chamber. As described in Part II.B, the Extraordinary Appeals Chamber has the potential to destabilize the entire legal system by challenging final judgments from the past twenty years. The Extraordinary Appeals and Public Affairs Chamber also has jurisdiction over the validity of elections, the crucial last resort for Polish democracy.

A judge's position in that chamber alone, however, does not raise the same moral issues as sitting in the new Disciplinary Chamber. The Disciplinary Chamber is a potential sword hanging over all the country's lawyers and judges. Judges joining this Chamber, and receiving the forty percent higher salary it brings, are in a position to be the government's instrument of political control.³⁸⁵ The Ministry of Justice already has tried to influence the behavior of judges or prosecutors by threatening them with the risk of the disciplinary procedure.³⁸⁶ Hence, we can anticipate the Chamber will be used as

385. See *supra* note 102 and accompanying text.

386. Mariusz Jałoszewski, *Ziobro się nie podoba? Będą dyscyplinarki. Prokuratura ucisza niepokornych prokuratorów* [Ziobro does not like it? There will be discipline. The Prosecutor's office silences rebellious prosecutors], OKO.PRESS (March 29, 2017), <https://oko.press/ziobro-sie-podoba-beda-dyscyplinarki-uciszanie-niepokornych-prokuratorow/> [https://perma.cc/QJ7W-X4WC]; Michał Kucyński, *Minister sprawiedliwości posunął się za dleko? Zbigniew Ziobro grozi Prof. Gersdorf* [Has the Minister of Justice gone too far? Zbigniew Ziobro threatens Professor Gersdorf], CROWD MEDIA (June 25, 2018), <https://crowdmedia.pl/minister-sprawiedliwosci-posunal-sie-za-daleko-zbigniew-ziobro-grozi-prof-gersdorf/> [https://perma.cc/XEV2-N6DK] (quoting Minister of Justice Ziobro raising the possibility of a prosecution in the new Disciplinary Chamber for Supreme Court First President Małgorzata

an “accountability perversion.”³⁸⁷ Service in this chamber should be a *per se* disqualification for future judicial office, a fundamental value of which is judicial independence from political control.

Judges appointed through illegal procedures should not benefit from the guarantees of prohibition on judicial removal designed to protect judicial independence.³⁸⁸ A reconstituted National Judiciary Council would have to devise a method of individual review for judges appointed under unconstitutional procedures. Judges who by their allegiance to the PiS regime have violated their judiciary oath requiring the preservation of judicial independence probably will need to be dismissed—albeit in a process with adequate due process to hear their defenses. Judges who have been elected to the illegal Judiciary Council and accepted appointment should not occupy any position in the justice system of a democratic Poland observing the principles of the rule of law. Some judges already are suffering consequences for their resistance. More likely will do so. A process will have to be established to determine what is necessary to “undo” actions taken against them, reinstate people who resigned or lost their positions, and consider compensation for losses.

The Ministry of Justice will require major reorganization. The practice of seconding judges to the Ministry of Justice should be discontinued. This creates a group of judges who are too close to the executive branch of the government and therefore potentially too sensitive to political pressure. The Minister of Justice recruited his appointees for presidents of the courts and new members of the Judiciary Council from this group.³⁸⁹ Although this temporary

Gersdorf for refusing to step down from her position), see *supra* notes 99 and 100 and accompanying text regarding Judge Gersdorf; *supra* notes 344-355 and accompanying text.

387. KOSAŃ, *supra* note 4, at 7, 9, 13, 57, 68 (regarding how accountability mechanisms like judicial discipline can be perverted to influence judicial decision-making through prosecution and the threat of punishment).

388. The former PiS-Minister of Internal Affairs and Speaker of the Sejm in the 2005-2007 PiS government has called on all opposition Polish opposition parties to join a common statement saying applicants for Supreme Court vacancies under the new system and participating in other judiciary “reforms” should be removed in a future government, lose all judicial privileges including retirement benefits, and be banned from all legal professions. Ludwik Dorn, *Opozycja musi sięgnąć po metody Kaczyńskiego. Konstytucji nie obroni w białych Rękawiczkach*, [Dorn: *The opposition must reach for Kaczyński’s methods. The Constitution cannot be defended with white gloves*], GAZETA.PL (July 13, 2018, 10:28 AM), <http://wiadomosci.gazeta.pl/wiadomosci/7,161770,23668778,dorn-opozycja-musi-siegnac-po-metody-kaczynskiego-konstytucji.html> [https://perma.cc/D8H2-B97J]

389. *Supra* notes 126, 358, 359, and accompanying text.

assignment model may work in some countries, e.g., Germany, the Polish experience under the current situation shows it should be abandoned for Poland, at least for the time being.

Poland's prosecution model requires a complete reform. Restoring the separation of the Ministry of Justice and the Prosecutor General is not enough. As opposed to the majority of judges who have resisted, many prosecutors have bent to the political purposes of the executive branch.³⁹⁰ Professionalism and professional independence for many Polish prosecutors have evaporated. The prosecution function is now perceived to serve the political ends of the ruling power. A decentralization of prosecution may be necessary in order to make it impossible in the future for the prosecution apparatus to be controlled and directed for political ends.³⁹¹

Judgments of wrongfully composed courts should not be nullified across the board given reliance on them. We do not have a ready answer for what to do when an illegally-constituted court has rendered an opinion doing an apparent injustice. Perhaps the only way to “undo” injustice is for the state to assume liability for damages caused by the unlawful operation of the courts.

The loss of respect for the Constitutional Tribunal is so deep that it is difficult to envision how it can be restored. The Constitution's framework limits the possible range of restructuring options. Nonetheless, only fundamentally deep reform, a kind of fresh start, offers hope for salvation.

A post-PiS period must look carefully at the fault lines exposed in this period of political stress and consider the judicial independence mechanisms that were successful in at least delaying the breakdown of institutions.³⁹² As raised in the Introduction, achieving an appropriate balance between independence and accountability is difficult. One may

390. For contrary examples, *see supra* notes 370-375 and accompanying text.

391. *See supra* Part I discussing the check provided by the US federal system. Germany also provides a check on prosecution in its federal state. *See Sadurski supra* note 9 (discussing federalism as a veto point providing a check against potential “anti-constitutional, populist backsliding”) While Poland is not a federal system, a decentralization of prosecution to lower levels of government also could provide a check to a central authority.

392. Tomasz Ławnicki, *Plan prawnej depisizacji: Nieformalny zespół już pracuje nad tym, jak przywrócić właściwy stan prawny* [Legal deprivation plan: The informal team is already working on how to restore the proper legal status], NA:TEMAT (Dec. 7, 2017), <http://natemat.pl/224653.plan-prawnej-depizacji-nieformalny-zespol-juz-pracuje-nad-tym-jak-przywrocic-wlasciwy-stan-prawny> [<https://perma.cc/82EN-WCPM>] (on expert groups working on after-PiS reforms).

argue that, from the perspective of everyday functioning, the Polish judiciary had too much independence. As discussed in Part III, though, the Roundtable political forces may have recognized the potential threat to a fledgling democracy of a party with authoritarian inclinations.

The seizure of control over the judiciary by the executive branch, and in particular by the Ministry of Justice, will be nearly complete by the time this Article is published. Although public pressure, EU actions and the Polish government's reaction to them, and the autumn's local and regional elections offer some hopeful signs, judicial institutions are already largely under political control. Judicial independence will depend on the character of individuals.

It is difficult to assess whether the citizens would have been quicker to defend a more efficient and responsive judiciary. Poland is not the only country seeing how effective disinformation and concerted government attacks on the legal system and individuals can be. The young Polish democracy was unable to develop sufficient respect for its crucial institutions to make them impregnable. The protests in defense of the judiciary have grown and become more widespread, but it took considerable time for them to become established and have an effect. The Polish example offers a cautionary tale for others: reform the judiciary system before it is too late by enhancing not only its quality and efficiency but also its human approach to the people facing justice.

In Poland, a new justice system will have to be built carefully and in a dialogue with society explaining the judiciary's role and relevance for the country. The light at the end of tunnel is only flickering. Nonetheless, the democratic community in Poland must prepare for the transition back to the rule of law. Future reform must not only undo the demolition of the justice system but also use this experience to create a system that better serves the needs of the society and is able to survive political stress.