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Judicial Independence and Accountability: Withstanding Political Stress

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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,


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/int-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.
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. 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. 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. 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. 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. 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...
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. Kosar, 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).
19. See infra notes 228-325 and accompanying text.
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. PiS’s philosophy and policy aims have been consistent since the party’s founding. 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, 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. 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,

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22. See infra Part II.B.2.
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). At independence, the court systems of the previous ruling empires (Austria-Hungary, Russia, and Germany) were in place. 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. 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.

During World War II, Germany annexed large parts of Polish territory while the Soviet Union invaded other parts of the country. People in those territories became subject to the German and Soviet legal and judicial systems. 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. 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.

After World War II, a communist government took power in Poland under significant Soviet influence. 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).


29. Grzegorz Ławnikowicz, Sędziowie w autoritarnej Polsce [The Judges in Authoritarian Poland], (31) 2 KWARTALNIK KRAJOWA RAD 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.


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. For example, the communist party ultimately directed and ordered outcomes in criminal prosecutions. Some space for judicial independence opened in the post-Stalinist thaw beginning in 1956 and continued until the imposition of martial law in 1981. 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. 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. 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).

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; 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 Litynski, 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. Litynski, 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 & Stanislaw 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); an Ombudsman (1987). The Sejm adopted laws implementing the operation of the Constitutional Tribunal (1985) and Ombudsman (1987). 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. A negotiation process on sharing power commenced, and “the Roundtable” process proceeded from February 6 until April 5, 1989. The future status and operation of the judiciary was an important element of these negotiations.

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. The remaining voting was restricted to

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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.).


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 ŁUKOWSKI & 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).


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; ŁUKOWSKI & 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. Under the agreement, control of the police, under the Ministry of Internal Affairs, and of the military remained under communist party control. Solidarity negotiators insisted on a strong form of judicial independence as a counterbalance to government control of the police and military. In practice, however, President Jaruzelski generally did not impede the shaping of the government into democratic form.

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.” 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.
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”).
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


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, Lustraton 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).


60. Zamoyski, supra note 26, at 397, 398.

61. THE ECONOMIST, Change of State, supra note 21, at 29, 30; Łukowski & Zawadzki, supra note 46, at 340.

name) to form a government. 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 Katyn Forest in 1940. The plane crashed, killing everyone on board. Under Polish law, Bronisław Komorowski, the Speaker of the Sejm, assumed the duties of the president until an election could be held. At his death, Lech Kaczyński was ending his presidential term and had indicated he would seek a second term. With his death, his twin brother, Jarosław Kaczyński, became the PiS candidate for President against Komorowski, who was the PO candidate. Komorowski narrowly prevailed after two rounds of voting. In 2011, PO remained in power in the same coalition, the first reelection of a government in the post-communist period.

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.

63. Id. at 396.
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.
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. 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. 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

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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/Lehrstuhl/Sanders/Dokumente/Good_change_-_7_October_2017_-_word.pdf, (last visited Jan. 31, 2019); see also infra Part II.D and sources cited there.
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 Minster 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 Minster 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, Politizace Instituti Ustavní Odpovědnosti Jako Jedna z Příčin 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 Blida 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.
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.\(^\text{82}\) 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.”\(^\text{83}\)

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”).\(^\text{84}\) 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.”\(^\text{85}\) 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.\(^\text{86}\) 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.”\(^\text{87}\) The UNSP report focuses on three clusters of action versus the CT: conflict over appointment of the justices including the Court President; refusal to

82. See, e.g., infra notes 104-107, 132-135 and accompanying text.
83. GRECO June 2018, supra note 74, at para. 56.
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.\footnote{88. Id. at para. 22.}

In October 2015, the PO-led government appointed five judges to replace five retiring judges.\footnote{89. Piotr Czarny, \textit{Der Streit um den Verfassungsgerichtshof in Polen 2015-2016} \textit{[The Struggle over the Constitutional Court in Poland 2015-2016]}, 64 \textit{OSTEUROPARECHT} 5, 6 (2018); Andrzej Dziadzio, \textit{Quis custodiet ipsos custodes? Die Auseinandersetzung um den Verfassungsgerichtshof in Polen (2015-2016) \textit{[Who Will Supervise the Supervisors? The Conflict over the Constitutional Court in Poland (2015-2016)]}, 64 \textit{OSTEUROPARECHT} 21, 30 (2018).} 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.\footnote{90. Czarny, supra note 89, at 7.} Nonetheless, President Duda refused to swear in any of the five judges.\footnote{91. Dziadzio, supra note 89, at 26.} The new PiS-controlled government appointed five new judges and passed a resolution purporting to nullify the appointments of the PO-appointed five.\footnote{92. Czarny, supra note 89, at 17.} 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.\footnote{93. GRECO June 2018, supra note 74, at para. 12.} The Venice Commission of the Council of Europe\footnote{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 \textit{THE VENICE COMM’N OF THE COUNCIL OF EUR., For democracy through law}, http://www.venice.coe.int/WebForms/pages/?p=01_Presentation [https://perma.cc/W8NH-3J47].} 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.\footnote{95. GRECO June 2018, supra note 74, at para. 12.}

A new President of the CT was appointed with a procedure deemed questionable by the Venice Commission.\footnote{96. GRECO March 2018, supra note 74, at paras. 11, 13.} The saga also includes the government’s refusal to accept the validity of some CT judgments and publish those opinions.\footnote{97. UNSR, supra note 74, at para. 35.} After extreme criticism,
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.’”  

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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. 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. 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


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

105. GRECO June 2018, supra note 74, at para. 31.
106. Id.
(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

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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.

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

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\(^{116}\) 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.).


\(^{118}\) 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.
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.”\textsuperscript{129} Affected judges were given no reason or opportunity to appeal.\textsuperscript{130} The retirement age for judges was lowered.\textsuperscript{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.\textsuperscript{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.\textsuperscript{133} Those expanded powers include selecting judges for disciplinary courts for all ordinary court judges and the disciplinary commissioners who act as prosecutors.\textsuperscript{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).”\textsuperscript{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.\textsuperscript{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


\textsuperscript{130} \textit{GRECO June 2018, supra} note 74, at para. 45.

\textsuperscript{131} \textit{Id.} at para. 41.

\textsuperscript{132} \textit{Id.} at para. 41.

\textsuperscript{133} \textit{Id.} at para. 42.

\textsuperscript{134} \textit{Id.} at para. 50.; \textit{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.).

\textsuperscript{135} \textit{GRECO June 2018, supra} note 74, at para. 51.

\textsuperscript{136} \textit{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/74/8726,23958052,za-to-kaczyinski-zaatakowal-sedzio-w-olsztynie.html.


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 dyskusji 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 – PRZEGŁAD 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 WIADOMOSCI (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 ofjofobic, harboring a hatred of their native country.\textsuperscript{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.\textsuperscript{147} In Kaczyński’s eyes, observance of the law should not justify a judicial decision if it differs from the interest of the nation.\textsuperscript{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,\textsuperscript{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.


\textsuperscript{146} Magdalena Nowicka-Franca,\textit{ Niemiłość narodowa} [National Non-Love], 1 TYGODNIK POWSZECHNY, at 87 (2019); Za co Kaczyński zaatakował sędziów w Olsztynie,\textit{ 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-kaczyinski-zaatakowal-sedziow-w-olsztynie.html.

\textsuperscript{147} On October 17, 2018, GAZETA WYBORCZA published a special issue of their newspaper called \textit{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, \textit{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-UYPF.

\textsuperscript{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 Fryderyk Stanisław Zoll).

\textsuperscript{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, \textit{Swoi i obcy w dyskusji 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 – PRZEGŁAD 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. 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.” 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. 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.” 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.” The program describes “the hyperactivity of the Constitutional Tribunal” as one of the manifestations of impossibilism. The program decries court decisions that overturn

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152. Id. at 14.

153. Id. at 14.


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

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. 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. 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.” 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.


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; (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”).

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

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\[^{161}\] UNSR, supra note 74, at paras. 17-19.


\[^{163}\] 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. They report the Polish National Foundation spent almost PLN19 million (almost US$5.5 million) on the campaign. 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.

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. 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. The reports confirmed nearly half of the Foundation’s 2017 budget was spent on the campaign.

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:

166. Id.
168. Id.
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

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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.

PiS also rails about corrupt judges, although their documents have provided very few examples.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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,\textsuperscript{179} “hermetic” judicial disciplinary proceedings, and Poland’s broad form of judicial immunity.\textsuperscript{180}

\textbf{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

\textsuperscript{175} See \textit{Justitia’s response to Government White Paper, supra} note 157.
\textsuperscript{176} GRECO 2012 Report, \textit{supra} note 74, at para. 15.
\textsuperscript{177} Id. at para. 15 and 224, vii-xi.
\textsuperscript{178} Id. at 15; see also European Network of Councils for the Judiciary, \textit{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).
\textsuperscript{179} Kosař, \textit{supra} note 4, at 15 (commenting that civil law judicial systems generally are less transparent than those in common law countries).
\textsuperscript{180} GRECO 2012 Report, \textit{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 \textit{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,\textsuperscript{181} European Commission’s December 2017 Reasoned Proposal in accordance with Article 7,\textsuperscript{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.\textsuperscript{183} These include a multi-front effort to destabilize non-governmental organizations and organize counter “government-organized-governmental organizations;”\textsuperscript{184} government actions with regard to the public media;\textsuperscript{185} changes in criminal, police, civil service,

\textsuperscript{181} EUR. PARL. DOC. (P8_TA 2017/0442) (2017).
and counter-terrorism law; a law limiting the right of assembly; 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; issues regarding women’s reproductive health; change in laws regarding domestic violence; media reports of police surveillance of opposition and civil society leaders; and the November 11, 2017 march by far-right groups termed “xenophobic and fascist” by the November 15 European Parliament resolution. 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. Many of the previously-listed initiatives presumably would be seen by PiS as such interests.


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


organizations, in what the report describes as a “slide toward . . . illiberalism,” in the “dismant[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. 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, Report of the Stefan Batory Foundation Legal Expert Group on the impact of the judiciary reform in Poland in 2015-18, and Devastation of Poland’s Supreme Court and judicial independence: the situation now. Poland is prominently featured in Freedom House’s report, Nations in Transit 2018, Confronting Illiberalism. 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.

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


200. STEFAN BATORY FOUNDATION, supra note 81.


government.\textsuperscript{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 fulfil 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.”\textsuperscript{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.\textsuperscript{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.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{210} That visit culminated in adoption of a June 2018 Addendum to Poland’s 2012 Fourth Evaluative Report on compliance with GRECO membership standards.\textsuperscript{211} Subsection I.B.1 of this Article cites a number of factual


\textsuperscript{209}. GRECO June 2018, supra note 74, at paras. 2-8.

\textsuperscript{210}. Id. at para. 7.

\textsuperscript{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.\textsuperscript{212} The new NJC composition does not meet the GRECO standard that half of the members be judges appointed by their peers.\textsuperscript{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.\textsuperscript{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.\textsuperscript{215} GRECO also raised undue influence of the executive on appointments of the presidents and vice-presidents of the ordinary courts.\textsuperscript{216}

The European Commission for Democracy through Law (commonly called the Venice Commission) is the Council of Europe’s advisory body on constitutional matters.\textsuperscript{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,\textsuperscript{218} the Public Prosecutor’s office,\textsuperscript{219} the National Council of the Judiciary,\textsuperscript{220} the Supreme Court,\textsuperscript{221} and the Ordinary Courts.\textsuperscript{222} These Venice Commission Opinions are cited

\textsuperscript{212.} Id. at paras. 57-58.
\textsuperscript{213.} Id. at para. 57, subpart i.
\textsuperscript{214.} Id. at para. 57, subpart ii.
\textsuperscript{215.} Id. at para. 57, subparts iv, v, and vi.
\textsuperscript{216.} Id. at para. 57, subparts iv, v, and vi.
\textsuperscript{217.} See THE VENICE COMM’N OF THE COUNCIL OF EUR., supra note 94.
\textsuperscript{211.} Id.
\textsuperscript{221.} Id.
\textsuperscript{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.\(^\text{223}\)

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, 2017\(^\text{224}\) and August 30, 2017\(^\text{225}\) the UN Human Rights Committee report on October 31, 2016\(^\text{226}\) and Canada’s intervention on May 9, 2017 at the UN Human Rights Council Universal Periodic Review of Poland.\(^\text{227}\)

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\(^\text{223}\) 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-communization” have so many resemblances to the Soviet system).


\(^\text{226}\) EUR. PARL. DOC., supra note 192, at 4.

\(^\text{227}\) 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.” 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. 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. When the Commission adopted the 2014 Framework document, the TEU Article 7 had never been activated.

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. 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.”


230. TEU, art. 7.


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. Acting within the Framework, the EC made Rule of Law Recommendations to Poland on July 27, 2017, December 21, 2016, and July 27, 2016. Finding the Polish government’s response inadequate, the Commission issued a fourth Rule of Law recommendation on December 20, 2017. 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.

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

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239. EC Reasoned Proposal, supra note 234.


approach with Article 7.\textsuperscript{242} The General Affairs Council of the Council of the European Union has held three formal hearings on the Article 7 proceeding against Poland.\textsuperscript{243} The European Parliament Committee on Civil Liberties, Justice and Home Affairs made a mission to Poland on September 19-21, 2018\textsuperscript{244} with a follow-up hearing on November 20, 2018 in Brussels.\textsuperscript{245}

On May 2, 2018, the European Commission presented a proposed European Union budget for 2021-2027.\textsuperscript{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.”\textsuperscript{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.”\textsuperscript{248} One of those is “effective review by independent courts.”\textsuperscript{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

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  \item \textsuperscript{242} EUR. PARL. RES. SERV., supra note 228, at 3.
  \item \textsuperscript{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).
  \item \textsuperscript{249} Id.
\end{itemize}
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from the EU budget is sufficiently protected.” On January 17, 2019, the European Parliament approved the proposed regulation by a vote of 394 in favor, 158 against, and 69 abstentions. Final approval must come from the Council.

European Union money has represented more than sixty-one percent of Poland’s infrastructure spending, and currently Poland is the largest beneficiary of European Union funds, receiving “some 14 billion euro annually.”

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.

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

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250. Id.


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


Fundamental Rights. 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.

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. 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. 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. 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

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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.\textsuperscript{261} On November 16, 2018, the CJEU President ordered that the matter be determined under the CJEU’s expedited procedures.\textsuperscript{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.\textsuperscript{263}

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

\textsuperscript{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].


\textsuperscript{265} Monika Ścisłowska, Polish leader appoints top court judges, against ruling, AP NEWS, (Oct. 10, 2018), https://apnews.com/72f55291a715434b62e32707f3c8bede9 [https://perma.cc/76G7-8HP8].
Kaczyński said Poland would fight the October 19 CJEU order.\textsuperscript{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.”\textsuperscript{267} Perhaps because of the PiS party’s poor showing in urban areas in the local elections in October and November 2018,\textsuperscript{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.\textsuperscript{269} After passage, by the Polish Senate, President Duda signed the bill into law on December 10, 2018.\textsuperscript{270} Poland now asserts that the infringement action should be dropped because Polish law is in compliance.\textsuperscript{271} The European Commission and at least four Member States argue that the questions of European treaty law involved should still be decided.\textsuperscript{272}

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\item \textsuperscript{267} Id.
\item \textsuperscript{268} 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 (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/27508be038e54ed281034d0f2beb0000 [https://perma.cc/YK8Y-PLRM].
\item \textsuperscript{269} Vanessa Gera, Poland moves to reinstate retired judges to Supreme Court, AP NEWS, (Nov. 21, 2018), https://www.apnews.com/9e4251bb43c8422ab1f0b4d0b7ea2 [https://perma.cc/J2NU-3CVX].
\item \textsuperscript{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.
\item \textsuperscript{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-najwyszszym.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.
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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 proceeding\(^{276}\) 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 press\(^{279}\) drew swift condemnation from the Association of Judges of Ireland.\(^{280}\)

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\(^{274}\) Id.


\(^{276}\) 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.


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. 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. 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.”

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. 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.” 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.
283. Id. at para. 79.
284. Id. at para. 34.
“were independent and subject only to the Polish constitution and laws.” 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.”

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. 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. On January 4, 2019, a Dutch court decided to temporarily suspend extradition of eleven people with Polish European arrest warrants. 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.”

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

286. Id.
287. Id.
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_coment&view=article&id=19162:2019-01-06-10-03-15&catid=77:h [https://perma.cc/9EJR-R4ZB].
291. Id.
referred five questions to the CJEU.\textsuperscript{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.\textsuperscript{294} Two of the judges on adjudicating panels would be affected by the new provisions.\textsuperscript{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.\textsuperscript{296}

This case was set for argument in the CJEU on February 12, 2019 but was removed from the CJEU calendar.\textsuperscript{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.\textsuperscript{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.\textsuperscript{299} Terminating the August 2018 Article 267 preliminary ruling, however, would not in itself dispose of


\textsuperscript{294.} Id.


\textsuperscript{296.} Id. at para. 14.

\textsuperscript{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-krs.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).

\textsuperscript{298.} Supra notes 264-272 and accompanying text.

\textsuperscript{299.} POLSKIE RADIO, supra note 297.
the Article 258 infringement case brought by the European Commission.  
Belgium, the Netherlands, Latvia, and Denmark filed comments saying the Article 267 matter should still be decided by the CJEU.

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. 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.

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. 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. 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.

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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].


305. See Joined Cases, para. 6.

306. Id., para. 13.
other two appeals were from Supreme Court judges facing retirement at 65. 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. 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. These cases are reported to be scheduled for hearing on March 19, 2019.

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. 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.
5. Polexit?

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.” The specter of de facto Polexit 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.” 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 Polexit—a departure of Poland from the Western legal sphere. 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-a6e5-792428919c37 [https://perma.cc/5SPE-YVV5].
314. Bartosz T. Wieliński, Odpowiedź Trybunału Sprawiedliwości UE udzielona (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/7,759682371547,odpowiedz-trybunalu-sprawiedliwosci-udzielona-irlanskiej.html [https://perma.cc/XV2W-RPZ4]; M. Mateczak: Polska w B-klasie praworządnosci – 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. 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. This brought a stern rebuke from the CJEU President that this would put Poland outside the EU

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, Minster 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. 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.” A flurry of commentary referred to this as another manifestation of Polexit from the EU legal system.

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


See supra notes 264-66 and accompanying text.

See supra note 267 and accompanying text.


Id.


Tomasz Pietryga, Ziobro odnawia lęki o polexit - komentuje Tomasz Pietryga [Ziobro renews fears about polexit - 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 Polexit 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 Prokuratorii (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

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-deczji-rady-nie-bedzie.html#nowaZajawkaGlownaMT.
323. Id.
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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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 Kraśnicka, supra note 2, at 704.

\textsuperscript{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); STRZEMBIÓŚ & ZAKROCZYMSKI, supra note 39, at 194-95 (rationale for and history of vesting power in local judicial assemblies in December 1989 legislation).

\textsuperscript{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.\textsuperscript{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 \textit{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.\textsuperscript{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 \textit{Gutachtenstil} system.\textsuperscript{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.\textsuperscript{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.\textsuperscript{335}

\textsuperscript{331} Kraśnicka, supra note 2, at 704.
\textsuperscript{332} Id. at 698.
\textsuperscript{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.


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. 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.
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

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. 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.

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. 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,” devotes about half of the text to matters pursued against judges through the new disciplinary apparatus. 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


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-MCeD6Ooe&sns=em [https://perma.cc/98BR-UPWK].

with a better understanding of court work. 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. 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. Instead of saying such activities were not disciplinary violations, he said the judges were not aware their actions were violations. A week later, though, the disciplinary spokesperson said that Judge Frąckowiak would be prosecuted for her taking excessive time in a number of proceedings. 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.


347. Id.

348. Id.


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 Gależyńska, Sądowy 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/sadowictwo-jak-rzad-zamierza-karac-sedziow/vkq07dd [https://perma.cc/CM4G-VTDJ].

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 Lodz 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.

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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{358} Most of the eighteen applicants were judges seconded to the Ministry of Justice.\textsuperscript{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.\textsuperscript{360} Most judges also refused to apply for the forty-four openings announced for the Supreme Court.\textsuperscript{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.
but, so that they would have standing to challenge the appointment process.\textsuperscript{362}

Judges have organized congresses adopting resolutions against government undertakings and legislative measures.\textsuperscript{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.\textsuperscript{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.\textsuperscript{365}

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

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. 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.
The resolution outlines some pertinent examples including demotion of 113 prosecutors and involuntary transfers to other cities as quasi-disciplinary penalties. 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. 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. 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.

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. 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. 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. Kosař contrasts the many years that established democracies have had to create this identity with the short

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372. Id.
373. Id.
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 awaken.\(^{381}\) 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.


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. 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. 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.

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;
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 be anticipate the Chamber will be used as

385. See supra note 102 and accompanying text.
an “accountability perversion.”

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. 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.

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. KOSAR, 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 Kaczynski’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-B97I]

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. 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.

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. 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.
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.