Articles

The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition

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Abstract

This article argues that the establishment of the National Council of the Judiciary in 1989 and the empowerment of the general assemblies of court judges gave rise to the idea of judicial self-government in Poland. This very idea of self-government, implying that judges hold important decision-making or veto powers on matters concerning the judiciary, was regarded as a precondition of the separation of powers and judicial independence, neither of which existed under Communist rule. However, the package of laws introduced in 2017 marks the end of judicial self-government as we know it. Not only did it undermine the independence of the National Council of the Judiciary by altering the mode of electing its judicial members, but it also concentrated the power over the judiciary in the hands of the executive branch, allowing for, inter alia, the exchange of key positions in court administration and the reconfiguration of the Supreme Court. This article examines the impact of this "reform" on such values as independence, accountability, and transparency. Investigating the role of judicial self-government in ensuring the principle of separation of powers and democracy, the article concludes with an assessment of the early consequences of the introduced changes for the Polish judiciary.

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A. The rise of judicial self-government in Poland

I. Why historical context matters

The rise of judicial self-government in Poland is the effect of a transition from Communist regime to democracy. It was marked by the establishment of the National Council of the Judiciary (henceforth the NCJ or the Council) in 1989 and the empowerment of general assemblies of judges in courts. The article argues that the core achievement of the transition to democracy in Poland was the introduction of the idea of self-government in the judiciary, which implied that judges exercise certain decision-making powers directly or indirectly via their representatives. This particular understanding of judicial self-government has been recognized as a precondition of the separation of the judicial branch from the legislative and the executive branches, and fundamental to the guarantee of independence.

This article focuses on judicial reform concerning the system of ordinary courts, the Supreme Court, and the NCJ.[1] The reform was introduced in 2017, and it was proclaimed to enhance the democratic accountability of the judiciary and the effectiveness of the court system in Poland.[2] It will be argued that the reform actually deforms the present model of the judiciary in Poland and puts an end to the idea of judicial self-government as we know it. The reform concentrates the powers of the Minister of Justice (henceforth the MoJ) over ordinary courts and entrusts the election of judicial members in the NCJ to the legislature. By lowering the retirement age applicable to current judges of the Supreme Court, including the First President of the Supreme Court, the reform also violates the constitutional principle of irremovability of judges.

The immediate effect of the reform is the elimination of the existing system of checks and balances designed to secure the independence of the judiciary from the executive branch, and in particular to suppress the executive branch's tendency to influence adjudication. The article argues that the reform appears as a U-turn to the past and a breach of the "social contract", which laid the groundwork for the Constitution of 1997.[3]

[1] The legislative package has been presented as a "reform" and this term will be further used to designate the recent changes in the judiciary.

[2] The amendments to the Act of 12 July 2017 on the System of Ordinary Courts, Official Journal 2017, Item 1452; the Act of 8 December 2017 on the Supreme Court, Official Journal 2018, Item 5; and the Act of 8 December 2017 on the National Council of the Judiciary, Official Journal 2018, Item 3.

[3] For some authors, the government of the Law and Justice party brings Poland back to dictatorship. ANDRZEJ ZOLL, MAREK BARTOSIK, OD DYKTATURY DO DEMOKRACJI. I Z POWROTEM (2018).

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II. Judges under Communist rule

After the Second World War, Poland was among the satellite states aligned with the Soviet Union that accepted the Soviet-type constitution based on the principle of uniformity of powers.[4] Between 1949 and 1989 the Council of the State, as the nation's highest authority, held the power to appoint and remove judges,[5] while the interests of the Communist Party were guaranteed by two institutions: the Supreme Court and the MoJ. Court presidents and other managerial positions in the higher courts and in the Supreme Court were covered by the nomenclature system: the professional position depended on the opinion of the party milieu or the relevant department of the Central Committee of the Communist Party. Notably, there was a term of office (5 years) for judges of the Supreme Court and it was possible to exchange those persons who did not meet the expectations of the party leadership.[6] It was also a common practice to use the system of awards to motivate and discipline ordinary judges. In addition, relocation of a judge to another court was also a form of political influence over the judiciary.

The first postulations of the independence of the courts and judges were formulated by the "Solidarity" trade unions in 1980. Its leaders shared the political ambition to strengthen the role of judicial self-government and to empower the general assemblies of judges in courts. In this respect, the greatest success of the judicial trade unions was the negotiation of new rules for the appointment of court presidents in Warsaw in November 1981. It was agreed that the MoJ would hold the authority to appoint a president from two candidates selected by the general assembly of judges in an appropriate court.[7] Moreover, the MoJ also accepted that it would not request the removal of a judge by the Council of the State without consultation with the general assemblies of judges in an appropriate court. These concessions shaped the position of judicial self-government at the end of the Communist regime.

The Round Table negotiations held between 6 February and 5 April 1989 between the representatives of the Communist Party and the opposition led to democratic reforms that brought about a peaceful overthrow of the Communist system. They laid the groundwork for the introduction of the principle of irremovability of judges in the Constitution and the resignation of judges from the Supreme Court. Further, the requirement of "adequate performance of judicial duties", which served as a proxy for political loyalty in the Communist period, was erased. It was also settled that court presidents would hold their

[4] Constitution of the People's Republic of Poland of 22 July 1952, Official Journal 1952, No 33, Item 232.

[5] Article 60(1) of the 1952 Constitution.

[6] *Stara szkoła sędziowska*, RZECZPOSPOLITA (October 6, 2012), http://www.rp.pl/artykul/939507-Stara-szkola-sedziowska.html

[7] STRZEMBOSZ, *supra* note 10, 126. After 1989 such a rule was adopted for all courts.

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office for a specified term in order to eliminate their alienation from other judges. While their appointment was still in the hands of the MoJ, the choice was limited to two candidates selected by the general assemblies of judges in a respective court.

Nevertheless, the most remarkable concession of the Communist Party in the Round Table agreements was the introduction of the National Council of the Judiciary. It thus appears as a bottom-up initiative put forward by legal experts and judges related to the "Solidarity" trade unions in the early stage of the democratic transition, rather than a solution mandated by international organizations or the accession to the EU.

III. Settling accounts with Poland's Communist past and the question of legitimacy

The country's democratic transition left the question of how to settle accounts with its Communist past and establish a transparent judiciary. Notably, Poland did not establish any extraordinary procedures to cleanse the judiciary from "unworthy" judges after the regime change. Instead the judiciary had to clear itself from within. At first, the most compromised judges left the judiciary on their own, often moving to other legal professions. Others were *de facto* removed by the NCJ, which did not allow them to continue their service after reaching the retirement age.[8] Finally, the Parliament entrusted the verification process to disciplinary courts in 1997.[9] However, a procedure for an official removal from the judicial profession by disciplinary courts for offences committed between 1944 and 1989 did not actually work.

Overall, there were only 30 disciplinary proceedings initiated against 55 judges, out of which only 4 were heard by disciplinary courts, and all were acquitted. The law has clearly had a hidden internal flaw – it allowed the initiation of disciplinary proceedings against a judge only in relation to a concrete case, rather than evaluating her entire judicial activity in a particular court over a period of time.[10] Therefore, judges who were involved in political trials may have remained in office after the regime change.

Still, some judges and prosecutors who served or were employed in so-called "formations of repression" against the Polish Nation or against persons acting for Polish independence were deprived of their special pension benefits. This sanction could be ordered by the NCJ after a judge had been sentenced by a court for crimes committed in service, removed from service by a disciplinary court, or after a court found that her declaration concerning

[8] Between 1990 and 2000 the Council refused to permit 511 judges to continue service for reasons related to their past. Ewa Siedlecka, Jak to sędziowie się samooczyszczali, GAZETA WYBORCZA (September 26, 2016), http://wyborcza.pl/1,75968,20746326,jak-to-sedziowie-sie-samooczyszczali.html

[9] Judgment of 24 June 1998, Case no. K 3/98.

[10] STRZEMBOSZ, *supra* note 10, 159.

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collaboration with the Communist regime was untrue.[11] Also in this regard the effects of the law were rather modest.[12]

Another measure aimed to enhance the social legitimacy of the judiciary was the lustration law, which mandated that certain public officials, including judges, make public declarations about their collaboration with the state security service.[13] However, only those judges who lied about their past could be prosecuted for a "lustration lie" and subjected to a criminal sentence, including the deprivation of all public rights, their status as a retired judge, and their special pension benefits. Moreover, the Constitutional Tribunal confirmed that judges are guaranteed immunity in the lustration proceedings, which needs to be waived by a disciplinary court on request of the National Institute of Remembrance. According to the Constitutional Tribunal, judicial immunity helps to protect judges against hasty or instrumental use of lustration proceedings that may place their independence in question.[14]

Today only a small percentage of judges in service began their careers before 1989. Still, the government openly claims that the Polish judiciary is dominated by post-Communist judges.[15] Clearly, these statements form a part of its populist rhetoric, but there is a grain of truth in the argument suggesting that the decommunization process in the judiciary has not been completed due to the unwillingness of judges to harm their peers. Nevertheless, the Supreme Court, once a symbol of judicial dependence on the Communist party, was subject to an informal decommunization process, because all the Supreme Court judges had to be reappointed by the National Council of the Judiciary in 1990. As a result, only 22 judges who served in the old court remained in office after receiving positive verification in the reappointment process, while 80 percent of the old judges did not pass this threshold.

[11] The European Court of Human Rights confirmed that the loss of status of a retired judge and of the special pension benefits attached to that status, as a result of the submission of a false lustration declaration, do not amount to an interference with one's property rights protected under Article 1 of Protocol No. 1. *See Rasmussen v. Poland*, judgment of 28 April 2009, App. No. 38886/05.

[12] According to Ewa Siedlecka, only 66 judges were deprived of their special pension benefits. Ewa Siedlecka, *Bez końca, do grobowej deski, czyli zemsta na PRL. Ewa Siedlecka o 30 latach rozliczeń z komunizmem*, OKOPRESS, https://oko.press/bez-konca-grobowej-deski-czyli-zemsta-prl-ewa-siedlecka-o-30-latach-rozliczen-komunizmem /

[13] Official Journal 2006, No 219, Item 1592.

[14] Judgment of 2 April 2015, Case No. P 31/12.

[15] M. Morawiecki, *Why My Government is Reforming Poland's Judiciary*, WASHINGTON EXAMINER (Dec. 13, 2017), https://www.washingtonexaminer.com/prime-minister-mateusz-morawiecki-why-my-government-is-reforming-polands-judiciary

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IV. Who governs the judges in Poland?

Judicial governance in Poland is shared by the executive branch, the National Council of the Judiciary, court administration (represented by court presidents), and the bodies of judicial self-government. According to the Constitution, the administration of justice is exercised by the Supreme Court, as well as by ordinary, military, and administrative courts.[16] The Constitution also provides for a two-tiered court procedure, leaving the organization of the court structure, jurisdiction, and proceedings to ordinary legislation. In practice, judicial appointments, promotion, training, disciplinary proceedings, and immunity hinge on the mutual relations between the main actors in the judiciary. Additionally, there is a growing position of private associations of judges who represent the voice of the judiciary vis-à-vis the state organs, although they do not have any formal competences.

The power to appoint judges is a presidential prerogative.[17] It may be used only on a motion of the NCJ, but the prerogative permits the President to refuse to appoint a particular candidate without reason. The selection of candidates for judges and for judicial promotion depends on a positive assessment by the bodies of the judicial self-government in the respective courts. Candidates for judges and candidates for judicial promotion must meet a number of statutory criteria to be appointed to a particular court,[18] and they must additionally be approved by the respective court college and general assembly of judges.

The President of the Republic appoints apprentice judges or prosecutors (*aplikanci sędziowscy* and *aplikanci prokuratorscy*) to the position of probationary judges (*asesorzy sądowi*).[19] This power also relies on a motion by the NCJ.[20] Probationary judges are graduates of the National School for Judges and Prosecutors who have passed judicial

[16] The system of ordinary courts is comprised of district, regional, and appellate courts. There are 377 ordinary courts, out of which there are 321 district courts, 45 regional courts, and 11 appellate courts. There are also 16 regional administrative courts and the Supreme Administrative Court but the status of administrative court judges is not specifically analysed in this study.

[17] Article 144(3)(17) of the Constitution.

[18] A judge of a district court must meet the following criteria: 1) hold only Polish citizenship, enjoy full civic and public rights; and not be sentenced by a court for a publicly indictable crime; 2) have a good character; 3) have graduated from a school of law in the Republic of Poland and hold a Master's degree or foreign legal studies recognized in Poland; 4) be eligible with regard to the state of health to perform the duties of a judge; 5) be at least 29 years old; 6) have passed the exam for a judge or a prosecutor; 7) have performed the duties of a judge for a period of at least three years as a probationary judge. Article 61(1) ASOC.

[19] Official Journal 2018, Item 1045.

[20] Article 33a (14) of the Act of 23 January 2009 on the National School for Judges and Prosecutors, Official Journal 2009, No. 23, Item 157.

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examination.[21] Although the status of probationary judges has sparked a lot of controversy in the past, it is now similar to that of a judge, including the guarantee of irremovablity.[22] The important difference is that probationary judges serve exclusively at district courts and may not decide on the use of pre-trial detention in preparatory proceedings against a detained person; on complaints against decisions refusing to initiate an investigation, or discontinuing an investigation; and on cases in the field of family and guardianship law.[23] Since the reform of the National School for Judges and Prosecutors in 2017,[24] the appointment of probationary judges has become the preferred track to a judicial career. They can become full-fledged judges after a minimum of 4 years of service if positively appraised by the MoJ.[25] The other way is to pass judicial examination as an external candidate.[26]

The MoJ exercises supervision over the administration of justice.[27] There is a thin line between the administrative supervision of the MoJ over the administration of justice and the exercise of justice.[28] Due to the tendency of all previous Ministers of Justice to expand their supervision threshold, it has been a recurring postulate to entrust this competence to the First President of the Supreme Court.[29] In the opinion of the Constitutional Tribunal,

[21] Article 106h ASOC.

[22] Article 106k ASOC. In 2007, the Constitutional Tribunal found that the law granting probationary judges adjudicatory functions contravenes the principle of judicial independence because they could be removed by the MoJ. Judgment of 24.10.2007, Case no. SK 7/06.

[23] Article 2(1)(1a) ASOC.

[24] The National School for Judges and Prosecutors was established in 2009 to counteract local parochialisms of the judicial training organized by the appellate courts. It was designed to follow the best traditions of professional schools in Europe. However, the School remains institutionally related to the Ministry of Justice and this relationship was tightened in 2017. The MoJ appoints the Director of the School and the members of the Program Council. The MoJ may also object to the employment of individual lecturers.

[25] Article 106i(8) ASOC.

[26] Such as court referendaries and assistants, other legal professions trying to transfer to the profession of a judge (attorneys at law, legal advisers, notaries or prosecutors) and persons who completed the judicial training under the old system attached to the appellate courts.

[27] Article 9 ASOC.

[28] Judgment of 15 January 2009, Case no. K 45/07. In this decision the Tribunal explained that the Minister's power to issue reproaches against individual judges is constitutional as long as it does not interfere with the adjudicative function. The Tribunal also found that the Minister's power to appoint temporary court presidents is unconstitutional since the law did not provide any time limitations for serving in this capacity. The Tribunal upheld the practice to delegate judges to the Ministry of Justice provided that the delegated judges abstain from adjudication. However, the Tribunal struck down the law providing for the delegation of judges against their consent.

[29] The power of administrative supervision over administrative courts belongs to the President of the Supreme Administrative Court.

the ministerial supervision over the administration of courts is not unconstitutional *per se*, but it should not involve measures concerning judicial decisions in individual cases such as planning court proceedings or setting dates for a hearing.[30] These actions, however, may be subject to the internal administrative supervision exercised by court presidents or heads of court divisions.[31]

The MoJ has the power to establish and abolish courts and court divisions; to appoint and dismiss court presidents; to initiate disciplinary proceedings against a judge; to issue reproaches against a judge; to appoint directors general in each court; to revoke administrative orders; and to issue internal regulations binding in courts. The MoJ carries out these supervisory tasks through inspection visits, statistical analysis, examination of case files, and hearing complaints against judicial decisions. In its current practice, the MoJ exercises external supervision over the administrative activities of the courts by a supervisory service composed of judges delegated to the Ministry of Justice and directors general.

Court presidents are the key officials in the court administration. Moreover, one can hardly separate their administrative functions from their functions related to the exercise of justice.[32] They represent the court and manage the caseload. They assign judges to respective divisions in courts and set out their duties. They dispose of several discretionary competences through which they can exercise pressure over individual judges. They may request that a decision is rendered by a particular time. They may also refuse to extend the deadline for a written justification of a decision, while a delay may trigger a disciplinary action against a judge. They may issue a critical notice on irregularities in the work of a judge, to be included in her personal files. They may also request the initiation of disciplinary proceedings on grounds unrelated to a judge's caseload. Court presidents are also official superiors of judges, probationary judges, court referendaries, and assistants, as well as other employees of the court, except directors general. They make decisions about important personnel matters such as on-call and substitution rosters. They also need to approve the teaching positions of judges in academia and judges' relocation to another court.

According to a narrow, statutory definition, judicial self-government is constituted by the general assemblies, which are composed of judges of various courts.[33] It includes the

[30] *See* also judgment of 1 October 2015, Case Kp 1/15 (concerning the ministerial power to request access to pending case files)

[31] Case no. K 45/07.

[32] Case no. K 45/07.

[33] Article 3 of 27 July 2001 of the Act on the System of Ordinary Courts (further as ASOC), Official Journal of 2001, No 98, Item 170.

general assemblies of judges in appellate courts,[34] the general assemblies of judges in regional courts,[35] and the general meetings of judges in district courts.[36] Additionally, there are also colleges of judges in appellate and regional courts. The bodies of judicial self-government have traditionally exercised some consultative powers in the decision-making processes concerning the judiciary.[37] One of the most important competences of the general assemblies of judges is to express opinions about candidates for judges and court presidents.[38] It should also be noted that the bodies of judicial self-government lack a centralized structure that would otherwise help to consolidate their positions and communicate with the political branches of government or with society. Until recently, this integrative role has been *de facto* played by the NCJ.

V. The National Council of the Judiciary

The first Act of the National Council of the Judiciary was adopted on 20 December 1989 pursuant to the amended Constitution of 1952. However, it was not thoroughly consulted with judges and failed to avoid the challenge of exclusively serving the interest of the judiciary rather than the interest of justice. For that reason, the first Council had rather limited powers. The powers included consideration of candidatures for judges of the Supreme Court, the Supreme Administrative Court, military, and ordinary courts; hearing cases on reassignment of judges to other posts; establishing the number of members of disciplinary courts; granting consent to remain in office to judges who reached 65 years of age; and expressing views about the rules of ethical conduct for judges.

The Constitution of 1997 envisioned the NCJ as an independent organ of state administration that is functionally related to the administration of justice,[39] although in the

[34] It is comprised of the appeal court judges, the representatives of regional court judges acting on the area of the appellation, in the number corresponding to the number of the appeal court judges, and the representatives of district court judges acting in the area of the appellation, in the same number determined by the college of the appellate court.

[35] It is comprised of the regional court judges and the representatives of district court judges acting in the area of the region, in the number corresponding to the number of the regional court judges.

[36] It is comprised of all judges of a district court.

[37] The general assembly of judges in the appellation also expresses opinions about the annual information on the court activities prepared by the director general of the appellate court and the annual report delivered by the president of the appellate court.

[38] Among all bodies of judicial self-government, the position of the general assembly of judges in the appellation is the strongest, while the general assemblies of judges in court regions, and the general meetings of judges of district courts have more limited competences. The general assembly of judges in the appellation expresses opinions about candidates for judges of the appellate courts and candidates for judges of the regional courts in a given appellation, and about candidates for the president of the appellate court.

[39] Katarzyna Zawiślak, *Pozycja ustrojowa, kompetencje i skład Krajowej Rady Sądownictwa*, 3(9) IUSTITIA 117 (2012).

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literature it also appears as a "non-judicial organ of the administration of justice".[40] Its independence is demonstrated by the power to elect the President and two Vice-Presidents of the Council and the power to adopt internal rules and decisions by the majority of members sitting in a plenary session.[41] The NCJ was established as the guardian of the separation of powers and the independence of courts and judges, and indirectly for the effective realization of the right to a fair trial enshrined in Article 45(1) of the Constitution.[42]

The main competences of the NCJ include: 1) selection of candidates for judges of the Supreme Court and the Supreme Administrative Court, as well as judges of ordinary, administrative, and military courts and their presentment to the President of the Republic for judicial appointment; 2) issuing individual decisions on the reassignment of judges to other posts (and their return to previous posts) or their retirement; 3) presenting opinions on the appointment and the dismissal of presidents and vice-presidents of ordinary and military courts; 4) adopting rules of ethical conduct for judges and supervision of their compliance; 5) expressing views on the judicial cadre; 6) presenting opinions regarding legislative acts concerning courts and judges, including the section of the state budget relevant to the judiciary and other legal acts regarding the salary of judges;[43] 7) presenting opinions on the judicial apprenticeship training programs, as well as the entry exams for the judicial apprenticeship and the final exams for judges; 8) expressing views on current problems concerning the judiciary to the President of the Republic or to other public organs or bodies of judicial self-government.

The Council also had the power to appoint the main disciplinary spokesman of ordinary courts and the disciplinary spokesman of military courts and to request for such a person to initiate disciplinary proceedings. Currently, this power has been moved to the MoJ. The Council may appeal against decisions of disciplinary courts of lower rank and request the reopening of disciplinary proceedings. Additionally, there are certain institutional links between the National Council of the Judiciary and the National School for Judges and Prosecutors. The Council's opinion is required for the appointment and the dismissal of the

[40] Tadeusz Ereciński, *Rola rady sądownictwa w państwie demokratycznym*, 5 PREZEGLAD SEJMOWY 3 (1994), 15.

[41] Since 2006 the Council has also had an independent budget. Article 231 of the Act of 30 June 2005 on the public finances, Official Journal 2005, No. 249, item 2104.

[42] Krzysztof Szczucki, *Komentarz do artykułu 186 Konstytucji RP*, *in* KOMENTARZ DO KONSTYTUCJI RP (Marek Safjan & Łukasz Bosek eds.) (2016), para. 10.

[43] According to the established case-law of the Constitutional Tribunal, legislative proceedings disrespecting the obligation to consult the Council on acts concerning the independence of courts and judges or leaving the Council without time to react to legislative drafts or amendments to such drafts amount to a procedural breach of the Constitution and may result in a declaration that the acts adopted via such proceedings are unconstitutional. *See* i.e. judgments of 24 June 1998, Case no. K 3/98, and of 19 November 1996, Case no. K 7/95.

director of the National School and the Council appoints one member of the Program Board.

The Council may also initiate proceedings before the Constitutional Tribunal and request an abstract constitutional review on matters concerning the independence of courts and judges.[44] Although the mandate of the NCJ is limited to matters regarding the independence of courts and judges, it has occasionally proved to be very effective in preventing legislative and executive interferences in judicial power. It is also accepted that the Council may challenge normative acts affecting its own position. This power is necessary to realize the constitutional role of the Council.[45] Moreover, the Council may also challenge normative acts concerning the position of the Constitutional Tribunal insofar as these acts are related to the realization of the principle of independence of the Tribunal and the Tribunal's judges.[46]

The Council has a hybrid composition that includes representatives of the legislative, executive, and judicial branches, as established by the Constitution. According to Article 187(1) of the Constitution, the members of the NCJ include the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic; 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts; 4 members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its Senators.

In sum, there are 25 members of the Council and most of them are appointed for a fixed term of office (4 years). The term of office for the First President of the Supreme Court, the President of the Supreme Administrative Court, the MoJ, as well as the representatives of the Sejm and the Senate is tied to their primary office. In addition, the President of the Republic can dismiss the individual he appointed to the Council at any time.[47]

Although the NCJ is not regarded as the organ of judicial self-government, the Constitution gives judges a numerical dominance over other branches of government on the Council. The representatives of the judiciary have furthermore dominated the work of the Council in practice, since the presence of other non-judiciary members of the Council in the plenary sittings has been less regular. This practice crystalized after the Constitutional Tribunal confirmed that a Council member needs to be present in person in order to

[44] Article 186 (2) of the Constitution.

[45] Case no. K 40/08.

[46] Judgment of 9 December 2015, Case no. K 35/15.

[47] Article 8(1) of the Act on the NCJ of 2011 as amended.

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vote.[48] This decision practically excluded the participation of the MoJ, and it limited the participation of the First President of the Supreme Court and the President of the Supreme Administrative Court from lengthy deliberations concerning individual matters such as the evaluation and selection of candidates for judicial appointments.[49]

Clearly, the most contentious issue is the representation of the judicial branch on the Council. The Constitution is silent on this matter and does not stipulate that all judges shall have equal voting rights in the election of the judicial members of the Council. Still, it would be possible to introduce a proportionate system of voting by statute.[50] Until 2017, the 15 judicial members in the Council were allocated as follows: 2 members were judges of the Supreme Court; 2 members – the judges of administrative courts; 2 members – the judges of appellate courts; 8 members – the judges of regional and district courts; and, 1 member – a judge of a military court.[51] As a result, judges of higher courts were overrepresented, while the district court judges did not have an adequate number of representatives (for example, in the last term of the NCJ there was only one judge from the district court).[52]

The Law and Justice party vigorously used this apparent problem with the lack of democratic representation of judges in the Council to justify the decomposition of the Council and to change the mode of election of all judicial members. In the first move, the MoJ (acting in the capacity of the Prosecutor General) challenged the previous Act on the NCJ before the Constitutional Tribunal with regard to the mandate of the elected judges.[53] The Constitutional Tribunal - a 5-judge panel composed of persons appointed by the current government (whose status could be questioned due to the unconstitutional

[48] Case no. K 40/08, para 44.

[49] In another decision the Constitutional Tribunal found that the law may not prohibit the judicial members of the Council from holding the office of president or vice-president of a court. Judgment of 18 July 2007, Case no. 25/07.

[50] Piotr Mikuli, *Konstytucyjność wyboru sędziów sądów powszechnych do KRS*, 4(9) KRAJOWA RADA SADOWNICTWA 9 (2014).

[51] The Act on the NCJ of 2011 introduced a complicated electoral system for judges of ordinary courts based on indirect voting, which evidently underprivileged judges of district courts.

[52] As the lack of democratic representation of judges in the Council attracted much criticism, the Association of Polish Judges "Iustitia" agreed to grant judges of the lower courts more equal representation in the Council. It proposed to introduce a new electoral system based on the principle of direct voting and reserved seats. See the draft amending the Act on the NCJ presented by "Iustitia" as an alternative to the Act adopted by the Parliament in July 2017.

[53] The Prosecutor General argued that several provisions on the Act on the NCJ violate the principle of equal (passive and active) voting rights of judges of different courts in a way that restricts their ability to stand in elections for members of the National Council of the Judiciary. It also challenged the Act with respect to the concept of the individual mandate of elected members of the Council.

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circumstances of their nomination) - held that Article 187(3) of the Constitution implies a collective mandate of all elected members of the Council.[54] In effect, the Tribunal confirmed that the present individual mandate of judges is invalid. This decision gave the government a "legitimate" reason to reform the election process and move the authority to select judicial members away from the bodies representing the judiciary and into the hands of the Parliament.

B. The fall of judicial self-government in Poland

The following section will argue that the recent judicial reform introduced in 2017 marks the end of judicial self-government in its current form. The reform was accompanied by a media campaign presenting judges as an insulated caste and accusing them of nepotism, corruption, laziness, and abuses of justice under Communist rule.[55] However, those who still remember the Communist period led massive street protests in support of the Supreme Court and the independence of courts and judges.[56] The reform was criticized by the National Council of the Judiciary,[57] the Association of Polish Judges "Iustitia", the Ombudsman,[58] international and national legal experts,[59] as well as the Venice Commission[60] and the UN Special Rapporteur on the Independence of Judges and Lawyers of the Human Rights Council.[61] It also triggered a reaction from the European Commission,

[54] Judgment of 21 June 2017, Case no. 5/17.

[55] The campaign "Fair courts" was commissioned by the government and was led by the Polish National Foundation endowed with millions of Polish zloty for outdoor and TV campaigns, Internet presence, as well as viral activities.

[56] Rick Lyman, *In Poland, An Assault on Courts Provokes Outrage*, NEW YORK TIMES (July 19, 2017), https://www.nytimes.com/2017/07/19/world/europe/poland-courts-law-and-justice-party.html

[57] Opinion on the MPs' draft of the law amending the Act on the System of Ordinary Courts and other acts (Print no. 1491), (May 12, 2017).

[58] "Plowing up the courts" (July 19, 2017), https://www.rpo.gov.pl/en/content/%E2%80%9Cplowing-courts-adam-bodnar-onetpl-changes-judicial-system

[59] Grainne de Búrca and Wojciech Sadurski, *Open Letter to Vice-President Frans Timmermans,* VERFASSUNGSBLOG *(June* 9, 2018), https://verfassungsblog.de/open-letter-to-vice-president-frans-timmermans/

[60] Opinion No. 904/2017 (Dec. 11, 2017), http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e (noting that the reform bears "a striking resemblance with the institutions which existed in the Soviet Union and its satellites").

[61] Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland, A/HRC/38/38/Add1, (April 15, 2018), https://documents-dds-ny.un.org/doc/UNDOC/GEN/G18 /084/27/PDF/G1808427.pdf?OpenElement

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which for the first time decided to use the procedure stipulated in Article 7 of the EU Treaty against a Member State defying the rule of law.[62]

One of the officially proclaimed goals of the reform that is the decommunization of the judiciary begs the question of whether it is legitimate almost 30 years after the regime change. Further, the means employed to serve this aim are proportionate since they concern all judges regardless of the individual person's actual role in the Communist system. In any case, settling accounts with the past by lowering the retirement age of all current judges of the Supreme Court is overbroad and thus disproportionate. It also violates the constitutional guarantee of irremovability and disregards the fact that an expiration of the President of the Supreme Court's term of office is contrary to Article 183(3) of the Constitution, which sets the term of office for six years.

Taking alone the reconstruction of the Supreme Court and the National Council of the Judiciary, it is evident that the hidden goal of the government was to replace the key actors in the administration of justice with persons accepted or nominated by the Minister of Justice. Additionally, the new rules of ministerial supervision over the administration of justice and the new system of disciplinary courts have turned political loyalty into an eligibility criterion upon which a judge's career may depend.[63]

I. Diminishing the role of judicial self-government in the appointment and dismissal of court presidents

Since 2017 the MoJ has had the authority to appoint all court presidents. It then "presents" the appointees to the general assembly of judges in the appropriate court.[64] Before the reform, the general assembly had to express its opinion on the candidates. A negative opinion by the general assembly, if sustained by the NCJ, was binding on the MoJ.[65] In the same fashion, the power of dismissal previously required the approval of the general assembly of judges in the appropriate court, and if there was no such approval then the approval of the NCJ was required. Only the presidents of district courts were appointed and removed by the presidents of appellate courts, who were accountable to the MoJ for the effectiveness of all courts in their jurisdiction. The MoJ could remove the presidents of

[62] Reasoned Proposal under Article 7(1) for a Council Decision regarding rule of law in Poland (Dec. 20, 2017), 21, http://ec.europa.eu/newsroom/just/document.cfm?action=display&doc_id=49108

[63] Wojciech Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding*, SYDNEY LAW SCHOOL RESEARCH PAPER No. 18/01 (Jan. 17, 2018), https://ssrn.com/abstract=3103491

[64] Articles 23, 24, and 25 ASOC.

[65] This mechanism was introduced during the first government of the Law and Justice party (2005-2007). It replaced a provision which gave the MoJ the power to appoint the president of a court from two candidates presented by the general assembly of judges.

appellate and regional courts during their term of office, for instance, for a gross failure to perform their professional duties, with the consent of the NCJ. Pre-reform, the opinion of the NCJ served as a safeguard against "hasty" decisions depriving certain persons of their official function. However, as the government of the Law and Justice party argued, it limited the ability of the MoJ to influence effective caseload management among the courts.

Under the 2017 amendments, the dismissal of a court president may only be objected to by the NCJ in a decision taken by a two-thirds majority vote, which is hard to obtain.[66] Furthermore, the 2017 amendment strengthened the hierarchical subordination of the presidents of lower courts to the presidents of the appellate courts, and ultimately to the MoJ. The presidents of upper courts can reprimand presidents of lower courts. However, the ultimate decision lies with the MoJ, which can uphold or reject a critical notice or issue such a notice unilaterally.[67] If a critical notice is upheld, the MoJ may also decide to reduce the salary or functional allowance of the respective president of the court. In this pyramid, the MoJ becomes the highest disciplinary authority in a "chain of command".[68]

In effect, the recent judicial reform has deprived the general assemblies of judges of their veto powers in the process of the appointment and dismissal of court presidents. It has thereby weakened the general assemblies' position. Additionally, the general assemblies of judges in regional courts lost the exclusive power to appoint members of the college of judges.[69] The reform also modified the eligibility criteria for the positions of court president, allowing lower court judges to hold this office in higher courts. Last but not least, the amended Act on the Supreme Court provides that the President of the Republic appoints the First President of the Supreme Court from among 5 candidates. In application, this means that a candidate who got the least votes of the General Assembly of the Supreme Court could nevertheless be appointed.[70] In sum, it is a shared view that the modification of the appointment and dismissal procedure of court presidents, the introduction of new supervision tools, and the gradual disempowerment of judicial self-

[66] On 12 April 2018 the Parliament adopted an amendment to the acts implementing the judicial reform. This amendment is presented as a concession to the recommendations made by the European Commission. It provides that the dismissal of a court president requires an opinion of the college of a respective court. If the college disagrees with the dismissal, the MoJ needs to seek the approval of the NCJ. Official Journal 2018, Item 848.

[67] Article 37e ASOC.

[68] Venice Commission, Opinion 904/2017, *supra* note 60, para 109.

[69] The college of a regional court now consists of the court president, the oldest vice-president, the representatives of district courts, elected by the meetings of district court judges from among the district court judges, one from each district court, and two representatives of regional court judges, elected by the meeting of regional court judges. *See* amendment to the ASOC of 12 April 2018, Official Journal 2018, Item 848.

[70] Article 12 of the Act on the Supreme Court, Official Journal 2018, Item 5.

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government is likely to affect Poland's realization of the principle of judicial independence.[71]

II. The political capture of the NCJ

The second step leading to the fall of judicial self-government in Poland was made with the adoption of an amendment to the Act on the NCJ extinguishing the constitutionally prescribed term of office of the judicial members and altering the mode of their election. Since the reform came into force, the parliamentary majority has held the power to appoint the judicial representatives on the Council. The politically-driven Council will now fill numerous judicial vacancies in courts. The reform lowered the retirement age for its current judges, as well as for judges of ordinary courts, and it created two new Chambers of the Supreme Court, which will also be filled by the Council.

The political capture of the NCJ played out in two parts. First, the Parliament passed the amendment to the Act on the NCJ on 12 July, 2017, but the President blocked it by veto. Then he proposed his own draft, which nevertheless raised the same concerns as the rejected amendment. The Presidential draft was passed into law on 8 December, 2017, after a round of negotiations with Poland's political leadership.

Pursuant to the new law, the Sejm elects 15 judicial members by a three-fifths majority.[72] If the qualified majority does not accept the full list of candidates, then the list may be later passed by an absolute majority. Crucially, the voice of the judiciary in this process can only be heard during the pre-selection of candidates since judges have the right only to appoint "candidates for candidates" for the judicial members in the Council. Precisely, candidates can be proposed by either 25 judges (excluding retired judges) or by 2000 citizens who are eligible to vote. There is then to be a nomination by the parliamentary party caucuses, which may select up to 9 candidates. After this stage, a parliamentary committee chooses 15 persons from among the pre-selected candidates to be elected by the Sejm for a collective mandate. In this way, the political branch has taken control over the election of judges on the Council[73] and the Council has lost its independent mandate.

[71] *The response of the Polish Judges Association „Iustitia" to the White Paper on the Reform of the Polish Judiciary presented to the European Commission by the Government of the Republic of Poland* (March 24, 2018), 37, https://www.iustitia.pl/images/pliki/response_to_the_white_paper_full.pdf

[72] Act of 8 December 2017 amending the Act on the National Council of the Judiciary, Official Journal 2018, Item 5.

[73] According to the Special Rapporteur on the Independence of Judges and Lawyers in Poland "(t)he fact that judges will no longer have a decisive role in the appointment of the 15 judicial members of the Council puts the new election method at odds with relevant international and regional standards". Report, *supra* note 61, point 68.

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Notably, the change took effect during the term of office of the current members. It also contravened the existing standard for legislative intervention in the composition of the NCJ, which should only be applicable to the next term of office.[74] For these reasons, both the judges' associations and the opposition parties boycotted the election of the new judicial members as unconstitutional. As a result of the boycott, there were only 18 candidates for 15 vacant positions.

C. The Impact of the Judicial Reform on Independence, Accountability, and Transparency in the Judiciary

I. Independence

The Constitution of 1997 guarantees both the independence of the courts and the independence of judges. The independence of the courts is enshrined in the principle of separation of powers (Article 10) and specified in Article 173, which provides that courts and tribunals shall constitute a separate branch of the government and shall be independent of other branches of power. The institutional insulation of the judiciary is further guaranteed by the position of the Supreme Court, which exercises supervision over the adjudication of ordinary and military courts.[75]

The Constitution stipulates that judges shall be independent in the exercise of their office and subject only to the Constitution and statutes. It guarantees appropriate working conditions and remuneration corresponding to the dignity of the office and the scope of the judicial duties in addition to life tenure and immunity. More specifically, the Constitution provides that to recall a judge from office, to suspend her from office, or to transfer her to another bench or position against her will requires a court order, which is limited to instances prescribed by statute. Additionally, Article 178(3) of the Constitution prohibits judges from becoming members of political parties or trade unions and from performing public duties that are incompatible with the principle of judicial independence.

According to the constitutional standard developed by the Constitutional Tribunal, the process of appointing court presidents requires the involvement of the general assemblies of judges[76] and the NCJ.[77] Their participation in this process should fetter the discretion of the MoJ over positions in court administration, which are closely connected to the exercise of justice.[78] On this ground, the Constitutional Tribunal held that the minimum protection

[74] Judgment of 18 July 2007, K 25/07.

[75] Article 183 of the Constitution.

[76] Judgment of 9 November 1993, Case no. K 11/93.

[77] Judgment of 18 February 2004, Case no. K 12/03.

[78] Case no. K 11/93.

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of judicial independence is provided by the statutory obligation to obtain an opinion on a candidate for the position of court president from the appropriate body of judicial self-government (the general assembly of appellate judges – for the appointment of the president of the appellate court, and the assemblies of regional judges – for the appointment of the president of the regional court).[79] In the case of a negative opinion, a candidate needs to secure a positive opinion from the NCJ.[80] Following this view, the recent judicial reform runs counter to the constitutional interpretation of the principle of the separation of powers and judicial independence.

The most problematic change, however, was introduced in 2017 and was the product of a temporary power bestowed upon the MoJ. The MoJ was granted authority to dismiss any court president within a period of six months following the enactment of the amendment to the Act on the System of Ordinary Courts. This transformation was then followed by the newly appointed presidents' grant of power to dismiss the entire court management, including heads of court divisions or court sections, and court inspectors.[81] These powers made it possible to verify which judges held the highest executive functions and exchange them for persons who offered a guarantee of loyal service to the political leadership. As was already mentioned, the MoJ has also gained the power to award or discipline the court presidents financially. The MoJ may now reprimand court presidents and vice-presidents for administrative misconduct and reduce their functional allowance for a period of one to six months.[82] Moreover, the MoJ may also increase or reduce appellate court presidents' functional allowance based on the results of their annual evaluations.[83]

The recent reform also provided that judges delegated to the Ministry of Justice are entitled to conduct the "lustration", or purification, of a court or a court division by carrying out supervisory activities over court presidents. It has been noted that lustration entails the supervision of adjudicatory activities, a role that should be reserved for court presidents.[84] One should note in this context that the position of delegated judges (to the Ministry of Justice or to other courts) in the structure of the Polish judiciary is highly

[79] Before the reform, the MoJ could appoint court presidents only in appellate and regional courts (less than 15% of all courts in Poland). In this respect, the government argued that the Minister did not have effective tools to react to bad management in district courts.

[80] Case no. K 12/03.

[81] During the period of six months after the amendments came into force, the Minister removed 130 out of 730 court presidents, often against the will of the general assemblies of judges in these courts.

[82] Article 37ga ASOC.

[83] Article 37h ASOC.

[84] Opinion, *supra* note 57, http://www.krs.pl/pl/aktualnosci/d,2017,5/4782,opinia-krajowej-rady-sadownictwa-dotyczaca-poselskiego-projektu-zmiany-ustawy-prawo-o-ustroju-sadow-powszechnych

problematic.[85] The MoJ has the power to withdraw such delegation (and detach a judge from adjudication of a specific case), and as a result these judges are dependent on the executive.

The impact of the recent reform on *de facto* independence should be assessed while taking into account another institutional change regarding the position of the MoJ: namely, the merger of the MoJ with the office of the Prosecutor General.[86] In addition to the new possibilities to use supervisory tools to exert political pressure over court presidents,[87] the Minister may now command both disciplinary spokesmen and public prosecutors to trigger actions against judges for their judicial activities. In fact, there were recently several instances in which judges who decided against the expectations of the ruling party were threatened with or subject to disciplinary proceedings or prosecuted for the misuse of power in criminal trials.[88] Moreover, the Spokesman of the National Council of the Judiciary, who was very critical of the judicial reform, experienced excessive review of his property statements by the Central Anti-Corruption Office.[89]

For a long time, the output of independence on the level of the judiciary was considered adequate. It has been a shared view that the judiciary could decide cases so that no actor is constantly preferred. This was demonstrated by the relatively high number of acquittals and lost liability cases against the State Treasury.[90] However, the line between the output of independence at the level of individual judges and their autonomy resulting from their position within the existing structure of the judiciary has always been thin. Although judges could enjoy de jure autonomy in adjudication, they were actually constrained by decisions of other (higher) courts due to a peculiar system of judicial promotion that depends on the

[85] According to the Constitutional Tribunal, delegation of judges is not unconstitutional *per se* provided that it is based on their consent and that they remain detached from the adjudication. Judgment of 15 January 2009, Case no. K 45/07.

[86] Act of 28 January 2016 – Law on the Prosecutor's Office, Official Journal 2017, Item 177.

[87] To counteract this pressure, several NGOs, including two private associations of judges, established the Justice Defense Committee in June 2018 - http://www.inpris.pl/en/whats-going-on-at-inpris/article/t/powstal-komitet-obrony-sprawiedliwosci-kos/

[88] *Reform of the Judiciary in Poland Poses Risk to The Right to Fair Trial,* (March 2018), https://www.amnesty.org/download/Documents/EUR3780592018ENGLISH.PDF (gathering testimonies from judges who reported being subjected to disciplinary proceedings or who feared sanctions for their decisions in cases involving governing-party politicians or for their participation in protests demanding the independence of the judiciary).

[89] *'They're trying to break me': Polish judges face state-led intimidation*, GUARDIAN (June 18, 2018), https://www.theguardian.com/world/2018/jun/19/theyre-trying-to-break-me-polish-judges-face-state-led-intimidation?CMP=share_btn_link

[90] Adam Bodnar & Łukasz Bojarski, *Judicial Independence in Poland*, in JUDICIAL INDEPENDENCE IN TRANSITION (Anja Seibert-Fohr ed 2012), 667-738, 668.

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number of decisions overturned on appeal. In short, a high number of repeals may be grounds for the negative assessment of a judge by an inspector, which hinders a judge's promotion.

Since the Law and Justice party came into power, judges may have been feeling additional pressure to adjudicate according to the specific party line. In particular, judges could be feeling trapped by political controversy over the position of the Constitutional Tribunal and hesitate on whether to follow its decisions or become openly involved in a process of dispersed judicial review.[91] Although there has been an emerging consensus that judges do not have the power to declare statutes unconstitutional (since it is the Constitutional Tribunal that has a monopoly in this regard), commentators agree that such power is legitimate in cases when the legislator intentionally violates the Constitution or adopts laws contrary to existing constitutional interpretation.[92]

According to a study conducted by the European Network of Councils of the Judiciary among Polish judges, 48% of respondents agreed that the court authorities expected them to settle the case within a certain time. Thirteen percent of respondents admitted that they had to decide cases according to the internal guidelines of their peers, and 5% of respondents admitted that there was pressure by the court to decide a case in a particular way. Although the sample included only 621 judges and was not representative of the entire judiciary, it shows that judges experience different forms of internal pressure.[93]

In the same study, only 5% of respondents believed that cases were allocated in a way that could indicate a particular outcome, while 7% found that there was a risk of disciplinary sanctions for deciding a case in a particular way. Nineteen percent of respondents claimed that their decisions were influenced by the media, such as television, radio or the press, while the influence of social media was evident for only 2% of respondents. Interestingly, only one-third of the judges who took part in the survey were convinced that they could count on promotion on the basis of substantive criteria and in a transparent procedure. According to 21% of respondents, to be appointed as a judge depended on criteria other than qualifications and experience, while 36% claimed that judicial promotion was based

[91] Tomasz T. Koncewicz, *The Court is dead, long live the courts? On judicial review in Poland in 2017 and „judicial space" beyond*, VERFASSUNGSBLOG (March 8, 2018), https://verfassungsblog.de/the-court-is-dead-long-live-the-courts-on-judicial-review-in-poland-in-2017-and-judicial-space-beyond/.

[92] Krzysztof Szczucki, *Komentarz do Artykułu 186 Konstytucji* RP, *in* KOMENTARZ DO KONSTYTUCJI (Marek Safjan & Łukasz Bosek ed 2016), para. 61.

[93] *Independence and Accountability of the Judiciary and of the Prosecution*, ENCJ Report 2014-2015.

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on criteria other than qualifications and experience.[94] Further research will show whether the perception of the judges has changed after the judicial reform of 2017.

In comparison, the opinion poll conducted in 2017 indicates low social trust in the independence of courts and judges. Only 24% of respondents found Polish courts and judges to be independent in all or a majority of cases.[95] In contrast, 61% believed that judges are not independent at all or are independent occasionally. The answer to this query differed when respondents had personal contact with courts. In such cases, respondents tend to have more trust in the independence of the judiciary.[96] The Eurobarometer study carried out by the European Commission in 2018 showed similar results. Only 37% of Poles declared satisfaction with the level of independence of courts and judges in Poland, whereas the EU average was 56%.[97]

II. Accountability

Judges (including probationary judges) may be subject to disciplinary proceedings in the case of professional offences, including obvious and flagrant breach of the law and undermining the dignity of the office.[98] In principle, judges need to perform the judicial duties in accordance with their oath and preserve the dignity of the office both on and off duty. Disciplinary proceedings are initiated by the disciplinary spokesman *ex officio*, or at the request of the MoJ and the presidents of appellate courts. In this context, it is quite symptomatic that the government of Law and Justice led its crusade against judges, while emphasizing the privileged status of the judiciary in law and the practical lack of criminal answerability for their actions. According to government propaganda, judges are frequently involved in criminal activity and are not held accountable for their wrongs.

In fact, there were about 270 disciplinary proceedings held between 2013 and mid-2016 in which judges were charged with 289 disciplinary offences. It could be thus concluded that judges committing disciplinary offences is a marginal problem. The most frequent allegations concerned excessive length of time for providing written justifications of judgments or other delays, which usually resulted from work overload. Only in 17 cases were the judges charged with committing a crime, including 1 charge of corruption, 3

[94] *Ocena polskiego sądownictwa w świetle badań*, Court Watch Foundation Poland (May 2017), https://courtwatch.pl/wp-content/uploads/2017/05/Raport-Fundacji-Court-Watch-Polska-Ocena-polskich-s%C4%85d%C3%B3w-w-%C5%9Bwietle-bada%C5%84-maj-2017.pdf

[95] CBOS, Opinion poll No 31, Warsaw (March 2017), https://www.cbos.pl/SPISKOM.POL/2017/K_031_17.PDF

[96] *Id* at 6.

[97] *Perceived independence of the national justice systems in the EU among the general public,* Flash Eurobarometer No. 461 (May 2018), https://data.europa.eu/euodp/data/dataset/S2168_461_ENG

[98] Article 107(1) ASOC.

charges of crimes against road safety, 2 charges of misuse of power, and 1 charge of document falsification. In 5 cases, judges were charged with minor offences. In 188 cases, disciplinary courts imposed sanctions on judges. In 24 cases, the courts did not impose any penalty due to the minor nature of the offence, and in 21 cases the proceedings were discontinued due to the limitation period. In 48 cases, the judge was acquitted.[99]

On the one hand, this data may show that the judiciary in Poland lives up to high legal and ethical standards. On the other hand, it may indicate that there are inherent barriers to conducting disciplinary proceedings against judges and to imposing sanctions on them. These barriers may be further related to the position of disciplinary spokesmen. Until recently, the NCJ could appoint the Disciplinary Spokesman and two Deputy Disciplinary Spokesmen of Ordinary Courts for a term of four years. Currently, this power has been granted to the MoJ, who may also appoint the Disciplinary Spokesman of the MoJ to carry out a case against an individual judge.[100]

The Disciplinary Spokesman and the Deputy Disciplinary Spokesmen of Ordinary Courts are authorized to initiate disciplinary proceedings in cases concerning judges of appellate courts, as well as presidents and vice-presidents of appellate and regional courts. In case of other judges, this role is played by deputy disciplinary spokesmen. Previously, the deputy disciplinary spokesmen were elected by court colleges for each appellate and regional court.[101] Currently, the Disciplinary Spokesman appoints the deputy disciplinary spokesmen from among three candidates elected by the general assembly of appellate and regional courts.

Disciplinary courts are appellate courts and the Supreme Court.[102] They hear disciplinary cases and decide on the immunity waiver. Under the previous system, judges in appellate courts were appointed to a case by drawing lots. Under the new rules, the MoJ appoints the disciplinary judges in appellate courts.[103] Their panels are comprised of three judges in the first instance and two judges and one lay judge of the Disciplinary Chamber of the Supreme Court in the second instance. The creation of the Disciplinary Chamber sparks considerable controversy due to its institutional autonomy from the First President of the

[99] *Id* at 49-50.

[100] Article 112b(1) ASOC.

[101] In cases of the regional court judges, as well as the presidents and vice-presidents of district courts, the deputy disciplinary spokesman at the appellate court is the authorized prosecutor, and in cases of the district court judges and the probationary judges it is the deputy disciplinary spokesman at the regional court. Article 112 ASOC.

[102] Article 110 ASOC.

[103] The Minister of Justice entrusts the duties of a disciplinary court judge at the appellate court to judges who have at least ten years of practice as a judge after consulting the National Council of the Judiciary.

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Supreme Court and special allowances for the work of individual judges in this Chamber (40% of the ordinary remuneration). In the opinion of "Iustitia", this change threatens the independence of judges. Therefore, "Iustitia" has proposed to make the records of disciplinary proceedings available on-line.

Disciplinary sanctions include admonition, reprimand, removal from a post (such as the president of the court), transfer to another court, and removal from office. The 2017 amendment added a new sanction: reduction of basic salary by 5% - 50% for a period of six months to two years. However, pursuant to the Act on the Supreme Court of 8 December 2017, the MoJ may also demand the resumption of any disciplinary proceedings concluded with a final decision either in favor or against a judge. This power may easily become a tool of political oppression against some judges.

In the view of "Iustitia", disciplinary judges should be either elected by the bodies of judicial self-government or chosen at random by judges from the respective court. The current situation being that the MoJ has both the power to appoint the disciplinary spokesmen and the disciplinary judges, while the rights of a judge in the disciplinary proceedings are less favorable than that of a defendant in a criminal trial, pose a very real threat to the independence of the judiciary.[104]

III. Transparency

In the existing legal framework, the public can learn about the activities of the Supreme Court from the annual report of the First President of the Supreme Court.[105] The annual report is also presented to the general assembly of Supreme Court judges, which can be attended by the representatives of other institutions and the judiciary. Presidents of lower courts have the duty to present their annual report to the president of the appellate court, who in turn conducts the MoJ evaluation for the effective management of all courts in an appellate jurisdiction.[106] Furthermore, directors general prepare annual reports on the activities of the courts and present them in the following order: The directors general at the lower courts in a given jurisdiction report to the director general of the appellate courts, who then reports to the MoJ.[107]

[104] The response of the Polish Judges Association "Iustitia" to the White Paper on the Reform of the Polish Judiciary presented to the European Commission by the Government of the Republic of Poland, *supra* note 71, 51.

[105] Article 5(1) of the Act on the Supreme Court, Official Journal 2018, Item 5.

[106] Article 37(1) ASOC.

[107] Article 31a ASOC.

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Although one can obtain public information on court activities on request,[108] the publicly available data and statistics are hard to comprehend.[109] In particular, there is scarce information in the public domain about the internal management of courts, including information about courts' spending. The media coverage of court practices is rather rare, except in cases concerning charges of maladministration or corruption.[110] Since November 2016, judges' property statements are published on the Internet website of appellate courts.[111] This measure aims to enhance trust in the judiciary and prevent corruption.

Until recently, only administrative courts had a comprehensive database of all decisions, and there was no general database of Supreme Court judgments or judgments of ordinary courts available on-line. Although such databases have been recently launched, they are still not complete or fully operational.[112] As a result, it is a conventional practice to use commercial (paid) services providing access to electronic databases that contain full texts of court decisions.

In addition to the deficient transparency of case-law, the method of allocating cases has not been transparent either. Until the recent reforms, heads of civil court divisions could decide about the composition of adjudicating panels and allocation of cases (in effect, they could alter the allocation based on the alphabetic order), while the criminal court divisions used random case allocation. The new law provides that all cases are allocated randomly by a computerized system. While random allocation of cases may indeed strengthen the independence of "rank-and file" judges from court presidents and heads of divisions, and indirectly from the MoJ as well,[113] the central system of random allocation of cases is supervised by the MoJ. The MoJ refuses to reveal the algorithm used to draw cases to the public. As a result, the public lacks information on how the system operates in practice. Notably, the system of random allocation of cases has not been introduced in the Supreme Court.

Undoubtedly, the most serious problem with transparency concerns the process of evaluating judicial candidates and their selection by the NCJ. The duty to provide written

[108] Act of 6 September 2001 on Access to Public Information, Official Journal 2001, No. 112, Item 1198.

[109] *See* annual reports on the realization of the plan of activities by district courts.

[110] In December 2017, the media reported about the previous President of the Appeal Court in Cracow charged for accepting material benefits in exchange for the realization of public procurement contracts by external companies.

[111] Article 87(6) ASOC. Property declarations are published.

[112] For the database of the ordinary courts see - https://orzeczenia.ms.gov.pl/ The Supreme Court database is available at http://sn.pl/orzecznictwo/

[113] *White Paper on the Reform of the Polish Judiciary*, Chancellery of the Prime Minister (March 7, 2018), 38.

justification of decisions concerning individual candidates and the right to appeal the legality of individual decisions in courts was introduced in 2009 as a result of a judgment by the Constitutional Tribunal.[114] Eventually, the Act on the NCJ was amended to provide statutory criteria for the evaluation and selection of candidates for judges.[115] More recently, the problem of low visibility surrounding the Council's internal proceedings resurfaced again. While "Iustitia" proposed to provide online transmission of all plenary sessions and to introduce an advisory board at the Council,[116] the new law only requires that all plenary sessions be broadcast on-line. That is, unless the Council chooses to proceed with closed or private deliberations.[117]

Last but not least, the recent amendment to the Act on the NCJ that changes the mode of election of judicial members is a clear regress in the transparency of this process. Pursuant to the 2017 amendment, the Sejm voted on the list of 15 candidates, each of whom had the support of 25 judges. Nevertheless, the list of the judges who supported the respective candidates were not disclosed to the public, and there was no requirement to justify a particular candidature. Notably, the body of judicial self-government was excluded from this process, and most of the newly elected members have ties to the MoJ (as delegated judges or court presidents).[118]

D. The Role of Judicial Self-Government in ensuring the Principle of Separation of Powers and Democracy

I. Separation of powers

This article has argued that the democratic transformation and the recent reforms of the judiciary mark the rise and fall of judicial self-government in Poland. At the same time, it also notes that the scope of powers of key actors in judicial government has been determined by critical moments such as the conflict between the President of the Republic and the NCJ over judicial appointments.[119] In this conflict the President prevailed,[120] since

[114] Judgment of 27 May 2008, Case no. SK 57/06.

[115] Articles 34-37 of the Act on the NCJ. In 2007, the Constitutional Tribunal found that the power of the NCJ to determine criteria for evaluation and selection of candidates for judges without a statutory basis is contrary to the Constitution. Judgment of 29 November 2007, Case no. SK 43/06.

[116] The Social Board at the Council would comprise several representatives of legal professions, law departments, civil society, and the Ombudsman in order to ensure the social control over the process of judicial appointments.

[117] Article 20(1) of the Act on the NCJ.

[118] Marcin Matczak*, The Rule of Law in Poland: A Sorry Spectacle,* VERFASSUNGSBLOG *(*March 1, 2018, https://verfassungsblog.de/the-rule-of-law-in-poland-a-sorry-spectacle

[119] In 2008, the President of the Republic, Lech Kaczyński, refused to appoint 10 judges recommended by the NCJ. He did not provide any reason for this decision. As the Presidential action was challenged before administrative

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the NCJ does not have the power to overrule the President. As a result, individual judges (and candidates for judges) are left without an effective legal remedy.[121] The solution in this case is contrary to the OSCE Kyiv Recommendations, under which the executive branch's refusal to appoint judiciary candidates should be based only on procedural grounds and be reasoned.[122]

Still some of the controversies could be successfully settled due to the intervention of the Constitutional Tribunal, which laid down the standards for the transparency of the evaluation process of candidates for judges,[123] judicial immunity,[124] delegation of judges,[125] and their so-called "horizontal promotion",[126] the status of probationary judges,[127] or freezing the salaries of judges.[128] Other controversies regarding government plans

courts, the Supreme Administrative Court found that it does not have jurisdiction over the acts of the President, which are not administrative in nature. Similarly, the Constitutional Tribunal discontinued the proceedings on procedural grounds. It found that it cannot review the constitutionality of the act which is specified in the Constitution, and not in a statute. *See* decision of the Constitutional Tribunal of 19 June 2012, Case no. SK 37/08, and decisions of the Supreme Administrative Court: I OSK 1872/12, I OSK 1882/12, I OSK 1874/12, I OSK 1883/12, I OSK 1875/12, I OSK 1890/12, I OSK 1873/12, I OSK 1891/12, I OSK 1878/12, I OSK 1879/12, I OSK 1885/12, I OSK 1870/12, I OSK 1871/12, I OSK 1887/12, I OSK 1880/12, I OSK 1881/12, I OSK 1884/12, I OSK 1886/12, I OSK 1888/12, I OSK 1876/12, I OSK 1877/12, I OSK 1889/12.

[120] For the second time, the conflict over the judicial appointments, yet also concerning persons who are already judges in lower courts, arose in 2016 during the term of office of President Andrzej Duda.

[121] In 2014, the rejected candidates filed applications to the European Court of Human Rights but their claims were also rejected as inadmissible.

[122] The Kyiv Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, Kyiv 23-25 June 2010, http://www.osce.org/odihr/71178. *See* also a critical statement of the International Commission of Jurists of 25 October 2007, http://www.hfhrpol.waw.pl/precedens/aktualnosci/oswiadczenie-miedzynarodowej-komisji-prawnikow.html and the Consultative Council of European Judges adopted during the 9th Plenary meeting on 12-14 November 2008, http://www.hfhrpol.waw.pl/precedens/images/stories/Pdfy/deklaracja.pdf

[123] Judgment of 29 November 2007, Case no. SK 43/06.

[124] Judgment of 28 November 2007, Case no. K 39/07.

[125] Case no. SK 45/07.

[126] Judgment of 8 May 2012, Case no. K 7/10.

[127] Judgment of 24 October 2007, Case no. SK 7/06.

[128] Judgment of 12 December 2012, Case no. K 1/12.

diminishing the constitutional role of the NCJ were either dropped[129] or effectively blocked.[130]

The central point of controversy regarding the principle of separation of powers is the administrative supervision over the administration of justice in ordinary and military courts.[131] It is a recurring suggestion to entrust this function to the First President of the Supreme Court following the model of supervision over administrative courts.[132] This change would leave the MoJ with the power to decide about court organization and infrastructure, while moving some roles at the edge of administration and adjudication – like decisions on the number of judicial vacancies, judicial training, or the courts' budget - to the NCJ.[133]

While judicial self-government has been an important "check" over the executive branch's powers, the creation of the NCJ warranted that individual decisions concerning judges are institutionally separated from the judiciary. This is why the judicial appointments or promotions require the recommendation of the NCJ and the opinion of the general assembly of judges. Until recently, the opinion of the judicial self-government body was also required for the appointment and dismissal of court presidents. Further, the legislative power is restrained by the duty to consult the NCJ over draft legislation concerning the judiciary. However, the recent judicial reform has been implemented without thorough consultation with the NCJ or other stakeholders.

It should be noted however that for many years, the NCJ has had a dual role, and therefore somewhat of a vacillating position – on the one hand, it harmonized and stabilized the relationships between the executive, legislative, and judicial branches in areas concerning the independence of courts and judges, and on the other hand, it represented the administration of justice. Furthermore, in practice, the Council concentrated on matters that were vital for the members of the judiciary. Although the Council acted as a state

[129] In 2008, the government proposed to create a separate competition commission that would be in charge of the selection of candidates for judges. The NCJ objected to having only the power of "presentment" of the candidates to the President of the Republic. The reform was never passed into law.

[130] The Act on the NCJ adopted in July 2017 provided that the NCJ presents two candidates for one judicial vacancy, thus leaving the final choice to the President of the Republic. This Act was however vetoed by the President of the Republic following the severe criticism of various experts who argued that it would make the constitutional role of the NCJ, and indirectly the judicial independence, illusory.

[131] Bodnar & Bojarski, *supra* note 90, 668.

[132] This postulate needs to be reassessed nowadays due to the reconstruction of the Supreme Court, and the increase of Presidential powers in the process of appointment of the First President of the Supreme Court.

[133] Stanisław Dąbrowski, *Kilka uwag o kondycji sądownictwa*, 2 KRAJOWA RADA SADOWNICTWA 46 (2010).

organ *de facto* representing the judiciary, it took on this role due to the lack of a centralized system of communication between several levels of judicial self-government.

Since the judicial reform of 2017, the NCJ cannot be regarded as the organ representing the judiciary, because the elected judicial members have a political mandate. The political capture of the NCJ resulted in a similar transformation to that of the Constitutional Tribunal, in that it became an ally of the government. Nevertheless, the representative function has been taken up by judges' associations who not only defend the judiciary against political pressure and attacks, but also inform the public about the opinions of the judiciary on issues concerning the court system. Pitifully, the government has not recognized the main associations of judges as genuine partners and fails to involve them in a meaningful dialogue when reforming the court system.

II. Democracy

The recent judicial reform was introduced under a slogan of democratization. The change of the mode of election of the judicial members of the NCJ, as well as the introduction of lay judges to the Disciplinary Chamber of the Supreme Court, could be thus defended as rationally related to this objective. However, the slogans of democratization may also easily overshadow the real motives of the government, which is greed for power and governing via conflict.[134] By calling judges a caste, a self-interested corporation, the government not only undermines the authority of judges, but also creates a clear division between the judges and society.

Nevertheless, the roots of the division between judges and society are deeper than the populist propaganda. They are due to the growing alienation of the judiciary, which has continued since the beginning of the transition from Communism to democracy. It was thus a viable political strategy to initiate a campaign against the judiciary, knowing that society does not trust the courts. On the one hand, society complains about the complexity of court procedures and seems not to know how courts work. On the other hand, communication between courts and society has always been deficient or missing.[135] These factors contribute to the shared perception that judges are beyond social control.

In general, the social perception of the judiciary in Poland may be explained in relation to the institutional performance measured by, among other things, the time needed for settling a case in court. The excessive length of court proceedings are considered by public opinion to be the most serious problem of the administration of justice in Poland. The

[134] Ewa Łętowska, *Sądy odarte z godności*, 8 *KULTURA LIBERALNA* 2017, (Feb. 21, 2017), http://kulturaliberalna.pl/2017/02/21/ewa-letowska-wywiad-sady-reforma/

[135] Joanna Lora, *Komunikacja sądów z obywatelami – badania empiryczne, wnioski, rekomendacje zmian* (2009).

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European Court of Human Rights has also recognized it to be a systemic problem.[136] At the same time, there is a growing awareness that courts can remedy this problem. The number of claims for compensation for the breach of the right to a fair trial in a reasonable time increases every year. Finally, indicators of low societal trust in the judiciary and in judicial independence need to be viewed in light of the low trust in Polish society of the legal system as compared to other people. Surprisingly, Poles trust the legal system less than they trust other people.[137]

Part of the problem with the Polish judiciary is a consequence of the democratic transition, which was carried out primarily by legal means. In the opinion of Professor Adam Czarnota, the law has become a tool of reconstruction of public life and it was used by lawyers "to disarm the citizenry."[138] In practice, the citizens were effectively excluded from the process of law-making, as well as from the processes of its interpretation and application. This feeling of exclusion made people more susceptible to believe in the sincerity of the democratization slogan.

However, the low performance of the court system has to do with the excessive workload for the judiciary. This may also be linked to the transition to democracy. Many transitional problems such as reprivatization were to be solved in the courts and contributed to the delays in court proceedings. Additionally, the Polish judiciary inherited a specific legal culture favoring legal positivism and formalism. In Communism, the law was utilized and manipulated for political reasons, and in order to shield themselves from political pressure many judges took refuge in legal positivism. They were already trained to give priority to literal interpretation and avoided reading the law in a social context. The post-socialist legacy of the Polish judiciary could be also characterized by legal formalism, which helped judges to avoid making a final decision on the merits of a case. Even today, the administration of justice suffers from a lack of effectiveness because disputes are pending between court instances.

E. Conclusion

All social groups, regardless of their political leanings, recognize the need for judicial reform. According to the opinion polls, over 81% of respondents agree that the judiciary needs to undergo an institutional change.[139] However, the recent judicial reform has only

[136] *Rutkowski and others v. Poland*, judgment of 7 July 2015, Appl, No. 72287/10.

[137] Ocena polskiego sądownictwa w świetle badań, *supra* note 94, 19.

[138] Adam Czarnota, *Prawnicy naznaczeni socjalizmem*, *GAZETA PRAWNA* (June 11, 2017), http://prawo.gazetaprawna.pl/artykuly/1049466,prawnicy-wymiar-sprawiedliwosci-czarnota.html

[139] CBOS, Opinion poll No. 112, Warsaw (September 2017), https://www.cbos.pl/SPISKOM.POL/2017/K_112_17.PDF

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deepened the existing division in Polish society, the result of which is two opposite camps: the proponents of change (which includes the President of the Republic, Andrzej Duda, and the government, as well as the parliamentary ally of the Law and Justice party – the Kukiz 15' Movement), and its opponents (which includes the opposition parties, the Ombudsman, the First President of the Supreme Court and, paradoxically, the European Commission). In this conflict the European Commission is perceived not as a neutral arbiter, but a political actor, siding with the opposition.[140] Characteristically, the conflict developed two parallel narrations – in the first view, the government aims to remedy deficiencies in the administration of justice, while the opposition obstructs its actions; in the second view, the government violates the Constitution, and the rule of law, while the opposition and the EU attempts to stop the abuse of power.

There are a few important consequences of the reform and the harsh political attacks on the judiciary. First, society continues to manifest solidarity with judges and this credit of trust should not be wasted. Second, the judiciary realized that it needs to actively involve the public in the defense of the judicial independence and improve its communication with Polish society. Third, judges have lost their representation in the National Council of the Judiciary, and have to create alternative fora for expressing their positions vis-à-vis the government.[141] This has already been happening, as the bodies of judicial self-government have tightened their internal cooperation and called upon the government to withdraw the most critical elements of the reform.

Since the political capture of the NCJ, the Association of Polish Judges "Iustitia" has become the main independent representation of the judiciary vis-à-vis the executive and legislative branch. It formulates and communicates the opinions of the judiciary to the public. It also reacts to instances of political pressure concerning individual judges and rectifies false information disseminated by the media. In this respect, the Association of Polish Judges is protecting the image of justice and the reputation of the judiciary in society. It is also playing an important integrative role and setting standards of ethical conduct for judges who face new challenges to their independence. These standards assist judges facing the moral dilemma of whether or not to accept functions and positions offered to them by the MoJ, and how to generally reject conformity to political whims.

In sum, the main positive consequence of the reform is the integration of the judiciary in private associations of judges and other civic initiatives defending the independence of courts and judges, while the negative consequences are manifold. In the matrix of the new rules, it has again become an act of bravery to adjudicate against the interests and expectations of the ruling party. Judges need to learn how to deal with both political and

[140] 53% of respondents agree that the EU, European politicians and institutions are not neutral in this conflict.

[141] Note that the reform introduced rules that silence judges who wish to express their critical opinions about the judiciary in public. Article 89(1) ASOC.

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media pressure. This situation may only contribute to their growing frustration, since the reform has not improved the working conditions in courts. Rather, it has increased the supervision of the MoJ over the administration of justice and diminished the role of judicial self-government. In this respect, it is a regress with respect to the principle of judicial independence, and a compromise of the model of the judiciary that was accepted after the overthrow of Communism.

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