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## Polish Road Toward an Illiberal State: Methods and Resistance

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## **Polish Road toward an Illiberal State: Methods and Resistance**

*Addison C. Harris Lecture, Indiana University, Maurer School of Law*

ADAM BODNAR\*

*Since 2015, Poland has experienced a backsliding in democratic and rule of law standards. The ruling party, “Law and Justice,” has adopted a series of legislative changes affecting the independence of courts and checks and balances mechanisms. Some reforms were copied from Hungary, which, as the first Member State of the European Union, started the way toward illiberal democracy in contemporary Europe. Despite pressure from international organizations, the process of changes in Poland did not stop. However, it is important to look at methods implemented to dismantling democracy, as they can be used in other countries. This paper also analyzes different forms of domestic and international resistance toward non-democratic changes, including the special role of civil society and lawyers, as well as monitoring and judicial mechanisms used by the European Union.*

*Keywords: Poland, Illiberal Democracy, Human Rights, Rule of Law, Civil Society, European Union, Ombudsman, Federalism, Judicial Independence, International Organizations, Authoritarianism*

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#### INTRODUCTION

On November 15, 1989, Lech Wałęsa, leader of the Solidarity trade union in Poland, who later became the Poland’s President, delivered a speech to the US Congress. It was a symbolic moment for Poland, which had recently begun the democratic process after regaining full independence, following the partially free parliamentary elections held on June 4, 1989. In his speech, Lech Wałęsa thanked both the U.S. government and the American people for supporting democracy’s cause in Poland. He started his speech with the words “We the People.”<sup>1</sup>

With this speech, Poland started on its path toward becoming a constitutional democracy and member state of the Council of Europe, the North Atlantic Treaty Organization (NATO), and the European Union (EU). Shortly after, Poland became a market economy that experienced continuous growth and is commonly regarded as an economic success story, apart from macroeconomic destabilization and

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1. “‘We the People.’ With these words I wish to begin my address. I do not need to remind anyone here where these words come from. And I do not need to explain that I – an electrician from Gdansk – am also entitled to invoke them.” President Lech Wałęsa, Address to a Joint Session of the United States Congress (Nov. 15, 1989) (transcript available at <http://10-25.pl/we-the-people/> [<https://perma.cc/LQV8-CM7T>]).

hyperinflation that occurred just after 1989.<sup>2</sup> But let us take another snapshot. Just thirty years after President Lech Wałęsa's speech, Poland was subjected to the EU's rule of law mechanism, a procedure implemented to address threats to rule of law in EU Member States.<sup>3</sup> Currently, Poland is the only EU member state subject to this special monitoring procedure by the Council of Europe's Monitoring Committee.<sup>4</sup> In order to defend their constitutionally dictated independence, Polish judges organized the One Thousand Gowns demonstration, with the support of judges from twenty other EU member states.<sup>5</sup> The demonstration, which took place in January of 2020, was a protest against proposed changes to the Polish judicial system. It has also become a symbol of strong solidarity among EU Member States' judges, as representatives of more than twenty Member States participated in this demonstration. Finally, that same month, U.S. Congressmen Eliot Engel and Bill Keating, who sit on the House Committee on Foreign Affairs, wrote a joint letter to Polish President Andrzej Duda, in which they called on Polish authorities not to adopt a so-called "muzzle law," aimed at silencing judges. In their letter, Representatives Engel and Keating claimed that "[e]nacting this law would represent a significant step backward for Poland's historically strong leadership in democratic reforms in Europe. The erosion of democratic principles would undermine the great strides Poland has made through the decades to build a modern, democratic country."<sup>6</sup>

These snapshots raise a few questions: How did this constitutional crisis happen? Why was such a dramatic change possible? What went wrong? Are these events part of a general trend or specific to Poland?

These questions can be answered by presenting the story of the dismantling of the rule of law in Poland. This story is far from being over, as the dismantling process is not completed. Some of the methods and strategies implemented by ruling party may be regarded as almost a playbook for other autocratic regimes.<sup>7</sup> However, due to resistance from civil society, judges' and prosecutors' organizations, political opposition, and international organizations from numerous stakeholders, the situation in Poland may still improve, and the country may come back to a democratic track.

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2. Stanisław Gomułka, *Poland's Economic and Social Transformation 1989–2014 and Contemporary Challenges*, 16 *CENT. BANK REV.* 1, 19 (2016).

3. Commission Recommendation 2018/103 of 20 December 2017 Regarding the Rule of Law in Poland Complementary to Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, C/2017/9050, 2018 O.J. (L 17) 50, 50–64.

4. Eur. Parl. Ass., *The Functioning of Democratic Institutions in Poland*, 1st Sess., Res. No. 2316 (2020), <http://assembly.coe.int/nw/xml/XRef/XRef-XML2HTML-en.asp?fileid=28504&lang=en> [<https://perma.cc/B63F-38BC>].

5. Christian Davies, *Judges Join Silent Rally to Defend Polish Justice*, *THE GUARDIAN*, (Jan. 12, 2020, 2:17 AM), <https://www.theguardian.com/world/2020/jan/12/poland-march-judges-europe-protest-lawyers> [<https://perma.cc/3QUF-GTV5>].

6. Letter from Eliot E. Engel & Bill Keating, Reps., U.S. House of Reps., to Andrzej Duda, President of the Republic of Pol. (Jan. 17, 2020), <https://foreignaffairs.house.gov/2020/1/engel-and-keating-urge-polish-president-to-reject-dangerous-judicial-reforms> [<https://perma.cc/CN9W-TN83>].

7. WOJCIECH SADURSKI, *POLAND'S CONSTITUTIONAL BREAKDOWN*, 269–70 (2019).

## I. TRAJECTORY OF CHANGES IN POLAND

A. *Political Background of Changes*

In order to understand the situation in Poland, one must examine the trajectory of legal and political changes in the country. It is important to note that these changes did not happen overnight. Rather, they resulted from a long process of political and legal actions aimed at dismantling constitutional guarantees and safeguards.

Poland's current ruling party, "Law and Justice," came to power as a result of parliamentary elections in October 2015. Jarosław Kaczyński, leader of the party, had proclaimed in 2011 that he wanted to build "Budapest in Warsaw."<sup>8</sup> He praised the reforms made in Hungary by its strongman, Viktor Orbán. Orbán has managed to transition the country from a constitutional democracy to an illiberal state by using parliamentary majority, changing the operation of different independent institutions, and having so-called "constructive dialogue" with international institutions (especially the EU).<sup>9</sup> At the same time, he secured relative economic stability for Hungarian people and was highly efficient in using different propaganda techniques, including promotion of a nationalistic agenda.<sup>10</sup>

B. *Subordination of the Constitutional Court*

The process of change in Poland started with an attack on the independence of the Constitutional Court by the "Law and Justice" party after its failure to win the constitutional majority. The attack consisted of a few legislative changes aimed at changing the operation of the Constitutional Court and packing the Constitutional Court with three newly appointed judges, although seats for those judicial positions had been filled by the previous Parliament. The court-packing scheme began when President Andrzej Duda decided not to swear in judges that had been appointed by the 2011–2015 Parliament. Soon after, the new Parliament, controlled by the Law and Justice party, annulled the judicial nominations that had been made by the

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8. "Przyjdzie dzień że w Warszawie będzie Budapeszt" ["The day will come when there will be Budapest in Warsaw"], TVN24 (Oct. 9, 2011, 8:57 PM) (Pol.), <https://tvn24.pl/polska/przyjdzie-dzien-ze-w-warszawie-bedzie-budapeszt-ra186922-3535336> [<https://perma.cc/LVN7-BBTF>].

9. Kim Lane Scheppele, *Understanding Hungary's Constitutional Revolution*, in CONSTITUTIONAL CRISIS IN THE EUROPEAN CONSTITUTIONAL AREA: THEORY, LAW AND POLITICS IN HUNGARY AND ROMANIA 111, 124–37 (Armin von Bogdandy & Pál Sonnevend, eds., 2015).

10. For more discussion on the building of an illiberal state both in Poland and in Hungary, see Timea Drinóczi & Agnieszka, Bień-Kacała, *Illiberal Constitutionalism: The Case of Hungary and Poland*, 20 GERMAN L.J., (2019), 1140, 1142–48. See also Anne Applebaum, *Illiberal Democracy Comes to Poland*, WASH. POST (Dec. 22, 2016), <https://www.washingtonpost.com/news/global-opinions/wp/2016/12/22/illiberal-democracy-comes-to-poland/> [<https://perma.cc/E8QA-H6GS>]; Jacques Rupnik, *Illiberal Democracy in East-Central Europe*, 6 ESPRIT 69–85 (June 2017), [https://www.cairn-int.info/article-E\\_ESPRI\\_1706\\_0069--illiberal-democracy-in-east-central-euro.htm](https://www.cairn-int.info/article-E_ESPRI_1706_0069--illiberal-democracy-in-east-central-euro.htm) [<https://perma.cc/JP3K-X42L>]. For an interesting portrayal of changes in Poland and in Hungary as examples of national populism, see ROGER EATWELL & MATTHEW GOODWIN, NATIONAL POPULISM: THE REVOLT AGAINST LIBERAL DEMOCRACY (2018).

previous Parliament. The Parliament then elected different judges, who were immediately sworn in by the President in the middle of the night. Over the next several months, a few more judicial positions became vacant and were filled in with new judges selected by the Law and Justice party. As a result, by the end of 2016, the Law and Justice party had installed a majority of loyal judges in the Constitutional Court and secured the election of a chief justice loyal to the party's cause.<sup>11</sup>

Since January 2017, the Constitutional Court is no longer an independent constitutional body exercising judicial review. Chief Justice Julia Przyłębska, who was appointed in December 2016 and is strongly connected with the ruling party (Julia Przyłębska's husband is the Ambassador of Poland in Germany), started to have influence over the Constitutional Court's daily operation, including over its docket. Moreover, in cases of political significance, the composition of judicial panels has been manipulated so as to exclude any dissenting voices. The Constitutional Court operates, but its independence and effectiveness are mostly a façade. Moreover, sometimes the court's power is used as a mechanism to legitimize legislative acts made by the Law and Justice party.<sup>12</sup>

The political subordination of the Constitutional Court soon became the subject of close observation by numerous international bodies. The Venice Commission, an advisory body of the Council of Europe (but also with membership of the United States) focused on constitutional law, issued significant opinions on the matter.<sup>13</sup> The European Union started its first monitoring actions, by implementing its so-called "Rule of Law" procedure provided in Article 7 TEU. This issue was also raised by President Barack Obama during the NATO summit that took place in Warsaw in the summer of 2016.<sup>14</sup> Nevertheless, the international criticism and domestic protest (including massive demonstrations organized by the Committee to Protect Democracy) did not stop the Law and Justice party from moving forward with its authoritarian agenda. It was clear to Mr. Jaroslaw Kaczynski, the party's leader, that the Constitutional Court's power to exercise judicial review was crucial to change the system of government in Poland, without actually changing the text of the Polish Constitution.

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11. The process of changes in the composition and in the legislative basis for operation of the Constitutional Court has been subjected to review by the Venice Commission. See Venice Comm'n, *Opinion on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland*, COUNCIL OF EUR. (Mar. 11, 2016), [https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD\(2016\)001-e](https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e) [<https://perma.cc/RW8B-L3YG>]; Venice Comm'n, *Poland: Opinion on the Act on the Constitutional Tribunal*, COUNCIL OF EUR. (Oct. 14, 2016), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)026-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)026-e) [<https://perma.cc/6HR9-57FR>].

12. Wojciech Sadurski, *Polish Constitutional Tribunal Under PiS: From an Activist Court, to a Paralyzed Tribunal, to a Governmental Enabler*, 11 HAGUE J. ON THE RULE L. 63, 77 (2019).

13. See *supra* note 11.

14. *Remarks by President Obama and President Duda After Bilateral Meeting*, U.S. MISSION TO THE NATO (July 8, 2016), <https://nato.usmission.gov/remarks-president-obama-president-duda-poland-bilateral-meeting/> ("That's what make us democracies — not just by the words written in constitutions, or in the fact that we vote in elections — but the institutions we depend upon every day, such as rule of law, independent judiciaries, and a free press.").

*C. Changes in the Operation of Other Independent State Bodies*

In 2016, while public attention was focused on the fate of the Constitutional Court, the Polish Parliament passed a few legislative acts that increased the powers of the state apparatus.

First, the Office of the Public Prosecutor General was merged with the Office of the Minister of Justice.<sup>15</sup> This merged system had existed in Poland from 1989 until 2010, when the Prosecutor General was made independent of the executive power. However, this independence ended with the 2016 “reform” of the Prosecutor’s Office, aimed at creating a hierarchical subordination of all prosecutors in the country. Moreover, the Prosecutor General gained the individual right to decide on almost any investigation in the country after being given the power to change or revoke the decisions of subordinate public prosecutors. Furthermore, since 2016, a number of integral and professional prosecutors have been removed from their positions or demoted.<sup>16</sup> Some of them established the Association of Prosecutors “Lex Super Omnia,” which actively monitors policies and practices of the Prosecutors’ Office.

Second, two legislative acts increased the powers of governmental intelligence forces in terms of surveillance and anti-terrorist policies. As a result, these groups have a very broad surveillance mandate, and they work with almost no democratic oversight.<sup>17</sup>

Third, the non-partisan character of the civil service was abolished. This change was a strategic decision dating back to 1989, when the independent character of the civil service was established.<sup>18</sup> But this independent model was in fact abolished with a simple legislative act, allowing for purely political nominations to a number of higher positions in the civil service.<sup>19</sup>

The above changes were all accomplished with legislative acts. Moreover, all of them were challenged before the Constitutional Court for lack of compliance with the Constitution. However, the Constitutional Court was so overwhelmed with the fight for its own independence that it did not manage to make a review of these laws.

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15. Venice Comm’n, *Poland: Opinion on the Act on the Public Prosecutor’s Office as Amended*, COUNCIL OF EUR. (Dec. 11, 2017), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)028-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)028-e) [<https://perma.cc/9FNZ-54K7>].

16. *Prokuratura pod specjalnym nadzorem. Kadry i postępowanie „dobrej zmiany”* [The Prosecutor’s Office Under Special Supervision. Staff and way of operation of “good change”], FORUM OBYWATELSKIEGO ROZWOJU [FORUM FOR CIVIC DEVELOPMENT] (Nov. 26, 2018), <https://for.org.pl/pl/a/6413,raport-prokuratura-pod-specjalnym-nadzorem-kadry-i-postepowanie-dobrej-zmiany> [<https://perma.cc/HD3X-6J7C>].

17. Venice Comm’n, *Poland: Opinion on the Act of 15 January 2016 Amending the Police Act and Certain Other Acts*, COUNCIL OF EUR. (June 13 2016), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2016\)012-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2016)012-e) [<https://perma.cc/AD99-73XM>].

18. JACEK KOZŁOWSKI & ROBERT SOBIECH, SŁUŻBA CYWILNA DZIŚ I JUTRO. KLUCZOWE PROBLEMY I PROPOZYCJE ROZWIĄZAŃ [CIVIL SERVICE TODAY AND TOMORROW: KEY PROBLEMS AND PROPOSED SOLUTIONS] (2020) (Pol.), <https://www.batory.org.pl/wp-content/uploads/2020/09/Sluzba-cywilna-dzis-i-jutro.pdf> [<https://perma.cc/96MR-R6GS>].

19. Ustawa z dnia 30 grudnia 2015 r. o zmianie ustawy o służbie cywilnej oraz niektórych innych ustaw [The Act of 30 December 2015 Amending the Civil Service Act and Certain Other Acts], 2016 r. Dz. U. poz. 34 (Pol.).

After 2017, the Constitutional Court—under new politically loyal leadership—was not interested in examining the actions of the legislature. Some of the petitions have been withdrawn from the Constitutional Court (e.g., by the Ombudsman).

But there was one more change that happened at that time. The Polish Parliament adopted a new law on public broadcasting. This law enabled the ruling party to appoint its own loyal manager and officers to steer public radio and television. In Poland this is a strong instrument of power, since public radio and television reach the entire country, including rural areas (where there is no cable television with access to independent TV channels). As a result, public radio and television became a source of governmental propaganda and disinformation, with huge public funding. A number of independent, just, and integral journalists have been fired.<sup>20</sup> Public television is using manipulative information techniques, targeting critics with defamation lawsuits,<sup>21</sup> and organizing hate campaigns against selected politicians, activists, professional groups (e.g., judges), and thinkers. These changes have had a tremendous impact on the outcomes of elections.<sup>22</sup>

The Public Broadcasting Law was subject to review by the Constitutional Court in its old composition. The Constitutional Court made a judgment in a panel composed of three judges nominated before “Law and Justice” took the power. In its judgment of December 13, 2016, the Constitutional Court found provisions on the appointment of top-level public media officers to be unconstitutional.<sup>23</sup> However, this judgment has been just ignored by the government. It has never been implemented. Because the prosecutor’s office is subject to political control by the ruling majority, there is a limited chance of any criminal responsibility for disobeying constitutional obligations or abusing the law. Therefore, since 2017, it has become more common for governmental negligence in the adoption of different laws simply to go unpunished.

#### *D. Attack on Independence of the Judiciary*

In 2017, the Law and Justice party began to dismantle judicial independence in Poland. The process of making changes in the judiciary was complicated. As Steven

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20. For a list of journalists who were subject to reprisals by the Law and Justice party, see “Dobra zmiana” w mediach [*The “Good Change” in the Media*], TOWARZYSTWO DZIENNIKARSKIE [SOCIETY OF JOURNALISTS] (Pol.), <http://towarzystwodziennikarskie.pl/dobra-zmiana-w-mediach/> [<https://perma.cc/B2ZB-AD9K>].

21. The major opponent of the ruling party among intellectuals is Wojciech Sadurski. See Gráinne de Búrca, John Morijn, & Maximilian Steinbeis, *Stand with Wojciech Sadurski: His Freedom of Expression is (Y)ours*, VERFASSUNGSBLOG (NOV. 18, 2019), <https://verfassungsblog.de/stand-with-wojciech-sadurski-his-freedom-of-expression-is-yours/> [<https://perma.cc/V8LG-Z7JU>].

22. See OFF. FOR DEMOCRATIC INSTS. & HUM. RTS. [ODIHR], ORG. FOR SEC. & COOP. IN EUR. [OSCE], REPUBLIC OF POLAND: PRESIDENTIAL ELECTION 28 JUNE AND 12 JULY 2020, <https://www.osce.org/files/f/documents/6/2/464601.pdf> [<https://perma.cc/F9DY-75NF>].

23. Judgment of the Constitutional Tribunal 13 December 2016 (No. K 13/16) (Pol.). See Press Release, Trybunał Konstytucyjny, Press Release After the Hearing: The Act Amending the Broadcasting Act (Dec. 13, 2016), <https://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/9516-ustawa-o-zmianie-ustawy-o-radiofonii-i-telewizji> [<https://perma.cc/GYG9-8URS>].



Levitsky and David Ziblatt argue, the process of eliminating referees, the enemies of any autocrat, does not take place overnight.<sup>24</sup> In Poland's case, this process was accomplished through a series of laws. But before going into details, one should understand how it was at all possible. There were the following reasons behind it:

– The Constitutional Court could not effectively exercise judicial review, because it had become a politically subordinated institution effectively controlled by the ruling party.

– There was a real need to reform Polish courts, due to their lack of efficiency and some problems with judicial accountability. As a result, it was much easier for the government to argue that the judiciary needed reform. At the same time, the public had a limited capability to understand the real objective of the reforms, i.e. the political subordination of the judiciary.

– The general understanding of the rule of law and the importance of judicial institutions to the lives of regular citizens is quite low in Poland. Reforms aiming to create a rule of law started in 1989.<sup>25</sup> Apparently, the period of twenty-five years that followed was not long enough to embed the importance of judicial independence into people's legal awareness. Therefore, it was relatively easy for the government to attack courts and judges.

Between 2017 and 2020, the Parliament, controlled by the Law and Justice party, and supported by a loyal President of the Republic, managed to adopt several laws aimed at restricting judicial independence. It would exceed the limits of this article to present the whole legislative history and content of those laws in detail. Nevertheless, it is important to examine the most important changes introduced by those laws.

### 1. Court Presidents

The legislation adopted in 2017 amending the organization of Poland's common courts opened the window of opportunity for the Minister of Justice, Zbigniew Ziobro, to dismiss and replace all presidents of common courts without consulting the judges sitting in those courts. Thanks to this change in legislation, the Minister of Justice has violated the traditional rule of consulting judges before nominating their superiors, shortened the terms of previous court presidents, and filled those newly vacant positions with people loyal to the Law and Justice party. In the Polish legal system, court presidents have a lot of administrative powers with respect to judges. The personal opinions of court presidents may also influence the future careers of judges in a given court.<sup>26</sup>

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24. STEVEN LEVITSKY & DANIEL ZIBLATT, *HOW DEMOCRACIES DIE* 78–80 (2018).

25. One of the best books on this period is MARK BRZEZINSKI, *THE STRUGGLE FOR CONSTITUTIONALISM IN POLAND* (1998).

26. Two former vice-presidents of the Kielce Regional Court have submitted complaints to the European Court of Human Rights after being prematurely dismissed from their posts by the Ministry of Justice as a result of this new legislation. On June 29, 2021, the European

## 2. National Council of the Judiciary

Pursuant to the Polish Constitution, the major organ responsible for judicial nominations in Poland is the National Council of the Judiciary (NCJ) (*Krajowa Rada Sądownictwa, KRS*). The NCJ comprises twenty-five representatives of different branches of power, fifteen of whom are judges. According to the traditional interpretation of the Polish Constitution, the judicial members should be elected by their peers. But the Constitution does not mandate it with precise clarity. As a result of this ambiguity, the Parliament led by the Law and Justice party changed the method of appointing judicial members and shortened the terms of previous NCJ members.<sup>27</sup> Under this new legislation, judicial members of the NCJ are elected with by a three-fifths majority in Sejm (the lower chamber of the Parliament). Thus, the process of nominating new judges to the NCJ has been politically secured by the ruling party, and only loyal judges are now elected to this constitutional body. Not long after these changes were implemented, the NCJ in its new composition participated in a process of judicial nominations to the newly created two chambers of the Supreme Court (Chamber of Extraordinary Control and Public Affairs and the Disciplinary Chamber).<sup>28</sup> The status of the NCJ is the subject of questioning at the EU level.<sup>29</sup> Moreover, the NCJ's status as a member of the European Network of Councils for the Judiciary (ENCJ) has been suspended.<sup>30</sup>

## 3. The Supreme Court and the Disciplinary Mechanism

Under Polish law, the Supreme Court is the top judicial organ reviewing extraordinary appeals against final judgments in civil, labor, and criminal matters. It also adjudicates cases concerning electoral or regulatory issues. In 2017, the Law and Justice party tried to undermine the independence of the Supreme Court. The

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Court of Human Rights decided that Article 6 of the European Convention on Human Rights has been violated in their case, as they could not challenge the decision on premature dismissal to any court. The ECtHR has awarded 20.000 EUR compensation for pecuniary and non-pecuniary damages to each of them; *Broda and Bojara v. Poland*, Applications no. 26691/18 and 27367/18, Chamber Judgment of June 29, 2021.

27. Two former members of the NCJ have also submitted their cases to the European Court of Human Rights concerning the termination of their membership in the NCJ: *Grzęda v. Poland*, App. No. 43572/18 (July 9, 2019), <http://hudoc.echr.coe.int/eng?i=001-194853> [<https://perma.cc/G7CL-7DYX>]; *Żurek v. Poland*, App. No. 39650/18 (May 20, 2020), <http://hudoc.echr.coe.int/eng?i=001-202650> [<https://perma.cc/5VQ2-QGLR>].

28. See *infra* Section I.D.3.

29. See, e.g., European Commission, *2020 Rule of Law Report: Country Chapter on the Rule of Law Situation in Poland* 3–4 (Staff Working Document No. SWD (2020) 320 final, Sept. 30, 2020) [https://ec.europa.eu/info/sites/default/files/pl\\_rol\\_country\\_chapter.pdf](https://ec.europa.eu/info/sites/default/files/pl_rol_country_chapter.pdf) [<https://perma.cc/8S6X-44YE>].

30. The decision to suspend the NCJ's membership in the ENCJ was made by the ENCJ General Assembly on September 17, 2018. *ENCJ Suspends Polish National Judicial Council – KRS*, Eur. Network of Councils for the Judiciary, <https://www.encj.eu/node/495> [<https://perma.cc/7HLS-WYKH>]. Currently, the ENCJ is contemplating expulsion of the NCJ. See *Position Paper of the Board of the ENCJ on the Membership of the KRS (Expulsion)*, at 9–10 (May 27, 2020), <https://www.encj.eu/index.php/node/556> [<https://perma.cc/E36L-BFR6>].

Parliament passed new law that changed the organization of the Supreme Court. It provided that all judges of the Supreme Court would be retired, except those selected by the Minister of Justice. However, this law—due to its radical nature and massive people’s protests<sup>31</sup>—was vetoed by the President of Poland. Nevertheless, under a couple of new legislative acts (that were later on revised a few times in order to achieve an intended political objective) a lot of other changes have been introduced. Most importantly:

– The retirement age for judges of the Supreme Court was decreased from seventy to sixty-five. As a result of this change, which was applied to the judges sitting on the Supreme Court at the time, twenty judges were forced into retirement. This provision applied also to the First President of the Supreme Court, whose constitutional six-year term was shortened by this provision. However, due to intervention by the Court of Justice of the European Union,<sup>32</sup> judges pushed into retirement were able to come back to adjudication.<sup>33</sup>

– A new disciplinary system for judges has been created.<sup>34</sup> New legislation pushed by the ruling party has created a new framework for disciplinary procedures against judges.<sup>35</sup> At the center of this framework are: top disciplinary judges, who are empowered to bring disciplinary cases against judges, appointed by the Minister of Justice, and the Disciplinary Chamber of the Supreme Court, fully appointed in 2015 by the NCJ in a new composition. This new disciplinary system creates many possibilities to exert influence on judges’ behavior, and it is being used to target members of judicial associations and judges who have protested against the ruling party’s threats to judicial independence.<sup>36</sup> Moreover, the so-called “muzzle law” adopted in 2020 created additional possibilities for the Law and Justice party, acting

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31. Rick Lyman, *In Poland, an Assault on the Courts Provokes Outrage*, N.Y. TIMES (July 19, 2017), <https://www.nytimes.com/2017/07/19/world/europe/poland-courts-law-and-justice-party.html> [<https://perma.cc/2HEC-W6NB>].

32. Court of Justice of the European Union Press Release No. 159/18, Order of the Vice-President of the EU Court of Justice in Case C-619/18 R, *Commission v Poland*: 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) [hereinafter Order of the Vice-President of the EU Court of Justice in Case C-619/18].

33. Case C-619/18, *Comm’n v Poland*, ECLI:EU:C:2019:531 ¶¶ 95–97 (June 24, 2019).

34. Katarzyna Gajda-Roszczyńska & Krystian Markiewicz, *Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland*, 12 HAGUE J. ON RULE L. 451, 456–57 (2020).

35. A remarkable report concerning the system of disciplinary proceedings against Polish judges, including its practical application, was prepared in 2019 by the Batory Foundation. BATORY FOUND. & THE EUROPEAN STABILITY INITIATIVE, *THE DISCIPLINARY SYSTEM FOR JUDGES IN POLAND: THE CASE FOR INFRINGEMENT PROCEEDINGS* ¶¶ 17–33 (2019), <https://esiweb.org/publications/disciplinary-system-judges-poland-case-infringement-proceedings> [<https://perma.cc/UYW9-HG4E>].

36. See MICHAŁ BOBER, PIOTR GAĆIAREK, JOANNA JURKIEWICZ, JAKUB KOŚCIERZYŃSKI, MARIUSZ KRASOŃ, & DOROTA ZABŁUDOWSKA, *JUSTICE UNDER PRESSURE – REPRESSIONS AS A MEANS OF ATTEMPTING TO TAKE CONTROL OVER THE JUDICIARY AND PROSECUTION IN POLAND. YEARS 2015–2019* (Jakub Kościerzyński ed., 2020), [https://www.iustitia.pl/images/pliki/raport2020/Raport\\_EN.pdf](https://www.iustitia.pl/images/pliki/raport2020/Raport_EN.pdf) [<https://perma.cc/E5NR-JPYB>].

through the Disciplinary Representatives selected by the Minister of Justice (and thus implementing governmental objectives), to target disobeying judges.<sup>37</sup>

– The Law and Justice party created two new chambers of the Supreme Court: the Disciplinary Chamber, and the Chamber of Extraordinary Control and Public Affairs. The party then packed those chambers with judges selected by the NCJ in its new composition. The Disciplinary Chamber has a significant level of independence from the general structure of the Supreme Court. It has autonomous status within the Supreme Court and ultimate power to adjudicate on disciplinary cases against all judges, remuneration scheme for its judges (earning 40% more than other Supreme Court judges).

– The Disciplinary Chamber of the Supreme Court has started to adjudicate disciplinary cases against Polish judges, mostly those who were active in their fight for judicial independence. It has been the subject of numerous legal challenges brought by way of preliminary references (questions asked by Polish courts to the CJEU) or infringement actions by the European Commission.<sup>38</sup> Despite this the Disciplinary Chamber continued to operate. On February 4, 2020, it decided to suspend judge Paweł Juszczyszyn as a result of disciplinary proceedings. He was accused of committing a disciplinary delict, because he wanted to verify status of judicial nominations made by the National Council of Judiciary in its new composition.<sup>39</sup>

– On April 8, 2020, the EU Court of Justice issued an interim order, which forced the Disciplinary Chamber to suspend the adjudication of disciplinary cases concerning judges.<sup>40</sup> However, the interim order did not specifically address proceedings other than disciplinary ones. Therefore, some judges started to be targeted with proceedings aimed at lifting their judiciary immunity. Relevant cases have been brought by the Prosecutor's Office. As a result, two additional judges have been suspended: Beata Morawiec, and Igor Tuleya.<sup>41</sup> Interestingly, Beata Morawiec

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37. See ODIHR, OSCE, *Urgent Interim Opinion on the Bill Amending the Act on the Organization of Common Courts, the Act on the Supreme Court and Certain Other Acts of Poland (As of 20 December 2019)*, at ¶¶ 78–86, Opinion-Nr.: JUD-POL/365/2019 [AIC] (Jan. 14, 2020), <https://www.osce.org/odihr/443731> [<https://perma.cc/26NK-HY6T>]; Venice Comm'n & Directorate Gen. of Hum. Rts. & Rule of L., *Poland: Urgent Joint Opinion on the Amendments to the Law on Organisation on the Common Courts, the Law on the Supreme Court and Some Other Laws*, CDL-PI(2020)002, COUNCIL OF EUR. 8–9 (Jan. 16, 2020), [https://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-PI\(2020\)002-e&lang=fr](https://www.venice.coe.int/webforms/documents/default.aspx?pdf=CDL-PI(2020)002-e&lang=fr) [<https://perma.cc/37HJ-GBT6>].

38. See opinion of the Advocate General E. Tanchev of May 6, 2021 in Case C-791/19, Comm'n v. Poland. The CJEU judgment in this case was delivered on July 15, 2021, and declared that the whole system of disciplinary responsibility of Polish judges is contrary to Article 19 TEU and violates principles of judicial independence. ECLI:EU:C:2021:596.

39. See *Polish Judge Suspended in Row Over Court Shake-Up*, BBC (Feb. 4, 2020), <https://www.bbc.com/news/world-europe-51370907> [<https://perma.cc/MQ8Z-LZ4E>].

40. Case C-791/19, Comm'n v Poland, ECLI:EU:C:2020:277 (Apr. 8, 2020).

41. See CTR. FOR HUM. RTS., AM. BAR ASS'N, THE CASE OF JUDGE IGOR TULEYA: CONTINUED THREATS TO JUDICIAL INDEPENDENCE IN POLAND 10–11 (2020), [https://www.americanbar.org/content/dam/aba/administrative/human\\_rights/justice-defenders/igor-tuleya](https://www.americanbar.org/content/dam/aba/administrative/human_rights/justice-defenders/igor-tuleya)

managed to win her case on June 7, 2021, and she was reinstated. The case of Igor Tuleya, however, became much more symbolic. After his suspension, the prosecutor's office wanted to present criminal charges against him. As a civil disobedience measure, he refused any cooperation with the Prosecutor's Office. Prosecutors requested that the Disciplinary Chamber of the Supreme Court use physical coercion measures against Tuleya. However, the Disciplinary Chamber ultimately refused to do it.<sup>42</sup> It is not clear what the Court's motivation was—compliance with the Constitution, or perhaps some kind of political calculation connected with the poor optics of a judge being arrested. Nevertheless, Tuleya is still suspended as a judge and deprived of his judicial immunity. There are also other judges facing proceedings aiming to suspend them, most notably Włodzimierz Wróbel, one of the most prominent criminal lawyers in Poland and a judge on the Supreme Court.

– The circumstances surrounding the appointment of judges in 2018 to the Chamber of Extraordinary Control and Public Affairs and the Disciplinary Chamber of the Supreme Court were also dubious. In response, the EU Court of Justice has created a test allowing judges of other courts to verify whether the NCJ's appointments fulfilled the EU's guarantees of judicial independence.<sup>43</sup> However, it seems that due to different disciplinary measures and other methods of harassment against judges (see above, in particular the case of Paweł Juszczyszyn), it has been difficult for other courts to open such processes of verification.

– On April 30, 2020, the constitutional six-year term of the First President of the Supreme Court, Małgorzata Gersdorf, came to an end. The new First President, Małgorzata Manowska, was selected in a controversial way, as most of the support for Manowska came from newly appointed judges. It is already clear that the new First President of the Supreme Court will not implement the policies of her predecessor. Moreover, her statements and actions upon taking office suggest that she will try to undermine neither the mandates of any judges to adjudicate as a result of CJEU orders or judgments, nor the status of the NCJ in its new composition. For example, Ms. Manowska did not challenge immunity-waiving proceedings pending against judges, despite the obvious threat to judicial independence. Manowska's appointment does not mean, however, that the Supreme Court lost its independence. There are currently more than fifty judges sitting on the Supreme Court who can still be regarded as guardians of judicial integrity. Moreover, there is a chance that pressure from the EU may lead to some structural changes in the Supreme Court, including possible liquidation of the Disciplinary Chamber.

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.pdf [<https://perma.cc/4LW3-7FHX>].

42. Vanessa Gera, *Polish Legal Body Rejects Prosecutor Request to Arrest Judge*, ASSOC. PRESS (Apr. 23, 2021), <https://apnews.com/article/europe-government-and-politics-a783b94d031f2680f6651da0280764e3> [<https://perma.cc/SW79-P6C4>].

43. Joined Cases C-585/18, C-624/18, and C-625/18, A.K. v. Krajowa Rada Sądownictwa [NCJ] & CP & DO v. Sad Najwyższy [Supreme Court of Poland], ECLI:EU:C:2019:982 (Nov. 19, 2019); see also Joelle Grogan, *Introductory Note to Joined Cases A. K. v. Krajowa Rada Sądownictwa (C-585/18) and CP (C-624/18), DO (C-625/18) v. Sad Najwyższy (C.J.E.U.)*, 59 INT'L LEGAL MATERIALS 459 (2020).

#### 4. Judicial Independence: The Way Forward?

The process of reducing judicial independence in Poland is not yet over. Some institutions lost their independent and non-partisan status: The NCJ, court presidents, and disciplinary judges. The Supreme Court remains somewhat independent, not institutionally, but rather due to the strength and integrity of some its judges. Additionally, the Supreme Administrative Court and Regional Administrative Courts have maintained their independent statuses, but their role might be limited in the future, due to packing-in of those courts with new judges selected by the NCJ. There are numerous judges who are subject to disciplinary proceedings due to their involvement in protests concerning judicial reforms, but also due to the merits of their judgments (especially those that go against the ruling party). Disciplinary cases often have a so-called “chilling effect” on judges.

Nevertheless, pressure by the European Union, as well as popular support,<sup>44</sup> give a lot of courage to Polish judges. Therefore, despite the institutional changes implemented by the ruling party, Polish citizens may still, in most cases, count on enjoying judicial independence in adjudicating their cases. However, there is a paradox in this reality, as it seems that the pressure exerted on Polish judges to act in accordance with political expectations instead serves as motivation for many judges to act against the ruling party to protect their independence and remain loyal to the Polish constitution.

## II. REASONS AND METHODS EMPLOYED TO IMPLEMENT CHANGE – SIMILARITIES TO OTHER SYSTEMS

### *A. Taking Advantage of Economic Stability and Tradition*

Certainly, when implementing reforms, the Law and Justice party took advantage of the social stability and economic growth in Poland. As of 2019, 81% of Polish citizens claim that they enjoy middle or good quality of life. It is a remarkable achievement.<sup>45</sup> The previous government, controlled by the “Civic Platform,” which ruled Poland between 2007 and 2015, concentrated mostly on infrastructure development and economic growth. However, its policies increased disparities between bigger cities and smaller cities/rural areas. It was the initiative of the Law and Justice party to invest more money into massive social programs to support families with children, most notably the program entitled “Family 500 Plus.”<sup>46</sup> The party has also revoked the prior reform of the retirement system, which provided for

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44. See *infra* III.B and III.C.

45. Anna Cieślak-Wróblewska & Grzegorz Siemionczyk, *Polska jest dziś pięć razy bogatsza niż w 1989 r.* [Poland is Five Times Richer Today than It Was in 1989], RZECZPOSPOLITA [REPUBLIC] (June 4, 2019, 12:35PM) (Pol.), <https://www.rp.pl/Biznes/306039901-Polska-jest-dzis-piec-razy-bogatsza-niz-w-1989-r.html> [<https://perma.cc/NA7K-YYD5>].

46. The Family 500 Plus program provides families with a monthly allowance of 500 Polish zloty (approximately 120 USD) per child in a family. It is especially significant for families living in smaller cities and rural areas. Ministry of Fam. & Soc. Pol’y, “Family 500+” Programme, Republic of Pol. (Sept. 14, 2017), <https://www.gov.pl/web/family/family-500-programme> [<https://perma.cc/PPA5-WKQE>].

a higher retirement age. Finally, it started to fight against abusive labor practices. As a result, the Law and Justice party was acclaimed for building a more egalitarian society.

The Law and Justice party has incorporated those social factors and reforms into a political discourse along with a populist narrative about national pride, martyrdom of Polish heroes during the Second World War, and a vision of Poland as being the opponent of alleged threats coming from other parts of the world (such as fear of massive migration).<sup>47</sup> Polish society is quite homogenous. Therefore, the ruling party chose the somewhat easy task of presenting itself as the defender of traditional values, family, and Christianity in Poland. All of these factors created fertile ground for “reforms” affecting many state institutions. Because these “reforms” did not have an impact on the day-to-day lives of most citizens, the public at large seemed to be unconcerned. However, recently, the judgment of the Polish Constitutional Court on October 22, 2020, concerning access to legal abortion, provoked massive protests across the country.<sup>48</sup>

### *B. Civic Awareness Level*

In Poland there is a relatively low level of civic awareness concerning the operation of the country’s independent institutions, including, among other things, how they are constructed, their role in the democracy, and the division of powers among them. Poland’s transition to a democracy began just thirty-two years ago. Poland has managed to shift the legal reception of institutions (such as the Constitutional Court) and basic democratic principles, but legal elites did not spend enough time educating the public about the objectives of these institutions and why regular citizens need them.<sup>49</sup>

Against this background, it was much easier for the Law and Justice party to carry out massive attacks against the judiciary, not only using smear campaigns, but also

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47. For commentary on one of the best outcomes of political strategies by the Law and Justice party and the use of polarization techniques was presented by Anne Applebaum, *A Warning From Europe: The Worst Is Yet to Come*, THE ATLANTIC (Oct. 2018), <https://www.theatlantic.com/magazine/archive/2018/10/poland-polarization/568324/> [<https://perma.cc/X6XG-YW7T>].

48. Judgment of the Constitutional Court of October 22, 2020, No. K 1/20, concerning access to legal abortion, was issued as a result of the ruling party’s parliamentary deputies’ motion, and that resulted in the outbreak of massive protests in Poland. See Anna Rakowska-Trela, *A Dubious Judgment by a Dubious Court: The Abortion Judgment by the Polish Constitutional Tribunal*, VERFASSUNGSBLOG, (Oct. 24, 2020), <https://verfassungsblog.de/a-dubious-judgment-by-a-dubious-court/> [<https://perma.cc/3L64-6AVC>].

49. There is a lot of literature on the transition of post-communist countries to democracy and the role of institutions in securing those transformations. See, e.g., MARK BRZEZINSKI, THE STRUGGLE FOR CONSTITUTIONALISM IN POLAND (Alex Pravda ed., 1998); Herman Schwartz, THE STRUGGLE FOR CONSTITUTIONAL JUSTICE IN POST-COMMUNIST EUROPE (2000); RETHINKING THE RULE OF LAW AFTER COMMUNISM (Adam Czarnota, Martin Krygier & Wojciech Sadurski, eds., 2005); Mark F. Brzezinski, *The Emergence of Judicial Review in Eastern Europe: The Case of Poland*, 41 AM. J. OF COMPARATIVE L., 153–200 (1993); WOJCIECH SADURSKI, RIGHTS BEFORE COURTS: A STUDY OF CONSTITUTIONAL COURTS IN POSTCOMMUNIST STATES OF CENTRAL AND EASTERN EUROPE (2d ed. 2014).

targeting individual judges.<sup>50</sup> This strategy, implemented since mid-2017, aimed to discourage judges from being active in public discourse; it has been noted in a report by Diego Garcia-Sayan, UN Special Rapporteur on Judicial Independence.<sup>51</sup> But despite reports and statements denouncing these attacks, the Law and Justice party continued to use them as a political weapon against judges. It should be noted that negative statements by officials against judges have created an additional risk of horizontal attacks on these judges by regular citizens. Such risk has been a daily reality for some prominent judges.<sup>52</sup>

### C. Abuse of Legislative Process

The systemic changes affecting the judicial institutions in Poland would not be possible without violating the Constitution. The Law and Justice party's subordination of the Constitutional Court led to a mockery of the legislative process and limitation on the role of the Parliament. Such effect was possible due to the Law and Justice party's cumulation of political power. Between 2015 and 2019, the party enjoyed a majority in both the lower (Sejm) and upper (Senate) chambers of the Parliament. Moreover, most of the time, the party could count on the President to sign laws with which the party presented him. The speed of proceedings usually did not allow for proper reflection regarding whether proposed laws were in compliance with the Constitution. President of the Criminal Chamber of the Supreme Court, Stanisław Zabłocki, has coined the phrase "pendolino speed" to denote the similarity of the current legislative process to the high-speed train.<sup>53</sup> What is more, opinions on potential unconstitutionality were neglected (even if they were prepared by internal research offices of the Parliament, especially in the Senate). The Law and Justice party took advantage of the Constitutional Court's de facto inability to exercise judicial review.

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50. Magdalena Gałczyńska, *Śledztwo Onetu. Farma trolli w Ministerstwie Sprawiedliwości, czyli „za czynienie dobra nie wsadzamy”* [Onett Investigation: A Troll Farm in the Ministry of Justice, or "We do not Lock [People] Up for Doing Good"], ONET (Aug. 21, 2019, 12:12AM), <https://wiadomosci.onet.pl/tylko-w-onecie/sledztwo-onetu-farma-trolli-w-ministerstwie-sprawiedliwosci-czyli-za-czynienie-dobra/j6hwp7f> [<https://perma.cc/BKT5-TE6F>]. In the article, Gałczyńska describes the hate campaign organized against some judges by close affiliates of the Deputy Minister of Justice Łukasz Piebiak, the chief architect of judicial changes in Poland. *Id.*

51. Diego Garcia-Sayan (Special Rapporteur on the Independence of Lawyers and Judges), *Rep. of the Special Rapporteur on the Independence of Judges and Lawyers on his Mission to Poland*, U.N. Doc A/HRC/38/38/Add.1 (Apr. 5, 2018), <https://undocs.org/A/HRC/38/38/Add.1> [<https://perma.cc/AE7J-EDST>]. Garcia-Sayan made a visit to Poland from October 23–27, 2017.

52. For the personal story of Judge Igor Tuleya, see Joanna Berendt, *In Poland, A Stubborn Defender of Judicial Independence*, N.Y. TIMES (Jan. 10, 2020), <https://www.nytimes.com/2020/01/10/world/europe/poland-judges-tuleya.html> [<https://perma.cc/TZJ4-KB4L>].

53. Stanisław Zabłocki, President of the Criminal Chambers of the Supreme Court, Speech at the Debate on the Supreme Court Act in the Senate (July 21, 2017) (transcript available at <https://www.rpo.gov.pl/content/wystapienie-wiceprezesa-sadu-najwyzszego-stanislaw-a-zablockiego-w-czasie-debaty-o-ustawie-o-sadzie> [<https://perma.cc/U63V-RVJU>]) (Pol.).



Interestingly, at the same time, the Law and Justice party took good care to assure that their adopted laws were in formal compliance with procedural rules of legislative process. Some changes were adopted by reference to formally correct arguments, but abused for political purposes and contrary to the spirit of the Constitution. A good example of this abuse of process regards the retirement age of Supreme Court judges. The Parliament adopted legislation lowering the retirement age from seventy to sixty-five.<sup>54</sup> In promoting this law, the Law and Justice party argued that the rules should be the same for all Polish judges, whether they sit in common courts or the Supreme Court. Importantly, however, this change was not made *pro futuro*. Instead, it affected the judges sitting on the Supreme Court when the law was passed, including the First President of the Supreme Court. Nevertheless, the “equality” reasoning argument prevailed and was presented to the general public as sufficient justification for such regulation. Such strategy was also important to the Law and Justice party for implementing changes affecting judicial independence. The fact that the arguments supporting these changes look convincing at first sight made it much more difficult for the public to understand the party’s true motivation in implementing these changes. Therefore, between 2015 and 2020, Polish lawyers were forced to consider legal questions from an additional perspective. When looking at a draft law, lawyers had to think in advance to determine not only what was in the law, but also what kind of political effect the law aimed to achieve. However, such analysis implies that legislative proposals are always made in bad faith. Therefore, lawyers have to go beyond the scope of their traditional roles and add political imagination to their regular legal review.

#### *D. Strategic Use of Accomplished Facts*

Another strategy employed by the Law and Justice party is to use a *fait accompli* method. This method allows the party to make changes and resist both domestic and international pressure, all while achieving progress in dismantling certain institutions. Use of this strategy has been promoted by Viktor Orbán. This practice is effective because it gives the impression of a dialogue between national authorities and international organizations. That is also the perception of the domestic audience. However, use of any monitoring procedures by international organizations and response by national authorities requires time. In the meantime, specific changes in the organization of the state institutions are implemented. After they are completed, they are almost impossible to be unwrapped. They create irretrievable damage. A good example is the “muzzle law” adopted in the beginning of 2020. This law aimed to restrict the ability of Polish judges to verify the status of other judges with regard to their judicial independence and the manner in which they were appointed. It was passed in an effort to limit the power that had been conferred upon these judges by the CJEU judgment in the case *A. K. v. Krajowa Rada Sadownictwa and CP & DO*

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54. Venice Comm’n, *Poland: Opinion on the Draft Act Amending the National Council of the Judiciary, on the Draft Act Amending the Act on the Supreme Court Proposed by the President of Poland, and on the Act on the Law on the Organisation of Ordinary Courts*, CDL-AD(2017)031, COUNCIL OF EUR. (Dec. 11, 2017), [https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)031-e](https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e) [<https://perma.cc/3DW3-K73W>].

v. *Sad Najwyższy*.<sup>55</sup> In fact, after the adoption of the “muzzle law,” any judge who even attempts to verify the legitimacy of another judge risks disciplinary proceedings. Such a measure clearly undermines the effectiveness of the EU law established in *A. K.* The problem was well known to the European Commission, considering its vice president, Vera Jourova, visited Poland when the “muzzle law” was the subject of discussion in the upper chamber of Parliament.<sup>56</sup> However, despite their knowledge of the issue, the European Commission did not bring an official case to the EU Court of Justice until the end of March 2021.<sup>57</sup> This delay has effectively given Polish authorities time to deepen their attack on judicial independence—in this case to limit the ability of Polish judges to verify whether the status of other judges is in compliance with EU law.<sup>58</sup>

### *E. Controlling Public Emotions*

The Law and Justice party has also tried not to overheat public emotions. Between 2015 and 2019, the use of any physical measures against participants of demonstrations was heavily restricted. Legal changes implemented by the party were the subjects of careful propaganda promotions. Disciplinary cases were made gradually and thoroughly, especially with respect to those judges who had previously been portrayed as “enemies of state.” Only once, it seems, has the Law and Justice party gone “one bridge too far.” In July 2017, Parliament passed the law providing for an early retirement of all judges of the Supreme Court; then the Minister of Justice could cherry pick those Supreme Court judges whom he believed should stay on the

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55. Joined Cases C-585, C-624, & C-625/18, *A.K. v. Krajowa Rada Sadownictwa* [NCJ] & CP & DO v. *Sad Najwyższy* [Supreme Court of Poland], ECLI:EU:C:2019:982 (Nov. 19, 2019).

56. Marek Strzelecki, *EU's Rule-of-Law Chief Defends Polish Judges as Spat Deepens*, BLOOMBERG (Jan. 28, 2020, 7:39 AM), <https://www.bloomberg.com/news/articles/2020-01-28/eu-s-rule-of-law-chief-defends-polish-judges-as-spat-deepens> [https://perma.cc/MF8Y-DBES]; see also Rob Schmitz, *Poland's Overhaul of Its Courts Leads to Confrontation with European Union*, NPR (Feb. 13, 2020, 4:41 PM), <https://www.npr.org/2020/02/13/805722633/polands-overhaul-of-its-courts-leads-to-confrontation-with-european-union?t=1581870712307> [https://perma.cc/36BQ-UMAF].

57. Under Article 258 of the EC Treaty, the European Commission may start an infringement action before the EU Court of Justice if “the Member State has failed to fulfil an obligation under the Treaties.” The Commission members thus act as so-called “Guardian of Treaties.” Before formal submission to the CJEU, the Commission must send to the Member State concerned a letter of formal notice, and thereafter the reasoned opinion. Those two steps may take some time, but in urgent cases, it is possible to shorten the timeline to three or four months.

58. See Adam Bodnar & Paweł Filipek, *Time Is of the Essence: The European Approach Towards the Rule of Law in Poland Should Not Only Focus on Budgetary Discussions*, VERFASSUNGSBLOG (Nov. 30, 2020), <https://verfassungsblog.de/time-is-of-the-essence/> [https://perma.cc/BEZ5-TS7N]. On the delay in the Commission actions see also Laurent Pech, Patryk Wachowiec & Dariusz Mazur, *Poland's Rule of Law Breakdown: A Five-Year Assessment of EU's (In)Action*, 13 HAGUE J. OF RULE OF L., 1–43 (2021), <https://doi.org/10.1007/s40803-021-00151-9> [https://perma.cc/5DVY-8CUV].

Court. This law provoked demonstrations in approximately 250 cities,<sup>59</sup> ultimately compelling President Duda to veto it.<sup>60</sup>

Since then, the mistake of going too far with just one legislative shot has not been repeated. As a result, it has been difficult for the general public to understand why yet another legislative change is dangerous to them. This process has been nicknamed in Poland the “process of heating the frog”: the frog does not realize when it has been cooked, until it is too late to save itself. Additionally, legislative changes were usually analyzed one single piece at a time. Individually, some of them could seem innocent. But taken together, they have led to a serious imbalance of powers between executive, legislative, and judicial branches. Therefore, it is the cumulative effect that counted. With the deepening of the rule of law crisis, one can see the effects of such cumulative endeavors as different judicial institutions are subordinated to the wishes of the executive branch.

#### *F. Role of Lawyers*

Polish lawyers have played a significant role in defending rule of law. However, some of them were architects of the changes, justifying the most radical ideas of the ruling party; drafting legislation; defending it in the Parliament, on social media, and on television; and using propaganda machinery to promote their vision. But there were also other lawyers—those who decided to participate in the process of dismantling the rule of law for the sake of their ideological beliefs, career opportunities, or other incentives. Without this group of party-loyal or opportunistic lawyers, the process of implementing the Law and Justice party’s changes would not be possible. There was a need to fill in vacant positions as new court presidents, as new judges in the Constitutional Court or the Supreme Court, or as lawyers working in law firms and protecting the political interests of state-owned companies. Therefore, the Law and Justice party was not alone in its attempts to dismantle the rule of law. It had constant professional support.

#### *G. Ideology*

Certainly, that the ruling party has tied its ideology to defending traditional values and Christianity played an undeniable role in justifying changes in Poland and attacks on rule of law. However, it seems that ideology was not a dominant motivation. Political philosopher Jan-Werner Mueller claims that Viktor Orbán and similar leaders abuse the concept of Christian democracy. According to these leaders’ ideological vision, Christian democracy is going to protect such states as Hungary or Poland against Islam and other “morally suspicious” ideologies coming from the

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59. Wszystkie protesty na jednej mapie. W obronie sądów spotkaliśmy się w ponad 250 miastach [All protests on one map. In defense of courts we have met in more than 250 cities], GAZETA WYBORCZA BIQDATA.PL (July 24, 2017), <https://biqdata.wyborcza.pl/biqdata/7,159116,22176137,wszystkie-protesty-na-jednej-mapie-w-obronie-sadow-spotkalismy.html> [https://perma.cc/LY78-P3L8].

60. Rick Lyman, *Poland’s President Vetoes Two Proposed Laws Limiting Courts’ Independence*, N.Y. TIMES (July 24, 2017), <https://www.nytimes.com/2017/07/24/world/europe/poland-president-duda-veto-courts.html> [https://perma.cc/6RM4-6MBW].

West. Mueller says, however, that this ideology is just a cynical ploy with international actors, aimed to distract them from discussion of real issues happening in countries marching toward authoritarianism.<sup>61</sup>

It is important to note that changes in Poland had more than an institutional dimension: they also resulted in democratic back-sliding. There are strong so-called “culture wars” under way, affecting mostly women’s rights, refugees, and LGBT rights.<sup>62</sup> The great ally of the ruling party in this war has been the Catholic Church. However, it seems that from time to time some aspects of the so-called “culture wars” are politically motivated in order to cover up negligence in the state administration, or to distract public attention from the European Union rule of law activities or further attempts to limit judicial independence.

### III. RESISTANCE

#### A. Looking Back to Polish History

In his 1947 work *The Treatise on Morality*, Polish poet and Nobel Prize winner Czesław Miłosz wrote that “The avalanche changes its course Depending on the stones it encounters as it forces its way through.”<sup>63</sup>

Passive people are like flat stones. If they take the Constitution, the rule of law, and human rights for granted, the avalanche may just slide—flat stones are easy to overcome. But if people stand up for their rights, each stone might be sturdy, massive, colossal, or even monumental. A number of people in Poland were like those sturdy and massive stones. Thanks to the resolve of these citizens, the rule of law and democracy in 2021 is not as decimated as it could be. Although Poland could be now portrayed as a system of competitive authoritarianism, there is still hope for Poland to return to the family of fully democratic countries.<sup>64</sup> This hope is rooted in

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61. Jan-Werner Mueller, ‘False Advertising’: Christian Democracy or Illiberal Democracy?, BALKAN INSIGHT: REPORTING DEMOCRACY (Feb. 3, 2020), <https://balkaninsight.com/2020/02/03/false-advertising-christian-democracy-or-illiberal-democracy/> [https://perma.cc/J938-DZ6G] (“Orbán and his ilk are trying to wage an EU-wide culture war because they have found this to be an effective way to distract domestic and international attention from the kleptocratic autocracies they have created. By portraying their critics as crazed progressives pushing for same-sex marriage and ever-more scurrilous forms of identity politics, they avoid any discussion of their cronyism, politicization of the judiciary, and stifling control of the media.”).

62. Daniel Baer, *Poland’s Slide Toward Homophobic Politics: When Putin’s Rhetoric Meets Trump’s Populism*, FOREIGN AFFS. (July 10, 2020), <https://www.foreignaffairs.com/articles/poland/2020-07-10/polands-slide-toward-homophobic-politics> [https://perma.cc/68W9-VPAD].

63. “Lawina biegnie od tego zmienia, Po jakich toczy się kamieniach,” *A Treatise on Morality*, originally published in “Twórczość” periodical (1948). This famous quotation was translated by Aleksandra and Michael Parker in ANDRZEJ FRANASZEK, *MIŁOZS. A BIOGRAPHY* (2017), at 240.

64. See Steven Levitsky & Lucan A. Way, *COMPETITIVE AUTHORITARIANISM. HYBRID REGIMES AFTER THE COLD WAR* (2010); see also Adam Bodnar, *System polityczny Rzeczypospolitej Polskiej w świetle teorii konkurencyjnego autorytaryzmu* [The Political System of the Republic of Poland in Light of Competitive Authoritarianism Theory], in *WOKÓŁ KRZYŻYU PRAWORZĄDNOŚCI, DEMOKRACJI I PRAW CZŁOWIEKA. KSIĘGA JUBILEUSZOWA MIROSLAWA*

the fact that even in authoritarian systems there is a possibility of defeating the incumbent, although doing so requires much stronger energy and creativity on the part of the opposition.

The process of dismantling the rule of law while simultaneously pretending that all legal actions are lawful is a long one. One cannot achieve significant results overnight without using physical force. When implementing a so-called “creeping coup d’état,” one must progress step by step, adapting different strategies to the electoral calendar, considering public reaction, discussing with international partners, analyzing polls, and, when necessary, deciding to soften one’s messages. If we take a snapshot into 2016 or 2018, we see how Poland has changed and how the Law and Justice party’s gradual strategy has proven to be effective. Nevertheless, one may say that the situation could be even worse, were it not for the powerful resistance of those who oppose unconstitutional changes.

### B. Civic Activism

Since 2015, Poland has seen the rebirth of the tradition of non-violent protest against undemocratic changes. This civic activism took different formats, including:

– Massive public protests organized by the so-called “street opposition” (especially organizations such as Komitet Obrony Demokracji (the Committee for the Defense of Democracy), Obywatele RP (Citizens of Poland), and Ogólnopolski Strajk Kobiet (the All-Poland Women’s Strike), and Akcja Demokracja (Action Democracy)).<sup>65</sup>

– Different forms of protest arranged by organizations of lawyers, including networking with international organizations, NGOs, and organizations of judges. A few examples of such organizations are the Polish Bar Association, the Polish Council of Legal Advisors, the Association of Polish Judges “Iustitita,” the Association of Judges “Themis,” the Association of Prosecutors “Lex Super Omnia,” the Helsinki Foundation for Human Rights, and the Forum for Civic Development. The most prominent example is an umbrella organization, “The Committee to Protect Justice,” which promotes the value of respect for the rule of law, and also supports judges and prosecutors who are subject to pressure and intimidation.<sup>66</sup>

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WYRZYKOWSKIEGO [AROUND THE RULE OF LAW, DEMOCRACY AND HUMAN RIGHTS CRISIS] 119, (Adam Bodnar & Adam Ploszka eds., 2020), [https://www.academia.edu/44842170/System\\_polityczny\\_Rzeczpospolitej\\_Polskiej\\_w\\_%C5%9Bwietle\\_teorii\\_konkurencyjnego\\_autorytaryzmu](https://www.academia.edu/44842170/System_polityczny_Rzeczpospolitej_Polskiej_w_%C5%9Bwietle_teorii_konkurencyjnego_autorytaryzmu) [<https://perma.cc/86JC-LRJD>].

65. See, e.g., Ireneusz Paweł Karolewski, *Protest and Participation in Post-Transformation Poland: The Case of the Committee for the Defense of Democracy (KOD)*, 49 COMMUNIST AND POST-COMMUNIST STUDS. 255 (2016), <https://doi.org/10.1016/j.postcomstud.2016.06.003> [<https://perma.cc/GQ34-FFY5>]; Krzysztof Podemski, *Proces de-demokratyzacji systemu politycznego a demokratyczne ruchy społeczne. Przypadek Polski 2015-2018* [Process of De-Democratization of the Political System and the Democratic Social Movements: The Case of Poland 2015–2018], in EUROPEAN CENTRE FOR SOLIDARITY, *KONTRREWOLUCJA U BRAM* [COUNTER-REVOLUTION AT THE GATES] 115–41 (Jacek Kołtan & Grzegorz Piotrowski eds., 2020).

66. For a complete list of members of the Committee for the Defense of Justice (KOS)

– Seeking new methods of approaching regular citizens to convince them that the ruling party’s changes may affect their lives. Notably, Polish judges have participated in musical rock festivals, using that exposure to promote different events concerning the rule of law.<sup>67</sup> Another interesting example is the activity of the *Free Courts Initiative* (Inicjatywa “Wolne Sądy”), which started to use social media and modern communication techniques to talk about abstract concepts such as judicial independence or the division of powers in Poland.

One important issue concerning civic activism in Poland is the disconnect between civic activism and the general population’s lack of legal awareness. NGOs face the problem of trying to convey why judicial independence is important to people’s daily lives, especially in times of economic prosperity. So, these NGOs were acting like a sailor on a boat during a storm—it was difficult to navigate to begin with, and they also had to concentrate on repairing sails, because their condition was heavily neglected before the storm. In Poland, this neglect resulted from an absence of comprehensive legal education programs available to the public. Unlike judges elsewhere, Polish judges were not participating in public life in a highly visible way—for example, they were not participating in educational media programs like Justice Sonia Sotomayor did when she appeared on *Sesame Street*.<sup>68</sup> Thus, Polish society lacks recognizable judicial figures like late U.S. Supreme Court Justice Ruth Bader Ginsburg. Therefore, as a consequence of the nation’s constitutional crisis, some lawyers also became human rights and citizenship educators, sometimes using social media and other efficient communication techniques. They had to get out of the box of their traditional role in society.

### C. Solidarity of Lawyers

The dismantling of the rule of law cannot be accomplished without lawyers. The Law and Justice party has managed to convince some Polish lawyers to be architects of reforms, to serve as judges in the Constitutional Court, to serve as new presidents of common courts, or to become members of the National Council of Judiciary. Some

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and detailed accounts of the outcomes of their activities, see KOMITET OBRONY SPRAWIEDLIWOŚCI, [COMMITTEE FOR THE DEFENSE OF JUSTICE], <https://komitetobronysprawiedliwosci.pl/> [<https://perma.cc/VWF4-GNAJ>] (Pol.). Please note that the KOS’s name refers to one of the first opposition groups in communist Poland: The Committee to Protect Workers (Komitet Obrony Robotników, KOR). For additional information on the KOR, see Nina Witoszek, *Friendship and Revolution in Poland: The Eros and Ethos of the Committee for Workers’ Defense (KOR)*, 10 CRIT. REV. INT’L SOC. & POL. PHIL., 215 (2007).

67. Some of the judges have even faced scrutiny from disciplinary judges for participating in music festivals, speaking in panel debates, and wearing judicial gowns outside the courtroom. See AMNESTY INTERNATIONAL, *Poland: Free Courts, Free People. Judges Standing for Their Independence* (2019), <https://www.amnesty.org/download/Documents/EUR3704182019ENGLISH.PDF> [<https://perma.cc/7CXQ-BYJE>].

68. *Sesame Street, Sesame Street: Sonia Sotomayor: “The Justice Hears a Case.”* YOUTUBE (Feb. 3, 2012), <https://www.youtube.com/watch?v=FizspmlJbAw> [<https://perma.cc/8CR9-77PF>].

of them probably made those commitments due to their genuine belief in the ruling party's changes. Others took advantage of the career opportunities that suddenly appeared.<sup>69</sup> Nevertheless, the ruling party's changes have not been accepted by the majority of lawyers. Moreover, these lawyers have started to cooperate with each other. By hearkening back to old traditions of the Polish Solidarity movement, they created solidarity among lawyers of different professions: judges, prosecutors, attorneys, and legal advisors, with the support of members of academia. There were different forms of such solidarity actions. The most exemplary form was a demonstration organized by the Polish legal community to protect judicial independence, which came to be known as the "March of One Thousand Gowns." On January 11, 2020, Polish judicial associations, accompanied by attorneys, prosecutors, and legal advisors, organized this public demonstration, which was also attended by judges from other countries who came to Warsaw to express solidarity. This event had a significant impact on public discourse and was widely covered by international media.<sup>70</sup> Another form of solidarity is legal representation of judges targeted and repressed by disciplinary judges or prosecutors. They are usually represented pro bono by the best lawyers in a country.<sup>71</sup>

#### *D. Birth of Constitutional Patriotism*

To many Polish citizens, the Polish Constitution, which was ratified in 1997, has been regarded as mere instructions as to how the state should operate, along with some general principles. Due to historical reasons,<sup>72</sup> Polish citizens tend to celebrate the Constitution of May 3, 1791, more than the contemporary Constitution of April 2, 1997. However, protests concerning the Constitutional Court and judicial independence have resulted in the birth of modern constitutional patriotism. Full allegiance to constitutional values, principles, and rights became a trademark of those who protest against undemocratic changes. The Constitution of 1997 has become a symbol of resistance, but also of hope. It has united different movements and political groups. There is a chance that the Constitution will become a binding force in building the new, fully democratic Poland. Moreover, protest groups have started to use a common symbol: an image reading "KonsTYtucJA," where the words "TY"

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69. See *supra* Section II.F.

70. See *supra* note 5.

71. There are also interesting family links. Jacek Dubois, a leading Polish criminal attorney, is representing "dissident" judges, most notably Igor Tuleya; his father, Maciej Dubois, represented political dissidents in Communist times.

72. The Constitution of May 3, 1791, was the second constitution in the world, adopted just before the partitioning of Poland by three empires (Russia, Prussia, and Austria-Hungary). The Constitution of May 3 put Poland on the track to modernization, but it was too late to save Poland from losing its independence. Therefore, the Constitution of May 3 is widely celebrated as a symbol of wisdom and civic courage, although it has almost nothing in common with the contemporary constitutional system. For an English translation of the May 3 Constitution, see the version published by Archiwum Główne Akt Dawnych (Main Archive of Historical Acts) and translated by Franciszek Bukaty, with a foreword by Anna Grześkowiak-Krwawicz explaining the document's historical context, [http://agad.gov.pl/wp-content/uploads/2018/12/Konstytucja-3-maja\\_Eng-v4.pdf](http://agad.gov.pl/wp-content/uploads/2018/12/Konstytucja-3-maja_Eng-v4.pdf) [<https://perma.cc/KY44-X8AK>].

and “JA” mean “You” and “I.”<sup>73</sup> This poster, created by Luka Rayski, has become the most recognizable emblem of many pro-democratic demonstrations in Poland.<sup>74</sup>

#### *E. The Ombudsman’s Office*

The Ombudsman’s Office was created in Poland in 1987, two years before the country’s democratic transformation began.<sup>75</sup> Later on, the office became a bridge between old times and new times, helping the newly democratic state administration to learn basics of constitutional protection of rights and freedoms. The Office of the Ombudsman was written into the Constitution (Articles 208–212) and gained important powers concerning protection of rights and freedoms. It has also gained public trust. This constitutional and institutional strength of the Ombudsman was important to resist the undemocratic tide that has been rising in Poland since 2015, in terms of providing alternative arguments to those proposed by the Law and Justice party-led government, but also in using strategic litigation to counteract some legislative changes (e.g. participation in proceedings before CJEU and ECtHR as third party interveners). In addition, the opinions issued by the Office of the Ombudsman were important to a number of international organizations and bodies.<sup>76</sup>

#### *F. Judges*

Polish judges have been subjected to a tremendous amount of pressure from the Law and Justice party since 2015. They have been targeted as an “extraordinary caste” or as “elites” that are far removed from society and its problems. Politicians in Poland have used individual cases of judicial mistakes or violations of judicial ethics as examples of misbehavior, poor moral character, and the need to reform the judiciary, especially with respect to disciplinary cases. Some individual judges were the targets of disciplinary cases or hate speech.<sup>77</sup> Hate campaigns have been coordinated by the former Deputy Minister of Justice.<sup>78</sup> Despite this pressure, judges have shown significant personal courage and professional dignity. They have

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73. Susan Yelavich, *A Sign of Resistance; A Symbol of Hope*, DESIGNOBSERVER (Nov. 8, 2017), <https://designobserver.com/feature/a-sign-of-resistance-a-symbol-of-hope/39638> [<https://perma.cc/SH5D-EZL8>].

74. *Id.*

75. See Ewa Łętowska, *The Commissioner for Citizens’ Rights in Central and Eastern Europe: The Polish Experience*, ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1 (1996).

76. In 2019, the Polish Ombudsman Office was awarded the Rule of Law Award by the World Justice Project for its defense of rule of law standards in Poland. *World Justice Project Announces 2019 Rule of Law Award Honoree*, WORLD JUST. PROJECT (Apr. 30, 2019), <https://worldjusticeproject.org/news/world-justice-project-announces-2019-rule-law-award-honoree> [<https://perma.cc/5RL9-9PGW>].

77. Anne Applebaum, *The Disturbing Campaign Against Poland’s Judges*, THE ATLANTIC (Jan. 28, 2020), <https://www.theatlantic.com/ideas/archive/2020/01/disturbing-campaign-against-polish-judges/605623/> [<https://perma.cc/6YFD-HK9R>].

78. Christian Davies, *Top Polish Official Resigns Over Alleged Harassment of Judges*, THE GUARDIAN (Aug. 21, 2019, 12:55 PM), <https://www.theguardian.com/world/2019/aug/21/top-polish-official-resigns-over-alleged-harassment-of-judges> [<https://perma.cc/SYE3-XHJD>].



managed to create bonds of unity within judicial associations, to organize protests, to have contact with regular citizens, and to propose alternative legislative solutions to those proposed by the Law and Justice party. This courage should be appreciated due to the personal risk judges face in carrying out these actions, including the suspension of their judicial mandate. Three of them—Paweł Juszczyszyn, Beata Morawiec, and Igor Tuleya—were suspended in 2020 after decisions of the Disciplinary Chamber of the Supreme Court.<sup>79</sup> Although Beata Morawiec was recently reinstated and other judges have good chances of winning their cases before the European Court of Human Rights,<sup>80</sup> their example might deter other Polish judges from maintaining their independence when performing judicial duties.

### *G. European Union Membership*

Poland's membership in the European Union proved to be a crucial factor in saving some remnants of judicial independence. Between 2016 and 2020, Poland was subjected to numerous international monitoring procedures by the UN Human Rights Committee, the UN Universal Periodic Review, the UN Special Rapporteur on Judicial Independence, the Commissioner for Human Rights of the Council of Europe, GRECO, the Venice Commission, and the Monitoring Committee of the Parliamentary Assembly of the Council of Europe. However, a great majority of the recommendations of these institutions concerning the rule of law were simply ignored by the Polish authorities. Nevertheless, those recommendations certainly helped to legitimize the different interventions and actions undertaken in Poland by the EU.

The EU legal system and its relationship to legal systems of EU Member States might be categorized as a system of multi-level governance, or it could be compared to federal systems.<sup>81</sup> One of the key principles of the EU legal order is the obligation to respect so-called “European values,” which are democracy, human rights, the rule of law, as well as protection of minorities. Moreover, the European legal order is based on the principle of mutual trust between EU Member States and their judicial systems. Without such trust, neither the smooth operation of the Common Market nor cooperation in criminal matters would be possible.

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79. Beata Morawiec was reinstated in June 2021. However, there are other cases pending before the Disciplinary Chamber of the Supreme Court that may lead to suspensions.

80. The European Court of Human Rights has already communicated Judge Tuleya's case to the Polish government. *Tuleya v. Poland*, App. No. 21181/19 (Sept. 1, 2020), <http://hudoc.echr.coe.int/eng?i=001-204784> [<https://perma.cc/TUS3-AVFQ>]. Judges Juszczyszyn and Morawiec have also submitted their cases to the ECHR. A similar case from Iceland provides helpful guidance as to how Tuleya and Juszczyszyn's cases might be resolved, as it provides a comprehensive test to examine the impact of executive power on the judiciary. *Ástráðsson v. Iceland*, App. No. 26374/18 (Dec. 1, 2020), <http://hudoc.echr.coe.int/eng?i=001-206582> [<https://perma.cc/495V-CE8S>].

81. There is plenty of literature on the character of the EU legal system and its comparability to federal systems, *see, e.g.*, *THE FEDERAL VISION: LEGITIMACY AND LEVELS OF GOVERNANCE IN THE UNITED STATES AND THE EUROPEAN UNION* (Kalypso Nicolaidis & Robert Howse eds., 2001); *THE WORLDS OF EUROPEAN CONSTITUTIONALISM* (Gráinne de Búrca & J. H. H. Weiler eds., 2012).

For a number of years, the EU was not supervising the judicial systems of EU Member States, as these systems were viewed as predominantly internal issues of Member States. However, starting with the case *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas (ASJP)*,<sup>82</sup> the EU Court of Justice declared that it has the power to verify whether a member state's potential violation of judicial independence requires EU intervention to ensure effective judicial protection to EU citizens.

*ASJP* paved the way for the Court of Justice to examine cases concerning judicial independence in Poland. Although there were many more cases (and some of them are still pending), it is interesting to look at two examples. First, thanks to an interim measure made by the CJEU on October 19, 2018,<sup>83</sup> more than twenty judges of the Polish Supreme Court were allowed to return to adjudicating cases; they had been forced into early retirement as a result of the Law and Justice party's legislative provision decreasing their retirement age from seventy to sixty-five. This legislative change affected even the First President of the Supreme Court, who had a guaranteed six-year constitutional term. Due to the EU's intervention, Małgorzata Gersdorf was able to complete her term, which ended in April 2020.

Second, it is important to mention the EU Court of Justice's judgment of November 19, 2019, in which the Court created a test setting out how individual judges should evaluate the independence of the NCJ and the Disciplinary Chamber of the Supreme Court. This judgment was met with strong resistance from the Law and Justice party, which managed to successfully push for adoption of a "muzzle law." This law goes in a completely different direction than the EU law would require. But we should also note that as a result of implementation of the Court of Justice's 2019 judgment, three joined chambers of the Polish Supreme Court adopted a resolution, which allows for exclusion of judges who were unlawfully elected by the newly composed NCJ.<sup>84</sup>

The above cases may suggest that Poland has become the laboratory for the EU to test the use of different rule of law measures. There is a chance that these Polish cases will be in future history books presented in a way similar to America's Fourteenth Amendment and Incorporation Doctrine caselaw starting with *Gitlow v. New York*.<sup>85</sup> The principle of effective protection, as guaranteed by Article 19 of the Treaty on European Union, coupled with the EU Charter of Fundamental Rights, may lead the EU's restriction of member states' power to regulate their own judiciaries.

But the principle of effective protection might also be the start of a legal war between Poland and the EU. The Polish government's consistent undermining of the EU law by Polish authorities, lack of respect for the EU hierarchy, and attempts to escape EU legal pressure may lead to a "legal Poxxit," similar to "Brexit," whereby

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82. Case C-64/16, *Associação Sindical dos Juizes Portugueses v. Tribunal de Contas*, ECLI:EU:C:2018:117, ¶¶ 32–44 (Feb. 27, 2018).

83. Order of the Vice-President of the EU Court of Justice in Case C-619/18, *supra* note 28.

84. The resolution of three joined chambers of the Supreme Court was adopted on January 23, 2020 (No. BSA I-4110-1/20). It was one of the most remarkable examples of defending judicial independence by judges in the Polish history.

85. 268 U.S. 652 (1925).

Poland would sever itself from the legal obligations that come with EU membership. Furthermore, there were three cases pending before the Polish Constitutional Court submitted by the Disciplinary Chamber of the Supreme Court,<sup>86</sup> the Prime Minister,<sup>87</sup> and the ruling party<sup>88</sup> that aim to undermine the principle of supremacy of EU Law.<sup>89</sup> There is a risk that the politically dependent Constitutional Court will be used in order to boost the “constitutional identity” argument and thus to refuse to obey the EU law and judgments of the CJEU. The first step in this direction has been made. On 14 July 2021 the Constitutional Court adjudicating in five-judges panel has declared that the EU law should not bound Polish authorities when it comes to the organization of the Polish judiciary and thus the EU law does not have supremacy over the Polish Constitution.<sup>90</sup> This judgment provoked a lot of controversy and criticism.<sup>91</sup> Two other cases await a final resolution.

The EU principle of mutual trust will not be applicable to Poland if its courts lose their independence. There are already significant problems concerning the use of the European Arrest Warrant to surrender suspects to Poland.<sup>92</sup> Breaking the legal trust connecting judicial systems in the EU could be a first step toward problems in numerous cases of a transborder nature.

Recent agreement on the future EU budget for the years 2021–2027 is an important step in safeguarding the rule of law in the EU. For the first time, the EU is using the policy of conditionality for the expenditures given to member states from the EU budget. Thus, the EU will be able to block the transfer of budget money if a given EU Member State does not comply with the EU rule of law requirements. There is a chance that this new legal instrument,<sup>93</sup> coupled with the growing caselaw

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86. Case No. P 7/20.

87. Case No. K 3/21.

88. Case No. K 5/21.

89. Maria Wilczek, *Will Poland Break from the EU?*, THE TIMES (June 10, 2021), <https://www.thetimes.co.uk/article/will-poland-break-from-the-eu-zsf0dn3qt> [<https://perma.cc/2ZLB-R73W>].

90. Judgment of the Constitutional Court of July 15, 2021, P 7/20, <https://trybunal.gov.pl/en/hearings/judgments/art/11589-obowiazek-panstwa-czlonkowskiego-ue-polegajacy-nawykonywaniu-srodkow-tymczasowych-odnoszacych-sie-do-kszaltu-ustroju-i-funkcjonowania-konstytucyjnych-organow-wladzy-sadowniczej-tego-panstwa> [<https://perma.cc/L6A2-DRHE>]; *Rule of Law Dispute Deepens as Rulings by Polish and EU Courts Clash*, REUTERS (July 14, 2021, 2:28 PM), <https://www.reuters.com/world/europe/polish-court-rules-eu-interim-measures-are-against-constitution-2021-07-14/> [<https://perma.cc/2KLN-84J5>].

91. Steven Erlanger & Monika Pronczuk, *Poland Escalates Fight With Europe Over the Rule of Law*, N.Y. TIMES (July 15, 2021), <https://www.nytimes.com/2021/07/15/world/europe/poland-hungary-europe.html> [<https://perma.cc/LK26-Y3PZ>].

92. Joined Cases C-354/20 PPU & C-412/20 PPU, Openbaar Ministerie, ECLI:EU:C:2020:1033, ¶ 69 (Dec. 17, 2020). This judgment does not automatically stop the surrender of suspects to Poland. Nevertheless, the existence of tests, which must be checked by national courts, delays the operation of this useful legal institution. There is also a risk that in certain individual cases, including those of a political nature, courts in other EU Member States may refuse to make a surrender to Poland on the basis of a European Arrest Warrant. *See id.*

93. Regulation on the protection of the Union’s budget in case of generalised deficiencies as regards the rule of law in Member States, legislative initiative resolution adopted by the European Parliament on 16 December 2020, <https://www.europarl.europa.eu/doceo/document>

of the CJEU and the annual report on the rule of law,<sup>94</sup> will contribute to the strengthening of EU rule of law standards.

#### *H. Pluralism of Debate*

As compared to Hungary,<sup>95</sup> Poland still seems to have pluralistic debate on a number of issues. Although the space for this debate is shrinking (due to pressure on civil society and the strong role of state-controlled public media), civil society organizations, opposing political parties, public intellectuals, and selected media outlets provide room for discussion.<sup>96</sup> In fact, there have been instances when the ruling party resigned from some ideas, afraid of public outrage.

But this pluralism is also alive today thanks to the domination of opposition parties in big cities. The mayors of most of Poland's large cities are affiliated with opposition parties. The parliamentary elections of 2019 were won by the Law and Justice party, but only in the lower chamber of the Parliament (Sejm). It allowed the ruling party to remain in power and to form the majority government. However, the opposition won elections to the upper chamber of the Parliament (Senate). Under the Polish Constitution, the Senate cannot effectively block any laws proposed by the Law and Justice party. However, it has thirty days for review of any legislative act adopted by Sejm. This time gives a chance for reflection, for more balanced and pluralistic consideration of different arguments. As a result, the character of the legislative process has changed, as compared to situation before recent parliamentary elections. Different Senate discussions had a significant impact on the public debate. Interestingly, the opposition-led Senate blocked three times the appointment of the new Ombudsman proposed by the ruling party, because this decision required the consent of two chambers of Parliament. Finally, the pressure by the Senate resulted in the appointment of a person, with a full constitutional authority and trust of two chambers of the Parliament, in accordance with Article 209 Section 1 of the Polish Constitution. In July 2021, Marcin Wiącek was appointed the new Ombudsman.

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/TA-9-2020-0356\_EN.html#title1 [https://perma.cc/7UJR-ZG8A].

94. European Commission, *2020 Rule of Law Report*, *supra* n. 29.

95. See generally ELDA BROGI, IVA NENADIC, MARIO VIOLA DE AZEVEDO CUNHA, & PIERR LUIGI PARCU, CTR. FOR MEDIA PLURALISM & MEDIA FREEDOM, ASSESSING CERTAIN RECENT DEVELOPMENTS IN THE HUNGARIAN MEDIA MARKET THROUGH THE PRISM OF THE MEDIA PLURALISM MONITOR, (2019), [https://cadmus.eui.eu/bitstream/handle/1814/64284/Hungarian\\_media\\_market.pdf?sequence=1&isAllowed=y](https://cadmus.eui.eu/bitstream/handle/1814/64284/Hungarian_media_market.pdf?sequence=1&isAllowed=y) [https://perma.cc/A2M6-K8LR].

96. On the situation in private media, see ANNABELLE CHAPMAN, PLURALISM UNDER ATTACK: THE ASSAULT ON PRESS FREEDOM IN POLAND (2017), [https://freedomhouse.org/sites/default/files/2020-02/FH\\_Poland\\_Media\\_Report\\_Final\\_2017.pdf](https://freedomhouse.org/sites/default/files/2020-02/FH_Poland_Media_Report_Final_2017.pdf) [https://perma.cc/7FZG-FQKZ]. Please note, however, that in 2020 the major state-controlled oil giant PKN Orlen purchased Polska Press, a company owning twenty local press titles. It seems that the Law and Justice party will try to increase its control over media by using state-owned companies to acquire independent media companies. See Alicja Ptak & Anna Koper, *Poland Uses State-Owned Refiner to Buy Regional Media Firm*, REUTERS (Dec. 7, 2020), <https://www.reuters.com/article/us-polskapress-m-a-pknorlen/poland-uses-state-owned-refiner-to-buy-regional-media-firm-idUSKBN28H277> [https://perma.cc/X5DE-ENBC].

## IV. FUTURE OF POLAND

The current situation regarding the Polish judiciary is dire, as it undermines the stability of the country's legal system, especially when it comes to cooperation with courts of the other EU member states. The judicial reforms have also had significant internal consequences. They may lead to lack of accountability for state authorities, discriminatory use of legal procedures against political opponents of the Law and Justice (so-called discriminatory legalism<sup>97</sup>), and a steady decline in the rule of law standards, following a trajectory similar to that which Hungary has followed under Viktor Orbán's rule.

Depending on a number of circumstances (reaction from the EU, resistance from Polish society, results of political elections) two likely outcomes emerge for Poland in the future.

In the negative scenario, Poland may experience the steady creation of an authoritarian system or a regular system of competitive authoritarianism.<sup>98</sup> Although these systems would provide for the operation of different institutions, this is a façade, as those institutions cannot change the way the authoritarian system operates. Opponents cannot effectively compete with those in power. Discriminatory legalism, in the form of court actions and inspections, would be used extensively against those who question the legitimacy of the ruling party. Judges would be forced to understand and respect the lines they cannot cross when adjudicating cases, especially when they deal with cases of a political nature. Such a scenario may lead to the questioning of Polish membership in the EU, as the EU is based on principles of democracy, the rule of law, and human rights. Finally, such a scenario may affect transatlantic relations, as well as the geopolitical position of Poland as a bridge between the East and the West.

But there is also a positive scenario. It may happen that Poland will get back on the democratic track. However, this democracy would certainly look different than the one that existed before the Law and Justice party's rise to power. Poland would have to rebuild the justice system and undo the reforms implemented by the Law and Justice party. It may take even a generation to do it. Poland's new democratic authorities would have to assure citizens about the return to continuity as regards the future development of Poland in order to secure stability and to deepen compliance with the rule of law. In this positive scenario, Poland would have to strengthen both the sense of integration into the EU, and also be a good partner in transatlantic relations. The democratization of Poland has been one of America and Western Europe's most pivotal achievements of the post-Cold War era. There remains a hope for this rebirth of such a positive influence on the world. Maybe the Polish case will serve one day as a warning for other countries heading down a similar path.

Neither Polish democrats nor civil society can predict the future. But, in the face of this unpredictability, they may provide the only answer for the future of Poland: there is a need to work hard in order to resist the Law and Justice party's changes; to

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97. See Kurt Weyland, *Latin America's Authoritarian Drift: The Threat from the Populist Left*, 24 J. DEMOCRACY 18 (2013), <https://www.journalofdemocracy.org/wp-content/uploads/2013/07/Weyland-24-3.pdf> [<https://perma.cc/NM8N-Y47L>].

98. See Levitsky & Way, *supra* note 64; see also Bodnar, *supra* note 64, at 119–48 (applying the theory of Levitsky and Way to the situation in Poland).

defend the principles of liberal democracy; and to use new methods of communication, transnational networks, and creativity. Certainly, this is not the time to be silent and be complacent in the face of the political trajectory of changes.

Karol Modzelewski, a Polish hero who spent eight years in Polish prisons during Communist era,<sup>99</sup> said that every generation has a certain price to be paid. In a private conversation in 2016, he said to me: “Now you are the battle soldier.” I feel privileged that I am one of many devoted battle soldiers, together with Polish judges, members of academia, activists, and citizens on the streets. I am honored that we can enjoy support of allied forces of democracy-believers in the United States, who show us solidarity and trust.

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99. Joanna Berendt, *Karol Modzelewski, Inspiring Vice of Poland's Solidarity, is Dead at 51*, N.Y. TIMES (May 23, 2019), <https://www.nytimes.com/2019/05/23/obituaries/karol-modzelewski-dead.html> [<https://perma.cc/Q32M-LHQF>].

