A Judiciary under Siege
An Institutional Approach to Rule of Law Backsliding in Poland

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Table of contents

1 INTRODUCTION .......................................................................................................... 1
  1.1 Topic and Background .............................................................................................. 1
  1.2 Rule of Law Backsliding in the Literature .............................................................. 3
  1.3 Studying Institutions ............................................................................................... 4
  1.4 Research Questions .................................................................................................. 5
  1.5 Methodology ............................................................................................................ 5
  1.6 Outline ...................................................................................................................... 6

2 PHASE ONE: CAPTURING THE CONSTITUTIONAL TRIBUNAL ...................... 6
  2.1 How It All Began: Nomination of “October” and “December Judges” ............... 6
  2.2 Attempts at Crippling the Court ............................................................................. 11
      2.2.1 Round One ...................................................................................................... 11
      2.2.2 Round Two .................................................................................................... 13
      2.2.3 Consequences for the Tribunal’s Functioning ............................................ 16
  2.3 The Take-Over ........................................................................................................ 17
  2.4 The Przyłębska Court ............................................................................................ 22

3 PHASE TWO: REFORMING THE JUDICIARY ................................................... 27
  3.1 #YearofNewAttacks ............................................................................................. 27
  3.2 Act on the Organization of Common Courts ......................................................... 32
      3.2.1 Contents and Criticism ................................................................................ 32
      3.2.2 Implementation and Repercussions .............................................................. 33
  3.3 Act on the National Council of the Judiciary ......................................................... 34
      3.3.1 Contents and Criticism ................................................................................ 34
      3.3.2 Implementation and Repercussions .............................................................. 39
  3.4 Act on the Supreme Court ..................................................................................... 41
      3.4.1 Contents and Criticism ................................................................................ 41
      3.4.2 Implementation and Repercussions .............................................................. 51

4 INSTITUTIONAL ANALYSIS: CONCEPTS AND BEGINNINGS ...................... 58
  4.1 Introduction .............................................................................................................. 58
  4.2 Introducing Greif’s Theory of Institutions ............................................................. 59
  4.3 Identifying the Central Transaction: the Basic Unit of Analysis .......................... 60
  4.4 The Judicial Transaction and Judicial Independence .......................................... 62
  4.5 Institutional Foundations: Establishing an Independent Judiciary ....................... 65
4.5.1 The Birth of the Polish Judiciary ................................................................. 65
4.5.2 The Polish Judges ......................................................................................... 67
4.5.3 The Problem of Credible Commitment to Judicial Independence ................. 69

5  THE CONSTITUTIONAL TRIBUNAL ................................................................. 71
5.1 Developing a Conjecture ............................................................................... 71
5.2 Presenting and Analyzing the Game Theoretic Model ...................................... 74
5.3 Evaluating the Conjecture ............................................................................. 79
5.3.1 Introduction ............................................................................................... 79
5.3.2 Political Importance ............................................................................... 80
5.3.3 Public Support ....................................................................................... 80
5.3.4 Transparency ......................................................................................... 85
5.3.5 International Organizations ................................................................. 86
5.3.6 Incentives to Affect the Parameters .................................................... 87

6  THE ORDINARY JUDICIARY ........................................................................... 88
6.1 Developing a Conjecture .............................................................................. 88
6.2 Evaluating the Conjecture ........................................................................... 91

7  CLOSING REMARKS .................................................................................... 93
1 Introduction

1.1 Topic and Background

The topic of this paper is the ongoing rule of law backsliding in Poland. More specifically, it concerns the attacks that the Polish judiciary has endured by the government since 2015.

The Polish 2015 election year resulted in a drastic shift of power away from the liberal-conservative Civic Platform (Polish acronym: PO), over to the national-conservative Law and Justice (Polish acronym: PiS). To begin with, PiS affiliate Andrzej Duda beat incumbent Bronisław Komorowski in the presidential election, and in the following October parliamentary election, the party secured a majority of seats in both the lower and the upper house of Parliament (referred to as the Sejm and the Senate, respectively). For the first time in democratic Poland’s history, a single party was able to form a majority government without any coalition partners. This electoral triumph marked the kickoff of an era of comprehensive legislative reforms and institutional redrafting, which rapidly led the country into a situation frequently referred to as a “constitutional crisis”.¹

PiS’ reformist program have affected all levels of the Polish judiciary. Since coming to power, the parliamentary majority has adopted more than twenty acts, ranging from minor amendments to full-fledged overhauls. At the outset, the country’s Constitutional Tribunal endured a period of severe turbulence, during which the government made use of a number of tactics to undermine the court’s activities. The maneuvers involved, *inter alia*, a sinister court-packing plan, purposeful wing clipping of the Tribunal, complete disregard of important judgments, and finally, seizing the Tribunal presidency. Basically, the government transformed the Tribunal “from an effective, counter-majoritarian device to scrutinise laws for their unconstitutionality, into a powerless institution paralysed by consecutive bills rendering it unable to review new PiS laws, and then into a positive supporter of the enhanced majoritarian powers”.²

Once the Constitutional Tribunal was out of play, the incumbents quickly turned their efforts toward the rest of the judiciary. Under the pretext of addressing lustration and efficiency issues, the Minister of Justice announced a sweeping judicial reform that would shake the foundations

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¹ See e.g., Koncewicz (2016).
² Sadurski (2018c) p. 20.
of the whole judiciary. Once again, PiS applied familiar tactics such as court-packing and attempts to handpick judges for key positions. In addition, they endeavored to dispose of a substantial portion of the country’s judges, politicize the procedure for appointing and promoting judges, and influence disciplinary procedures against judges. In the end, one scholar asserts, the judicial institutions were not “dismantled or destroyed but rather ‘hollowed out’, eroded and emptied: their sense and meaning are drained out of them, but their shells are maintained”.3

The standoff between the government and the Constitutional Tribunal, as well as the subsequent judicial reforms, have not gone by in silence. On the contrary, it has attracted enormous attention both in the home country and abroad. At every step of the way, public demonstrations have mobilized tens of thousands of protesters all over the country.4 More than 50 NGOs, including Amnesty International, the International Federation for Human Rights, and several Helsinki Committees, have appealed to the authorities, condemning the lack of respect for the rule of law. In addition, domestic stakeholders such as the National Council for the Judiciary, the Supreme Court, the Supreme Administrative Court, as well as a number of regional and district courts have adopted resolutions in which they speak up against the government.5

At the international level, several influential and powerful actors have harshly criticized the developments. The first international institution to get involved was the European Commission, who at the end of 2015 initiated a stern dialogue with the Polish government.6 Shortly thereafter, the Commission decided to examine the circumstances under their recently adopted Rule of Law Framework.7 This was the first – and heretofore only – time the Commission employed this procedure. Throughout 2016 and 2017, the Commission issued four recommendations under the Framework, all of which concluded that there was a systemic threat to the rule of law in Poland. In December 2017, after little to no progress had been made, the Commission finally triggered the dreaded procedure of Article 7(1) TEU, by submitting a reasoned proposal for a Council decision “on the determination of a clear risk of a serious breach by the Republic of

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3 Sadurski (2018a) pp. 69–70.
4 The demonstrations have largely been organized by the Committee for the Defence of Democracy (KOD), which was founded in late 2015 as a reaction to the developing constitutional crisis, see Committee for the Defence of Democracy (2015). For an overview of the demonstrations, see Amnesty International (2017).
5 See e.g., Iustitia (2018c).
7 European Commission (2016a).
Poland of the rule of law”, the very first of its kind.\textsuperscript{8} So far, however, the European Council have not made any decision in line with the Commission’s proposal.\textsuperscript{9}

In addition to the involvement by the European Commission, a number of important international organizations and expert groups have expressed their disapproval toward the Polish government, including the European Parliament,\textsuperscript{10} the Venice Commission,\textsuperscript{11} the UN Special Rapporteur for the Independence of Judges and Lawyers,\textsuperscript{12} the Consultative Council of European Judges (CCJE),\textsuperscript{13} the European Network of Councils of the Judiciary (ENCJ),\textsuperscript{14} and OSCE’s Office for Democratic Institutions and Human Rights (ODIHR).\textsuperscript{15}

1.2 Rule of Law Backsliding in the Literature

The Polish backsliding has not transpired in a vacuum, and is best understood in light of a larger European and Global context. Scholars claim that we are witnessing a “democratic recession”,\textsuperscript{16} “democracy in retreat”,\textsuperscript{17} “democratic backsliding”,\textsuperscript{18} “rule of law backsliding”,\textsuperscript{19} “constitutional retrogression”,\textsuperscript{20} “constitutional rot”,\textsuperscript{21} or – as one constitutional lawyer put it – “the End of ‘The End of History’”.\textsuperscript{22} Within Europe, countries like Hungary, Romania, and Turkey are highlighted alongside Poland as gloomy examples of countries taking illiberal turns.\textsuperscript{23} Interestingly, two of these countries, namely Poland and Hungary, were for a long time considered the most advanced democracies in their region.\textsuperscript{24}

\begin{thebibliography}{99}
\bibitem{8} European Commission (2017d).
\bibitem{9} A decision of this kind would not involve any real consequences, but is a precursor to the “nuclear-option” in Article 7(2) TEU, which, if triggered by a unanimous European Council, allows the Council to “suspend certain of the rights deriving from the application of the Treaties to the Member State in question, including the voting rights of the representative of the government of that Member State in the Council”.
\bibitem{10} European Parliament (2016a; 2016b; 2017).
\bibitem{11} Venice Commission (2016a; 2016b; 2017).
\bibitem{13} CCJE (2017).
\bibitem{14} ENCJ (2017).
\bibitem{15} OSCE/ODIHR (2017a; 2017b; 2017c).
\bibitem{16} Diamond (2015).
\bibitem{17} Kurlantzick (2014).
\bibitem{18} Bermeo (2016).
\bibitem{19} Pech and Scheppele (2017).
\bibitem{20} Huq and Ginsburg (2018).
\bibitem{21} Balkin (2018).
\bibitem{22} The End of “The End of History” lecture by Kim Scheppele (2017).
\bibitem{23} See Graber et al. (2018).
\bibitem{24} Bugarić and Ginsburg (2016) p. 71.
\end{thebibliography}
This growing body of literature highlights how the judiciary is oftentimes one of the first victims in eroding democracies.\textsuperscript{25} Considering the judiciary’s nature, this is perhaps not surprising:

When properly functioning, the courts can stand in the way of autocratic attempts to curtail liberal rights of speech and association, and can prevent charismatic populists from dismantling other checks on their authority – including election, legislatures, and internal instruments of horizontal accountability.\textsuperscript{26}

The fact that illiberal governments tend to show such great interest in the judiciary, suggests that courts matter in illiberal backsliding. Thus, gaining a better understanding of judicial institutions’ viability should constitute an important step toward understanding illiberal backsliding more generally.

Returning to the case of Poland, the existing literature promotes the view that PiS has been successful not necessarily by the “strength of the political attack on the rule of law but by the weakness of the defence mechanisms that should have been triggered once that attack started”.\textsuperscript{27} Scholars have proposed several explanations for this, including a lack of effective veto-points, an immature legal and constitutional culture, as well as the newness and underdeveloped popular support of judicial institutions.\textsuperscript{28} All of these accounts offer important insights into the current state of the rule of law in Poland. What has been lacking so far, however, is an attempt to study the situation from a strong theoretical perspective, capable of revealing the underlying causal mechanisms, and allowing for more rigorous analyses. Appropriate theories of this kind are available in the social sciences, notably in the field known as institutionalism.

1.3 Studying Institutions
Institutions have figured prominently as central objects of study in the social sciences – including history, sociology, economy, and political science – already from the infancy of these disciplines.\textsuperscript{29} More recently, Graver has demonstrated the fruitfulness of focusing on institutions within the socio-legal field.\textsuperscript{30} Theories concerning institutions’ characteristics, performance, and change are typically assembled under the umbrella institutionalism, even though this still

\begin{itemize}
\item \textsuperscript{26} Ginsburg and Huq (2018) p. 186.
\item \textsuperscript{27} Matczak (2018) p. 16.
\item \textsuperscript{29} Goodin (1996).
\item \textsuperscript{30} Graver (2018).
\end{itemize}
evolving field is far from uniform in terms of its conceptualizations and theoretical assumptions. Common for the discipline, however, is an emphasis on “the endogenous nature and social construction” of institutions.\(^{31}\) Moreover, all branches of institutionalism share the fundamental insight that studying institutions entails more than just taking account of formal rules and structures, as formally identical institutions often yield substantially different behavior and outcomes.\(^{32}\)

In conducting my study of the Polish judiciary, I have chosen to adopt a theory developed by Avner Greif in his seminal work *Institutions and the Path to the Modern Economy*.\(^{33}\) Greif developed his theory of institutions in order to study the role of institutions in economic development, specifically the commercial expansion in Europe and the Muslim world during the late medieval period. However, the theory aspires to be, in Greif’s own words, a “general framework for studying institutions”,\(^ {34}\) constituting a “conceptual, analytical, and empirical framework for fostering understanding and the positive analysis of institutions”.\(^{35}\) It therefore invites being tested on situations radically different from the ones it was developed for.

### 1.4 Research Questions

The aim of this paper is to better understand the attacks on the judiciary that transpired in the wake of PiS’ electoral victory. Taking an institutional approach, the paper seeks to identify the role judicial institutions played in these events. To explore this, it considers several research questions: What characterizes the judicial institutions in Poland? How have these institutions been affected by the government’s endeavors? And why have the efforts to resist the attacks not been more effective? Additionally, on a more theoretical level, the paper examines whether it is feasible to apply Greif’s theory of institutions to understand the contemporary judicial institutions of Poland, and if so, how, and with what limitations.

### 1.5 Methodology

Positioned within the field of socio-legal studies, this paper is concerned with identifying the social factors that have affected behavior in the situation under study – in this case behavior relevant to the recent attacks endured by the Polish judiciary. In order to do this, I have adopted the *empirical method of comparative and historical institutional analysis*, developed by Avner

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\(^{32}\) Graver (2018).

\(^{33}\) Greif (2006).

\(^{34}\) Ibid., p. xvi.

\(^{35}\) Ibid., p. 405.
The methodology can be described as a “theoretically informed, case study method that extensively relies on contextual knowledge of the situation and its history, and context-specific modeling”. Specifically, throughout the paper I develop and evaluate a conjecture about the relevant institutions, using contextual and game theoretic analysis. The paper is informed by the vast literature concerning courts, judicial behavior, and judicial independence, as well as the study of historical and legal sources, including legislation, judgments, opinions, press releases, letters, and newspaper articles.

1.6 Outline
In order to make sense of the Polish rule of law backsliding, it is necessary to first have a good grasp of the behavior we are trying to understand. Consequently, in the two subsequent chapters, I describe the attacks on the judiciary as they have occurred from late 2015 up until April 2019. First, I focus on the incidents surrounding the Constitutional Tribunal (chapter 2), before moving on to the ensuing reforms concerning the rest of the judiciary (chapter 3). The purpose of these chapters is twofold. For one, chronicling the developments has historical value in and of itself, and I therefore attempt to describe the events in some detail – adopting a literary style. But more importantly, the accounts provide the basis for the subsequent analysis (chapters 4–6).

For ease of exposition, the succeeding analysis is divided over three chapters. In chapter 4, I explore the nature of judicial institutions more generally, as well as the historical origin of the Polish judiciary. Then, I use these general insights to analyze the Constitutional Tribunal specifically (chapter 5). In the course of this chapter, I develop a conjecture about the institution (section 5.1), present and analyze a game theoretic model capturing this institution (section 5.2), and finally evaluate the conjecture using available knowledge and evidence (section 5.3). This exercise is then repeated for the ordinary judiciary (chapter 6).

The final part (chapter 7) summarizes the findings, and discusses their validity, as well as potential implications on policy and for future research on this topic.

2 Phase One: Capturing the Constitutional Tribunal
2.1 How It All Began: Nomination of “October” and “December Judges”
In the subsequent chapters, I tell the story of Poland’s “constitutional crisis”, specifically the turbulence surrounding the country’s Constitutional Tribunal. This first part focuses on the seed of the conflict, namely an illegitimate interference by PiS with the composition of the court. I

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then describe the resulting standoff between the PiS government and the Tribunal, before looking into how the government overcame this standoff. Finally, I discuss how the court is functioning today. Before we begin, just a quick note on terminology. Throughout the paper, I will for ease of exposition use the term “government” to refer to the combined legislative-executive policy branch, and for the sake of variation, I use the terms “government” and “authorities” interchangeably.

It is quite evident that the PiS government is responsible for the country’s constitutional crisis, which started to unfold as soon as the party came to political power towards the end of 2015. However, the initial opportunity to interfere with the composition of the Constitutional Tribunal was actually provided by the preceding incumbents, in their illegitimate attempt to seize constitutional power on their way out of office.

On 25 June 2015 – four months before the upcoming parliamentary election – the lower house of the Polish Parliament (hereafter referred to by its Polish name, the Sejm) adopted a new and comprehensive Act on the Constitutional Tribunal. The act was the result of several years of thorough preparations – a process that had involved many stakeholders, including representatives from the Constitutional Tribunal itself. Coincidently, the Sejm concluded this process not only while parliamentary elections were imminent, but also at a time when as many as five Tribunal judges were approaching their ends of term. In other words, the Sejm would very soon have the opportunity to replace as much as a third of the influential Tribunal’s judges. Feeling the urgency of the situation, the governing coalition – led by the liberal-conservative Civic Platform (PO) – made sure to add a transitional provision to the act, which allowed them to nominate judges for all five of the soon-to-be vacant positions. They did this despite knowing perfectly well that two of the positions would not become vacant until after the end of the sitting parliament’s term.

Less than three weeks before the October election, the PO coalition nominated five judges to the Tribunal. According to the adopted resolutions, three of these candidates, namely Roman Marek Hauser, Andrzej Stanisław Jakubecki, and Krzysztof Ślebzak, were to take up office on 7 November 2015. The last two, Bronisław Włodzimierz Sitek and Andrzej Jan Sokala, would commence on 3 and 9 December 2015, respectively. In the following, I will refer to these as the “October judges”. Alas, none of the October judges have to date had the chance to serve on

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38 Under article 194(1) of the Polish Constitution, judges of the Constitutional Tribunal are elected by the Sejm for a nine year term of office.

39 Article 137 of the Act of 25 June on the Constitutional Tribunal, stated that in the case of “judges whose term expires in 2015”, the time-limit for proposing a candidate “shall be 30 days after the day of the Act’s entry into force.”
the Tribunal. When presented with these appointments, Andrzej Duda – the President of the Republic of Poland and an affiliate of the Law and Justice Party (PiS) – refused to swear in any of them. Later on, Polish authorities have justified Duda’s actions by referring to a customary rule that purportedly allows the President of the Republic to refrain from taking the oath of elected judges to the Constitutional Tribunal, if he has any doubts “as to the procedure chosen to elect” them.40

On 12 November 2015, following the electoral victory of PiS, the 8th Sejm commenced their four-year term. The newfound PiS majority immediately took action to gain control over the constitutional deadlock. Already within the first week,41 they passed an amendment to the Act on the Constitutional Tribunal,42 in which they, inter alia, introduced a provision that provided a legal basis for redoing the contested elections.43 A week later, they adopted five resolutions, in which they invalidated all five of the previous Sejm’s nominations from 8 October.44 In the meantime, however, the opposition had taken steps of their own to prevent the PiS majority from getting the best of them. On 17 November 2015, a group of PO deputies lodged an appeal to the Constitutional Tribunal,45 hoping to get the Tribunal’s approval that the procedure prescribed in the transitional provisions of the Act from June 2015 was in fact constitutional. In a later appeal, they also challenged the new amendments from 19 November.46

As the first of these pending decisions from the Constitutional Tribunal would have consequences for the legality of the approaching nomination process, the Tribunal on 30 November ordered the Sejm to abstain from nominating any judges until the final decision was ready.47 Nonetheless, the Sejm majority went ahead and nominated five new judges two days later. These “December judges” were in better luck than the judges nominated by the previous Sejm.

40 Ministry of Foreign Affairs (2016b) p. 2. In its decision in case K 34/15 from 3 December 2015, the Constitutional Tribunal denied the existence of such a rule (see more about this decision below).
41 In hastily preparing this bill, the Sejm breached several procedural norms, according to the Constitutional Tribunal’s judgment of 9 December, Ref. No. K 35/15 (see section 3.5 of the judgment).
43 The amendment repealed article 137 of the Act on the Constitutional Tribunal, and introduced a new article 137a, which reads, “In the case of judges of the Court whose term of office expires in 2015, the deadline for the submission of the application referred to in Article 19 para. 2 shall be seven days from the day this provision comes into force.”
44 Monitor Polski, items 1131–1135.
46 Ref. No. K 35/15. The Polish Commissioner for Human Rights, the National Council of the Judiciary, and the First President of the Supreme Court filed similar complaints.
Understanding the urgency of the situation, President Duda accepted their oaths that very night, at approximately 3 a.m. This was just in time before the Constitutional Tribunal delivered its decision in the first of the awaited cases, later that day.

In its judgment of 3 December 2015, Ref. No. 34/15, the Tribunal found that Article 194(1) of the Polish Constitution obliged the Sejm to elect judges for vacant positions “during the parliamentary term in the course of which the vacancy occurs”. In accordance with this, the Tribunal unanimously held that the transitional provision enacted by the PO coalition was in line with the Constitution, insofar as it concerned the election for the three posts that became vacant during the previous Sejm’s term. Insofar as the provision allowed for the election of two judges for positions that became vacant only after the new Sejm’s term began, on the other hand, the Tribunal ruled the provision inconsistent with the Constitution. Furthermore, the adjudicating panel declared that article 21(1) of the Act on the Constitutional Tribunal expressed a norm that obliged the President of the Republic to receive the oath of an elected judge immediately, and without any discretion as regards refusing to do so.

Six days later, the Tribunal delivered its ruling in the second case. The court unanimously found most of the provisions of PiS’ November amendments unconstitutional. Notably, they held that the new article 137a – which provided the legal basis to reelect judges for the five positions already chosen by the previous Sejm – was in breach of the Constitution, insofar as it applied to the three positions legally filled. The only reasonable inference to draw from these two decisions is that three of the “October judges” were elected legally, and that President Duda was in the wrong when he refused to receive the oath of these three judges. The decisions also clearly indicated that Duda’s obligation to swear in three of the October judges persisted, notwithstanding the resolutions passed on 25 November 2015, in which the 8th Sejm had invalidated the election of all five October judges.

Taking account of the Tribunal’s own rulings, the President of the Tribunal, Andrzej Rzepliński, soon began assigning cases to Piotr Pszczółkowski and Julia Przyłębska – the two December

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49 Article 194(1) of the Polish Constitution reads, “The Constitutional Tribunal shall be composed of 15 judges chosen individually by the Sejm for a term of office of 9 years from amongst persons distinguished by their knowledge of the law. No person may be chosen for more than one term of office.”
50 See section 12 of the judgment of 3 December 2015, Ref. No. 34/15.
51 The relevant part of Article 21(1) reads, “The person elected to the position of a Court judge shall take an oath […] vis a vis the President of the Republic of Poland”.
judges that the Sejm lawfully elected.\(^{53}\) As regards the other three judges, however, Rzepliński did not recognize them as adjudicating judges. President Duda, in turn, has to date refused to take the oath from the three legally elected October judges, and the Polish government have insisted that Rzepliński was under the obligation to allow all December judges onto the bench.\(^{54}\) The result of this deadlock was a situation where the Tribunal for more than a year consisted of only 12 adjudicating judges.

Duda has justified his reluctance to swear in the three October judges by relying on the fact that the 8\(^{\text{th}}\) Sejm passed resolutions invalidating the previous Sejm’s nominations, arguing that this deprived him of the competence to receive their oath.\(^{55}\) Supporting this view, the PiS government has also articulated an alternative interpretation of the legal effects of the two decisions by the Tribunal. In their view, the judgments do not concern the validity of the elections per se, but merely the contested normative act’s compliance with the Constitution.\(^{56}\) They claim that only the Tribunal of State has the competence to rule on the legality of public authorities’ actions. However, this line of reasoning has not persuaded any of the international observers. The Venice Commission, the European Parliament, and the European Commission have all demanded the Polish government to ensure that the three legally elected October judges can take up their offices as judges of the Tribunal, in order to be in line with European standards concerning the rule of law.\(^{57}\)

The Polish government’s disapproval of the Tribunal’s rulings was further accentuated through Prime Minister Beata Szydło’s unprecedented attempt to refrain from publishing the judgment from 3 December 2015.\(^{58}\) On 10 December 2015, the Head of the Chancellery of the Prime Minister, Beata Kempa, sent a letter to the President of the Tribunal, Andrzej Rzepliński, in which she argued that the composition of the Tribunal in the judgment of 3 December (Ref. No. K 34/15) was contrary to the requirements of the act in force at the time.\(^{59}\) She claimed that the Tribunal thus had violated the Constitution, rendering the decision invalid. In light of this, she

\(^{53}\) TVP (2016).
\(^{54}\) Ziobro (2016a).
\(^{55}\) PAP (2015).
\(^{56}\) Ministry of Foreign Affairs (2016c).
\(^{57}\) Venice Commission (2016b) para. 104; European Parliament (2016a) para. 4; European Commission (2016c) para. 65.
\(^{58}\) Pursuant to article 190(2) of the Polish Constitution, all judgments by the Constitutional Tribunal shall be “immediately published” in one of the country’s official publications. The publication constitutes the moment when the decision takes effect, see paragraph 3.
\(^{59}\) Kempa (2015).
expressed doubts as to the possibility of publishing the decision. In President Rzepliński’s reply, he maintained that the Constitution provided no exceptions to the requirement of promulgating decisions, and requested Prime Minister Szydło to do so immediately.\(^{60}\) The following day, the Head of the Chancellery announced that the Prime Minister would publish the decision after all,\(^{61}\) and she did so five days later.\(^{62}\)

Although Prime Minister Szydło ultimately published the judgment, her hesitation to do so can in retrospect be seen as an early warning sign as to what would come next: active and coordinated attempts to undermine the Tribunal completely.

2.2 Attempts at Crippling the Court

2.2.1 Round One

After Rzepliński refused to allow three of the December judges to adjudicate, the Sejm majority did not let a month go by before they passed new legislation directly aimed at crippling the functioning of the Tribunal. The Act of 22 December 2015 amending the Act of the Constitutional Tribunal contained a number of changes that combined would have made adjudicating very difficult (if not impossible) for Rzepliński and his colleagues.

Firstly, the amended act introduced several provisions, which *de facto* could have blocked the Tribunal from performing its adjudicating functions altogether. Held together, article 44(1) and (3) prescribed that the Tribunal as a general rule shall “adjudicate sitting in full bench” with “the participation of at least 13 judges”.\(^{63}\) On top of that, article 99(1) required the judgments by the full bench to “be passed by a majority of two-thirds of the votes”. Considering the fact that the Constitutional Tribunal at that point consisted of only 12 active judges, the Venice Commission’s conclusion that these requirements would render the Tribunal’s “decision-making extremely difficult”, seems like an understatement.\(^{64}\) Secondly, the act introduced provisions that risked slowing down the work of the Tribunal considerably. Article 80(2) stipulated that the Tribunal had to hear all cases in the sequence that they received the appeals, whereas article 87(2) required a minimum delay of three months before the hearing, from “the day the

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\(^{60}\) Rzepliński (2015).

\(^{61}\) The Chancellery of the Prime Minister (2015).

\(^{62}\) Dz.U. 2015 item 2129.

\(^{63}\) Article 44(1), section 2 and 3 provided certain exceptions, under which the Tribunal could adjudicate in a bench of seven and three judges, respectively. Given these exceptions, the requirement of adjudicating in a full bench would primarily apply to the important cases of abstract review initiated by state institutions.

\(^{64}\) Venice Commission (2016a) p. 16.
notification on the date of the hearing has been delivered”. Confronted with an urgent case, these requirements would deny the Tribunal flexibility to quickly deal with the situation.

In defending these procedural changes, President Duda told the press that he believed that the amendments would “strengthen the position and the gravity of the tribunal’s jurisprudence, also in the public’s perception”.\textsuperscript{65} In sharp contrast, the Venice Commission opined that not only were the new procedural requirements highly unusual in a comparative perspective, they also risked breaching European standards, including the ECHR.\textsuperscript{66} The European Commission found that the amendments “undermined the effectiveness of the Constitutional Tribunal as a guarantor of the Constitution”.\textsuperscript{67}

Unsurprisingly, a number of competent bodies appealed to the Tribunal, challenging the constitutionality of the amendment.\textsuperscript{68} The Tribunal delivered its final decision in the case on 9 March 2016, sitting in a full bench – which at that time meant 12 judges.\textsuperscript{69} Dealing with the case was not a straightforward matter, however. Because the act did not provide any vacatio legis,\textsuperscript{70} the amendments were already in force when the case came before the Tribunal.\textsuperscript{71} This put the judges in a very delicate position, as they had to decide whether they should apply the newly enacted provisions while hearing the case. Doing so would entail two problems. Firstly, if they were to find the provisions unconstitutional, they would paradoxically have applied unconstitutional provisions in the procedure. Secondly, the new legislation contained requirements that was impossible for the Tribunal to meet. In other words – if applied – they would prohibit the Tribunal from hearing the case in the first place. The majority\textsuperscript{72} therefore held that they would hear the case by “bypassing the […] provisions [that] constitute the subject of the allegation in the present case”.\textsuperscript{73} Subsequently, the majority declared the amending act null and void in its entirety, due to several severe defects in the legislative procedure. Although it was

\textsuperscript{65} President of the Republic of Poland (2015).
\textsuperscript{67} European Commission (2016b) para. 28.
\textsuperscript{68} Applications were filed by the First President of the Supreme Court, two groups of Sejm deputies, the Polish Commissioner for Human Rights, and the National Council of the Judiciary.
\textsuperscript{70} Vacatio legis refers to the period between the act’s promulgation and its entering into force.
\textsuperscript{71} Pursuant to article 5 of the amending act, the act would come into force on the day it was published, i.e., on 28 December 2018.
\textsuperscript{72} Each of the two PiS-elected judges, Julia Przyłębska and Piotr Pszczółkowski, gave dissenting opinions in which they applied the amendments. This inevitably led them to the conclusion that the Tribunal failed to meet the requirements to hear the case.
\textsuperscript{73} Judgment of 9 March 2016, Ref. No. K 47/15, section 1.12,
not necessary for the outcome, the majority also commented on the constitutionality of the particular provisions of the act. They ruled all of the above-mentioned procedural hurdles unconstitutional as “by virtue of making it impossible for [the Tribunal] to carry out its activity diligently and efficiently, as well as by undermining its independence and separateness from the other branches of government – they infringe the principles of a state ruled by law.”\textsuperscript{74}

The judgment was not popular with the governing majority, and several key PiS figures blatantly expressed their disapproval of the ruling.\textsuperscript{75} Prominent among these were Prime Minister Szydło, who was quick to announce that the court’s refusal to apply the new procedural rules made it impossible for her to publish the decision.\textsuperscript{76} Once again, the Prime Minister was more than willing to undercut the Tribunal, but this time, she was ready to stick to her guns. Despite massive public demonstrations and pressure from institutions like the European Commission, the European Parliament, and the Venice Commission, Szydło remained adamant to the day she left office.\textsuperscript{77}

In the time that followed, the Tribunal continued to hear cases without applying the amendments, and Prime Minister Szydło – who regarded the amendments from 22 December 2015 as prevailing – continued to refuse to publish any subsequent judgments. Meanwhile, the Sejm had initiated the process of adopting yet another piece of legislation concerning the Tribunal. This time, the PiS majority concocted a complete act, which would replace the act from 25 June 2015 in its entirety. The Sejm adopted the act on 22 July 2016, quickly followed by President Duda’s signature and publication in the official journal of laws, \textit{Dziennik Ustaw}.\textsuperscript{78}

\subsection*{2.2.2 Round Two}

In the new act, the lawmakers did respond to some of the criticism that they had received concerning the amendments from 22 December 2015. For instance, they relaxed the requirement of adjudicating in a full bench,\textsuperscript{79} and lowered the full bench attendance quorum from 13 to 11.\textsuperscript{80} Furthermore, they removed the two-thirds majority requirement,\textsuperscript{81} and reduced the mandatory

\textsuperscript{74} Ibid., sections 5.5.5, 5.7.5, and 5.8.5.
\textsuperscript{75} onet (2016).
\textsuperscript{76} Ibid.
\textsuperscript{77} Szydło was succeeded by Mateusz Morawiecki on 11 December 2017. Morawiecki finally published the judgment on 5 June 2018, see section 2.4 below.
\textsuperscript{78} Dz.U. 2016 item 1157.
\textsuperscript{79} Act of 22 July 2016 on the Constitutional Tribunal, article 26(1).
\textsuperscript{80} Ibid., article 26(2).
\textsuperscript{81} Ibid., article 69(1).
delay of hearings from three months to 30 days. They also introduced exceptions to the requirement of hearing applications in the order they were filed. Notably, the act gave the President of the Tribunal the power to bypass the prescribed sequence when doing so was “justified by the necessity to safeguard the rights or freedoms of citizens, national security or the constitutional order”. The Venice Commission and the European Commission welcomed these changes, but they continued to question the advantages of having a (still relatively high) attendance quorum and a sequence rule, albeit a less rigid one. Moreover, the Venice Commission was not convinced that the reduction of the minimum delay of hearings was sufficient to provide the Tribunal with the necessary flexibility to hear pressing cases forthwith.

Besides these positive changes, the new act also introduced a number of provisions that were received with much less optimism. Firstly, the act replaced the requirement of hearing all cases in a full bench with a provision that would allow a group of any three judges of the Tribunal to refer to the full bench any case that was assigned to an adjudicating panel. Secondly, article 30(5) introduced a provision that prohibited the Tribunal from hearing cases without the presence of the Public Prosecutor General. As the PiS majority previously had merged the Prosecutor General office with the office of the Minister of Justice, the provision would de facto have enabled Minister of Justice Zbigniew Ziobro to block the Tribunal’s work, by not showing up to a hearing. Thirdly, the act allowed any group of four judges who disagreed with the majority’s opinion of an ongoing case, to demand a three months’ postponement of the case, were they to “deem that a given matter is of great significance for the constitutional order or the public order”. Finally, the act included a provision that suspended all pending cases filed by governmental bodies, for a period of six months.

Based on the combined effect of these provisions, the Venice Commission found that the new act “would considerably delay and obstruct the work of the Tribunal and make its work ineffective, as well as undermine its independence by exercising excessive legislative and executive control over its functioning”. Likewise, the European Commission strongly criticized the act, and concluded that “[t]he fact that the Constitutional Tribunal is prevented from fully ensuring

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82 Ibid., article 38(5).
84 Venice Commission (2016b) para. 51.
85 Act of 22 July 2016 on the Constitutional Tribunal, article 26(1)(g).
86 Ibid., article 68(5) and (6).
87 Ibid., article 84(1).
88 Venice Commission (2016b) para. 123.
an effective constitutional review adversely affects its integrity, stability and proper functioning, which is one of the essential safeguards of the rule of law in Poland”.  

As before, the new legislation was challenged before the Constitutional Tribunal, this time by a group of Sejm deputies and the Polish Commissioner for Human Rights. Unlike last time, however, the new act included a *vacatio legis* of 14 days, which allowed the Tribunal to determine the legality of the act before it entered into force. They delivered their final judgment on 11 August 2016, sitting in a full bench – which at that point meant 12 judges. Once again, the majority of the tribunal ruled all the above described procedural impediments unconstitutional, stating that they were contrary to “the principle of diligence and efficiency in the work of public institutions”. Moreover, the Tribunal held that several of the provisions constituted “excessive interference on the part of the legislator which infringed the principle of the separation and balance of powers as well as the principle of the separation and independence of the judiciary”. However, the judgment did not lead to any final resolution of the conflict. Instead, it merely represented the next move in the ongoing trench war, and neither of the belligerents were about to lay down their arms any time soon.

On top of containing the procedural impediments described above, the new Act on the Constitutional Tribunal also attempted to address the deadlock concerning the non-publication of all the judgments rendered since April 2016. Article 89 stipulated that all “rulings issued in breach of the provisions of the Constitutional Tribunal Act of 25 June 2015 before 20 July 2016 shall be published […] with the exception of rulings concerning normative acts that have ceased to have effect.” This solution did not please any of the government’s critics, however. For instance, the Venice Commission stated that “[s]uch a provision is unacceptable in a State governed by the rule of law”, as it rested on the premise that the government can “pick and choose” which judgments it will publish. Additionally, both the European Commission and the Venice Commission condemned the provision’s indication that the judgments were issued in breach of the law, claiming that this was “contrary to the principle of the separation of powers”, and “flouts the principle of independence of the judiciary and constitutes another flagrant violation

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89 European Commission (2016b) para 72.
91 The two December judges, Przyłębska and Pszczółkowski, as well as the freshly elected Zbigniew Jędrzejewski, delivered dissenting opinions.
92 Trybunał Konstytucyjny (2016a) section 4.
93 Venice Commission (2016b) para. 96.
94 European Commission (2016b) para. 23.
of the rule of law”. Likewise, the Constitutional Tribunal itself concluded that the provision “infringes the principle of the separation and balance of powers, the requirement of cooperation between constitutional state authorities, the independence of courts and tribunals, as well as all the norms and principles which underlie the constitutional order of the state”.

Despite all this, Prime Minister Szydło eventually published 21 of the hitherto-unpublished decisions on 16 August 2016, using the unconstitutional article 89 as a legal basis. However, she did not publish the important judgment from 9 April, as it concerned a normative act no longer in force. What is more, she also refrained from publishing the newly issued judgment from 11 August 2016. Consequently, yet another round of musical chairs was initiated: On the one hand, the Tribunal would not apply the procedural requirements from the new Act of 22 July 2016, as it had ruled them unconstitutional. The Prime Minister, on the other hand, did not recognize the Tribunal’s judgment, and therefore refused to publish any subsequent decisions, seeing that they did not meet the – in her view – still prevailing requirements of the new Act.

2.2.3 Consequences for the Tribunal’s Functioning

Even though Rzepliński and the Tribunal in some ways managed to shrug off the PiS government’s attempts to subdue them, their standoff nevertheless had several negative consequences, both for the court itself and the legal system as a whole. For one, throughout parts of 2015 and 2016, the Tribunal was largely preoccupied with hearing cases concerning their own existence, instead of dealing with the many other pressing issues. Additionally, Prime Minister Szydło’s unconstitutional refusal to publish key decisions led to a situation that one of the Tribunal’s own judges have characterized as “the most dangerous problem that could ever happen to the state of law”, namely the development of “two parallel legal systems”. By this, he alludes to the situation where governmental institutions continue to refuse to recognize the Tribunal’s decisions, whereas independent courts and bodies do apply them. And this is exactly what happened in Poland: On 26 April 2016, the General Assembly of the Supreme Court adopted a resolution, in which they stated that any judgment by the Constitutional Tribunal will have

95 Venice Commission (2016b) para. 98.
96 Trybunał Konstytucyjny (2016a) para 12.
98 Article 89 of the Act of 22 July on the Constitutional Tribunal only provided a legal basis for publishing “illegal” judgments that had been delivered prior to 20 July 2016.
broken the “presumption of constitutionality” from the moment of its delivery. In other words, in their view, the decisions were not reliant upon publication to have effect. Correspondingly, the Supreme Administrative Court of Poland on 8 August 2016 applied an unpublished judgment by the Constitutional Tribunal.

Through all of this, Rzepliński stubbornly continued to exclude the three illegally elected December judges, despite industrious efforts from the government to coerce him into letting them adjudicate. The clearest example of this effort was the adoption of article 90 of the Act of 22 July on the Constitutional Tribunal. Pursuant to this article, “[t]he judges of the Tribunal who have taken the oath of office before the President of the Republic, and who have not so far assumed the judicial duties, shall be included in adjudicating benches of the Tribunal, and shall be assigned cases, by the President of the Tribunal”. However, the Tribunal set this provision aside as contrary to the Constitution, as it rested on assumptions that were incoherent with the Tribunal’s prior rulings, notably the judgments of 3 and 9 December 2015.

2.3 The Take-Over

For the PiS government, the principled Rzepliński clearly represented a powerful obstacle. It should therefore come as no great surprise that Rzepliński from the outset was subjected to several targeted efforts to subdue him. The earliest of such attempts came already with the first round of PiS’ amendments to the Act on the Constitutional Tribunal, on 19 November 2015. Article 2 of the act introduced a provision stating that the term of the sitting President of the Tribunal “shall expire after three months from the day the Act comes into force.” Considering the fact that Rzepliński’s term originally was not supposed to end until 19 December 2016, the provision required him to step down from his position as President of the Tribunal close to a year early. However, the Tribunal did not allow this to happen. In their judgment from 9 December 2015, a bench of five judges unanimously held that prematurely removing the President of the Tribunal was inconsistent with the Constitution, as it constituted an “unauthorised interference on the part of the legislator in the realm of the judiciary and undermine[d] the principle of the Tribunal’s independence from the other branches of government”.

It seems as the PiS

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100 The Supreme Court of the Republic of Poland (2016).
101 Judgment of the Supreme Administrative Court of 8 August 2016, Ref. No. II FSK 1021/16.
102 Trybunał Konstytucyjny (2016a).
103 Judgment of 9 December 2015, Ref. No. K 35/15, section 8.7.2. Other aspects of this judgment is discussed in section 2.1 above.
government accepted this decision, as they neither refused to publish the judgment, nor at any point thereafter tried to reintroduce a similar provision.

This was not the sole attack against Rzepliński, however. On 2 December 2015 – i.e., the day before the Tribunal delivered its important decision regarding the nomination of the October judges – the Minister of Justice sent a letter to Rzepliński, entitled “Signalization on the possibility of committing a disciplinary tort”. In the letter, Minister Ziobro expressed his discontent with a public appearance made by Rzepliński, namely an interview he had given on 20 November 2015 to the commercial television channel TVN24. Ziobro was of the opinion that Rzepliński, by publicly criticizing the government’s actions, had violated his duty as a judge to abstain from political behavior, and that it therefore was justified to initiate disciplinary proceedings against him.

This letter likely came as something of a surprise to Rzepliński, because at that time the disciplinary procedures did not allow for any involvement by the Minister of Justice. Shortly afterward, however, through the amendments of 22 December to the Act on the Constitutional Tribunal, the Sejm introduced a new article 28a, which gave the Minister of Justice, as well as the President of the Republic, the authority to request the initiation of disciplinary proceedings against Tribunal judges. Additionally, a new article 31a was introduced, which included the Sejm as an essential party in the most serious disciplinary proceedings. The European Commission and the Venice Commission both objected to these changes, arguing that involving political institutions in disciplinary proceedings could have a negative impact on the independence of the Tribunal. Correspondingly, the Constitutional Tribunal ruled these provisions unconstitutional in its judgment from 9 March 2016. To Rzepliński’s fortune, Minister Ziobro never acted on his threats to initiate disciplinary proceedings against him. What is more, despite not recognizing the Tribunal’s decision from 9 March 2016, the PiS government seemed to have taken in some of the criticism against the changes to the disciplinary proceedings, as no corresponding provisions were found in the subsequent Act on the Constitutional Tribunal of 22 July 2016.

104 Ziobro (2016b).
105 The article read, “In particularly gross cases, the General Assembly shall apply to the Sejm to depose the judge of the Court.”
Despite these hardships, Rzepliński remained steadfast until his term came to an end on 19 December 2016.\textsuperscript{108} Under his leadership, the Tribunal continued to render judgments despite them not being published, and all the three illegally elected “December judges” were consistently kept off the bench. Parallel to Rzepliński’s departure approaching, the PiS government meticulously prepared for the important moment by making changes to the procedure for electing the new President of the Tribunal.

The first sign of these preparations can be found already in the Act of 22 July 2016 on the Constitutional Tribunal. Article 16(1) of the Act gave the President of the Republic an increased sway over the election of the President of the Tribunal in a subtle manner. Whereas the President of the Republic hitherto had had the authority to appoint the President of the Tribunal from among \textit{two} candidates proposed by the General Assembly of the Tribunal, the new act increased this number to \textit{three}. As the Venice Commission pointed out, this new procedure substantially increased the opportunity for the President of the Republic to appoint a Tribunal President who lacked substantial support within the Tribunal.\textsuperscript{109} The constitutionality of this new procedure was challenged before the Tribunal, but in its judgment of 7 November 2016, the Tribunal unanimously held that the new procedure was in line with the Constitution.\textsuperscript{110}

On 30 November 2016, Rzepliński convened a meeting of the General Assembly of the Constitutional Tribunal, to prepare for his retirement. The plan was to nominate candidates for the presidency, in accordance with the procedure laid out in the Act of 22 July 2016. However, the three PiS-nominated judges, Julia Przyłębska, Zbigniew Jędrzejewski, and Piotr Pszczółkowski, all called in sick, leaving the General Assembly unable to meet its statutory quorum of ten.\textsuperscript{111} The minutes from the meeting show that the Assembly nonetheless went forward with the nomination process. The Assembly pointed to their constitutional and statutory duty to submit candidates within the statutory time limit, and argued that the absence of the three judges

\textsuperscript{108} Rzepliński also underwent criminal investigations by the Public Prosecutor Office of Katowice, examining whether he had exceeded his authority when he refused three of the December judges to join the bench, see Goettig (2016).

\textsuperscript{109} Venice Commission (2016b) para. 29.

\textsuperscript{110} Judgment of 7 November 2016, Ref. No. K 44/16.

\textsuperscript{111} Trybunał Konstytucyjny (2016b).
should not prevent them from fulfilling this constitutional duty. Consequently, they nominated Stanisław Rymar, Piotr Tuleja, and Marek Zubik. The President of the Republic did not accept this nomination as valid, however. In a letter of 5 December 2016, the Head of the Chancellery of the President of the Republic informed the Tribunal that the President expected the General Assembly to meet the quorum requirement. Giving it one last try, Rzepliński immediately convened another meeting, but once again the three PiS-nominated judges boycotted the meeting. The result was that Rzepliński’s term came to an end before a successor had been ensured.

Just as Rzepliński was heading out the door, the PiS government made one last adjustment to the election procedure, thereby removing any remaining obstacles toward securing control over the election. During the first half of December 2016, the upper house of Parliament (the Senate) approved three new Acts concerning the Constitutional Tribunal. Creatively, one of these acts introduced a brand new position, namely that of a “judge performing the duties of the President of the Tribunal” (hereafter referred to as the “acting President”). Pursuant to the act, an acting President was to be appointed by the President of the Republic if no new President of the Tribunal had been successfully appointed before the act entered into force, i.e., the exact situation the PiS-elected judges successfully had evoked. Conveniently, the act allowed the President of the Republic to handpick the acting President “among the judges of the Tribunal with the longest period of work experience in common courts or in the central state administration”. As the European Commission pointed out, these criteria facilitated for “someone with no meaningful experience in the judiciary but only in central government [to] be selected, while someone with a long experience in the Tribunal itself but not in ordinary courts could not be

112 Pursuant to article 16(3) of the Act of 22 July 2016 on the Constitutional Tribunal, candidates for the position of the President of the Tribunal shall be presented to the President of the Republic between the 30th and the 15th day before the end of the term of the incumbent President.
113 Trybunał Konstytucyjny (2016c).
115 See article 17 of the Act of 13 December 2016. The responsibilities of the acting President involved, inter alia, presiding over the election of a new President of the Tribunal, see article 20 of the act.
116 Ibid., article 16.
117 Ibid., article 17(2).
It does not require a vivid imagination to suspect that these unusual criteria were tailored-made to ensure that President Duda could choose one of the PiS-elected judges as acting President of the Tribunal.

On 20 December 2016, the day after Rzepliński left office, President Duda appointed one of the Tribunal’s most junior judges, Julia Przyłębska, as acting President of the Tribunal. After her appointment, Przyłębska acted quickly to consolidate her newly attained power. She immediately summoned a meeting of the General Assembly of the Tribunal, for that very afternoon. The minutes from the meeting show that one of the Tribunal judges, Stanisław Rymar, was away on vacation that day. He promptly requested the meeting to be postponed to the next day so that he would be able to attend. In support of this, several judges opposed the convening of the meeting, on the grounds that all judges were entitled to participate in the decisions by the General Assembly. Przyłębska, however, refused to wait. Moreover, unlike Rzepliński, Przyłębska immediately recognized the three illegally elected “December judges” – Henryk Cioch, Lech Morawski, and Mariusz Muszyński – as legitimate members of the General Assembly.

The only matter on the Assembly’s agenda was the nomination of candidates for the post of President of the Tribunal. Only two judges submitted themselves as candidates: Mariusz Muszyński and Przyłębska herself. In protest of the procedure, eight of the fourteen judges present – all of the remaining “old” judges, as well as Piotr Pszczółkowski – refused to take any part in the voting. The remaining six PiS-elected judges, on the other hand, split their votes between the two candidates, and the result was presently handed over to the President of the Republic. The very next day, President Duda decided to swear in Julia Przyłębska as the new President of the Constitutional Tribunal.

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118 European Commission (2016c) para. 57.
119 Monitor Polski 2016 item 1229. A reminder: Przyłębska is one of the two legally elected December judges.
120 Trybunał Konstytucyjny (2016d).
121 Article 21(2) of the Act of 13 December 2016, which had come into force the previous day, prescribed that the election of the new President of the Tribunal was to be “attended by the judges of the Tribunal who have taken the oath of office before the President of the Republic of Poland.”
122 A little reminder: Pszczółkowski is one of the two legally elected December judges, alongside Przyłębska.
123 The minutes show that Przyłębska received five votes, and Muszyński one, see Trybunał Konstytucyjny (2016d).
124 President of the Republic of Poland (2016).
In the aftermath, the legality of Przyłębska’s election has been disputed by many observers, including the European Commission.\textsuperscript{125} Specifically, they allege that the election procedure failed to meet the formal legal requirements, because the General Assembly did not confirm the voting results through adopting a resolution; Przyłębska only held one vote, whereas her critics maintain that she ought to have held an additional one to sanction the nominated candidates. The grounds for such a demand was found in the Tribunal’s recent jurisprudence, which provided that all candidates proposed to the President of the Republic had to have the support of the majority of the General Assembly.\textsuperscript{126} Adopting such a resolution would have been difficult to achieve for Przyłębska, however, seeing that more than half of the Assembly boycotted the vote.

2.4 The Przyłębska Court

Unsurprisingly, one of Przyłębska’s first actions as the new President of the Tribunal was to begin to assign cases to the three dormant “December judges”,\textsuperscript{127} thereby contradicting the former President Rzepliński’s unequivocal stand on their illegality.\textsuperscript{128} Consequently, the Constitutional Tribunal again comprised 15 judges, for the first time in over a year. Moreover, Przyłębska willingly cooperated with the government to solve the issue of the non-publication of the Tribunal’s judgments rendered since 11 August 2016. Under article 19 of the new Act of 13 December 2016, all unpublished judgments were to be published “after their publication is ordered” by the President of the Tribunal.\textsuperscript{129} After receiving such an order from Przyłębska, the Prime Minister published 15 judgments in the Official Journal on 29 December 2016.\textsuperscript{130} However, the important judgments from 9 March, 11 August, and 7 November 2016 was not among

\textsuperscript{125} European Commission (2016c) para. 59–60.

\textsuperscript{126} Judgment of 7 November 2016, Ref. No. K 44/16. This judgment was not published until 5 June 2018, see section 2.4 below.

\textsuperscript{127} Article 18(2) of the Act of 13 December 2016 provided Przyłębska with a legal basis for doing this, as it instructed the President of the Tribunal to “assign cases to the judges of the Tribunal who have taken the oath of office before the President of the Republic of Poland and create conditions that make it possible for the judges of the Tribunal to perform their duties”. This provision is almost identical to article 90 of the Act of 22 July 2016 on the Constitutional Tribunal, which the Tribunal already found unconstitutional in its judgment of 11 August 2016, Ref. No. K 39/16, see section 2.2.2 above.

\textsuperscript{128} Other immediate actions taken by Przyłębska included imposing restrictions on press coverage of Tribunal hearings, and shutting down the website of the constitutional debate arena hosted by the Tribunal, Obserwator-Contytucyjny.pl, see Helsinki Foundation for Human Rights (2017b).

\textsuperscript{129} Again, the Tribunal had previously found unconstitutional a very similar provision from the Act of 22 July 2016 on the Constitutional Tribunal, see section 2.2.2 above.

\textsuperscript{130} Dz.U. 2016, items 2196–2210.
these, because article 19 of the Act contained an exception for judgments concerning “normative acts that have ceased to be binding”. On 18 May 2017, Przyłębska implicitly showed her support for this arrangement, by having these three decisions removed from the Tribunal’s own website. Together, these actions marked the end of the year long standoff between the government and the Tribunal.

Shortly after Przyłębska came to power, the PiS-nominated judges also attained the majority of the judge positions of the Tribunal. This was, of course, chiefly accomplished by including the three illegal “December judges” onto the bench. However, it was an additional incident that ultimately tipped the scale in PiS’ favor. On 24 January 2017, the PO-nominated judge Andrzej Wróbel decided to retire in protest, three years prematurely. This gave the PiS majority of the Sejm the opportunity to nominate their eighth judge in little over one year, and their decision fell upon Grzegorz Jędrejek. Near the end of June, yet another judge was replaced, as the term of the Vice-President of the Tribunal, Stanisław Biernat, came to an end. To fill the vacant post of Vice-President, the General Assembly of the Tribunal nominated one of the “old” judges, Stanisław Rymar, as well as the illegally elected December judge Mariusz Muszyński. Unsurprisingly, on 5 July 2017 President Duda chose Muszyński for the position. By April 2019, two additional judges have been appointed, but unlike the previous appointments, these did not shift the balance between PiS- and PO-nominated judges any further, as they both replaced judges already nominated by PiS. This was due to the fact that on 12 July and 30 December 2017, respectively, two of the illegal December judges – Lech Morawski and Henryk Cioch – died. They were soon replaced with Justyn Piskorski and Jaroslaw Wyrembak.

So far, Przyłębska’s period in office has not been free from controversy. On 28 June 2018, seven sitting judges of the Tribunal – namely all of the remaining “old judges”, as well as one of the legally elected “December judges”, Piotr Pszczółkowski – signed a letter to Przyłębska, in which they accused her of irregularities in her court management.

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131 Ref. No. K 47/15, K 39/16, and K 44/16, see sections 2.2.1, 2.2.2, and 2.3 above.
132 Trybunał Konstytucyjny (2017a). Wróbel instead took up a position as judge of the Polish Supreme Court.
133 Trybunał Konstytucyjny (2017f). Biernat was replaced with Andrzej Zielonacki on 28 June 2017.
134 Trybunał Konstytucyjny (2017c).
135 Monitor Polski 2017 item 684.
136 Trybunał Konstytucyjny (2017d); Trybunał Konstytucyjny (2017e).
137 Trybunał Konstytucyjny (2017b); Trybunał Konstytucyjny (2018).
to Przyłębska’s exercise of her competence to form the adjudicating panels of the Tribunal, specifically her practice of using unclear criteria when appointing the Presiding Judges and Judge Rapporteurs, making unjustified changes to previously established panels, and consistently omitting some judges from panels examining applications for the exclusion of judges. The judges were of the opinion that Przyłębska’s practice failed to guarantee the impartiality of the adjudicating panels, as well as secure predictability and transparency, not only to the judges of the Tribunal, but also to the public.\(^{139}\)

Five days after receiving the letter from the Tribunal judges, Przyłębska replied to the criticism.\(^ {140}\) In her response, she characterized the accusations as strictly unfounded, and pointed out that legally speaking she was granted considerable discretion in forming adjudicating panels.\(^{141}\) She further asserted that all the changes she had made to already formed panels was made out of necessity, in order to ensure the proper and effective functioning of the Tribunal. To substantiate this claim, Przyłębska pointed to the fact that one judge, namely Marek Zubik, was not performing any judicial activities. Indeed, ever since Przyłębska’s take-over, Zubik had been absent from all adjudicating panels, including the cases heard in plenary.\(^ {142}\)

Przyłębska’s remark caused Zubik to publish a letter of his own, in order to set the record straight as to why he had not been adjudicating all year.\(^{143}\) In his letter, Zubik stressed that his absence was involuntary, and explained that it was an indirect consequence of a constitutional complaint filed by the Prosecutor General, Zbigniew Ziobro\(^ {144}\) on 11 January 2017.\(^ {145}\) In his complaint, Ziobro challenged the validity of the election of Zubik as a Tribunal judge, which occurred more than six years earlier, on 26 November 2010. Ziobro argued that the election was invalid due to a minor formal error made by the Sejm. Subsequently, Ziobro used the fact

\(^ {139}\) A Polish NGO, the Stefan Batory Foundation, echoed these accusations in a report from July 2018. The foundation concluded that Przyłębska deliberately composed adjudicating panels so as to ensure domination by PiS-elected judges, see Stefan Batory Foundation (2018).

\(^ {140}\) Przyłębska (2018).

\(^ {141}\) Specifically, she referred to article 38 of the Act of 30 November 2016 on the Organization and the Mode of Proceedings before the Constitutional Tribunal, which requests that the “composition of an adjudicating bench, including a presiding judge and a judge rapporteur, shall be indicated by the President of the Tribunal in alphabetical order, taking account of the category, number and order of various applications received by the Tribunal.”

\(^ {142}\) This peculiar fact had already caught the attention of the mass media, see wprost (2018).

\(^ {143}\) Zubik (2018a).

\(^ {144}\) Ziobro happens to be the Minister of Justice as well, see section 2.2.2 above.

that this complaint was pending before the Tribunal as grounds to disqualify Zubik from a series of other – completely separate – cases before the court. The panels who decided on these motions agreed with the Prosecutor General that the pending case against Zubik constituted sufficient grounds to disqualify him from the separate cases, as his impartiality could risk coming into question. In light of these disqualifications, Przyłębska decided to remove Zubik from the panels of all pending cases, until the case against him was resolved. In his letter, Zubik urged Przyłębska to ensure that the case against him was heard as a matter of urgency, so that he could resume his duties as a judge. At that point, the case had already been pending for seventeen months. As of writing this – more than two years after the complaint was filed by the Prosecutor General – Przyłębska still have not set a date for the hearing. The combined effect of Przyłębska and Ziobro’s actions, therefore, has been that Zubik was de facto removed from the Tribunal, several years before the de iure end of his term.

In light of everything above, it is natural to question whether the Polish Constitutional Tribunal is functioning properly in its current state. Several esteemed voices are of the clear opinion that it is not. For instance, in July 2017, five former Presidents of the Tribunal (including Rzepliński) issued a joint statement, in which they stated that “[t]he disablement of the Constitutional Court has made an effective constitutional review of statutes and their application impossible and leads to arbitrary and unconstitutional legal solutions”. In equally strong terms, the European Commission has expressed that the developments following the appointment of Przyłębska has resulted in a situation where “the independence and legitimacy of the Constitutional Tribunal is seriously undermined and the constitutionality of Polish laws can no longer be effectively guaranteed”. And similarly, the UN Special Rapporteur on the Independence of Judges and Lawyers has observed that “[t]he participation of judges unlawfully elected by the current Sejm in the work of the Constitutional Tribunal – and, conversely, the exclusion of the ‘October

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146 See for instance Ref. Nos. Kp 1/17 and Kp 4/15. As an ex officio participant to all cases before the Tribunal, the Prosecutor General has the competence to file motions for disqualification of judges.
147 Decision of 8 March 2017 Ref. No. Kp 1/17. The decision was made by Henryk Cioch, Mariusz Muszyński (two of the illegally elected December judges), as well as PiS-elected Grzegorz Jędrejek. For a critique of this decisions, see Florczak-Wątor (2018).
judges’ from its judicial activities – not only affects the legality of the appointment of the President of the Tribunal, but also casts serious doubts about the independence and legitimacy of the Tribunal as a whole”.  

Concerns about the Tribunal’s legitimacy has already had concrete consequences for the court’s activities. For instance, there have been several incidences where applicants have withdrawn their constitutional complaint from the Tribunal, as a result of irregularities in the court proceedings. One example of this was case K 9/16, where the applicant was the Polish Commissioner for Human Rights. In his motion of 14 March 2018, Commissioner Adam Bodnar pointed to an unauthorized change in the adjudicating panel, as well as the introduction of illegally elected judges onto the panel, as the basis for withdrawing his case. The Vice-President of the Tribunal, Mariusz Muszyński, reacted to the withdrawal by writing an exorbitant discontinuance order, in which he strongly criticized the Commissioner for not fulfilling his constitutional duties; he even went so far as to call for Bodnar’s removal. Similarly, in case K 24/14, a group of local governments decided to withdraw their application, after President Przyłębska had removed Judge Marek Zubik from the panel, and replaced him with Mariusz Muszyński. The applicants withdrew the case despite having waited three years for it to come up before the Tribunal, as they were of the opinion that the court failed to meet the basic standards of procedural fairness. In addition to these and other cases being withdrawn from the court’s docket, there have also been claims that the total number of applications filed before the Tribunal have been declining, and that the Tribunal efficiency in delivering judgments have decreased since Przyłębska took over the Tribunal.

On top of this, one author has argued that all the hardship the Tribunal has undergone under PiS, has altered its core function completely. In his argument, Sadurski emphasizes how PiS – the minute they successfully had stacked the court – abruptly terminated all attacks directed

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151 The Commissioner for Human Rights is a constitutional authority for legal control and protection, set to “safeguard the freedoms and rights of persons and citizens specified in the Constitution and other normative acts”, see the Polish Constitution article 208(1). In order to fulfill its mandate, the Commissioner may lodge constitutional complaints before the Constitutional Tribunal, see article 16(2) of the Act of 15 July 1987 on the Commissioner for Human Rights, Dz.U. 2014 item 1648.
156 Sadurski (2018c) p. 15.
toward it, and instead began to *use it actively* in order to carry their policies into effect. Not only were PiS successful in neutralizing the Tribunal as a check on governmental power, but they quickly activated the court as a positive means to lend legitimacy to their many planned reforms.\(^{157}\) Examples of this dynamic includes several judgments which were ingeniously utilized by PiS as pretexts for their subsequent judicial reforms, or to rubber stamp questionable policy.\(^{158}\)

The Polish government has denied all claims that the Tribunal lacks independence, legitimacy, or proper and efficient functioning.\(^{159}\) Consistent with this, they have firmly resisted complying with the numerous recommendations and demands for change from national, international, and EU institutions. The only exception happened in April 2018, when the Sejm adopted yet another amendment to the acts on the Constitutional Tribunal.\(^{160}\) Under article 1 of this new amending act, all unpublished judgments – including those concerning acts that had lost its binding force – were to be published upon the order of the President of the Tribunal. However, pursuant to the amendment, the judgments would be published with the addendum “issued in violation of the law”, revealing how the PiS authorities still insisted that they enjoy the discretion to evaluate the legality of the Tribunal’s final decisions, contrary to the explicit demands by, *inter alia*, the European Commission and the Venice Commission. Nonetheless, upon an order by Przyłębska, the Prime Minister on 5 June 2018 at long last published the three judgments from 9 March, 11 August, and 7 November 2016, around two years after their adoption.\(^{161}\) Along with this concession came the end of the infamous “picket line”, which had held its ground outside of the Chancellery of the Prime Minister for 818 days; Poland’s longest continuous protest since the fall of communism.\(^{162}\)

### 3 Phase Two: Reforming the Judiciary

#### 3.1 #YearofNewAttacks

Having told the tale of the Tribunal’s demise, I now move on to recount the second part of the Polish authorities’ attack on the judiciary, namely their extensive organizational overhaul of the judiciary as a whole. I begin by exploring how the reforms came into being, before delving into

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\(^{157}\) Ibid., pp. 16–19.


\(^{160}\) Act of 12 April 2018 amending the Act of 13 December 2016.

\(^{161}\) Dz.U. 2018 items 1077–1079.

\(^{162}\) DoRezeczy.pl (2018).
the specifics of each piece of legislation (sections 3.2–3.4). In these slightly more cumbersome sections, I first describe the contents of the legislation and present some of the criticism it has received. I then examine how the adopted legislation has been implemented, as well as its consequences and repercussions.

The launching of this second phase occurred on 20 January 2017, when Prime Minister Szydło and the Minister of Justice, Zbigniew Ziobro, held a joint Press Conference under the headline “#YearofNewTasks”. Together, they announced that the Ministry of Justice’s main focus of 2017 would be comprehensive reforms of the judiciary. In her speech, Prime Minister Szydło explained that a reform was necessary, due to the citizens’ grave mistrust in judicial institutions. The main objective of the reforms, she explained, would be to ensure that people could rest assured that whenever they need the services of the courts, “the state stands on their side”. Minister Ziobro further noted that the Government had “diagnosed here many irregularities and phenomena, whose elimination […] will really improve the efficiency of the work of judges”.

The cornerstone of the announced reforms involved comprehensive amendments to three of the most central acts on the judiciary, namely the Act on the National Council of the Judiciary, the Act on the Organization of the Common Courts, and the Act on the Supreme Court. When the judicial reforms were announced in January, Minister Ziobro had already begun preparing amendments to the act on the important National Council of the Judiciary – a constitutional body tasked with safeguarding the independence of courts and judges. By mid-March, the government had submitted to the Sejm a bill amending the Act on the National Council of the Judiciary. The most important changes introduced in the bill concerned the structure of the Council, as well as the procedure for electing a majority of the Council’s members. About a month later, a group of PiS deputies submitted to the Sejm a second bill, containing amendments to the Act on the Organization of Common Courts. This bill introduced, inter alia, a new and lowered retirement age for ordinary judges and new powers for the Minister of Justice to dismiss and appoint presidents of the district courts.

163 The Chancellery of the Prime Minister (2017).
164 Ibid.
165 Ibid.
166 The Polish Constitution article 186(1).
168 The Sejm of the Republic of Poland (2017b). The bill was likely put forward by Sejm deputies instead of the government in order to avoid having the bill go through a round of social consultations, see Sadurski (2018b) p. 267.
Neither of the bills were received well by the opposition parties, who demonstrated their disapproval by boycotting the votes on the Sejm floor. However, their protest fell on deaf ears, and PiS single-handedly ensured the majority required to adopt both bills on 12 July 2017. That very day, a group of PiS deputies introduced yet another bill, to replace the Act on the Supreme Court.\(^{169}\) This particularly radical bill dictated, among other things, that all sitting judges of the Supreme Court would be dismissed \textit{en masse}. To add insult to injury, the PiS bloc decided to handle the bill in an expedited procedure, thus adopting it merely a week after putting it forward, devoid of any real public discourse.\(^{170}\) Without demur, the Senate then swiftly approved all three bills, and passed them on to President Duda for his signature. Consequently, in just six months, the Polish legislature had radically redrafted the judiciary’s institutional make-up.

Amid these rushed endeavors, key players within both the civil and international society mobilized to avert an anticipated disaster. Notably, the Secretary General of the Council of Europe, Thorbjørn Jagland, as well as First Vice-President Timmermans of the European Commission, promptly reached out to the Polish government. They both urged the government to withdraw the proposed legislation, and to ensure that both the public and all relevant stakeholders would be properly included in drafting any subsequent judicial reform legislation.\(^{171}\) When the Parliament ignored these and other appeals, the resistance quickly shifted its attention toward President Duda, whose veto-power represented a final glimpse of hope. Importantly, more than 50 NGO’s pleaded with Duda to exercise his veto over the three bills,\(^{172}\) and in all major cities of Poland, people took to the streets in their thousands to express outrage and dismay toward the government’s reforms.\(^{173}\)

In a turn of events, President Duda announced that he would succumb to the public demand, and veto two of the three bills, namely the proposed amendments to the Act on the National Council of the Judiciary and the bill on the Supreme Court.\(^{174}\) Duda declared that his grounds for repealing the bills were the new and amplified powers admitted to the Minister of Justice in the oversight and control of the Supreme Court, for which there “has been no tradition in Poland”.\(^{175}\) He acknowledged that the bills had caused “enormous anxiety and concerns”, and

\(^{169}\) The Sejm of the Republic of Poland (2017c).
\(^{171}\) Jagland (2017); Timmermans (2017).
\(^{172}\) Nowicki (2017).
\(^{173}\) Lyman (2017).
\(^{174}\) President of the Republic of Poland (2017a).
\(^{175}\) Ibid.
expressed a hope that his decision would prevent any further deepening of the division in society. Even though harsh criticism had been aimed at the third bill as well, i.e., the one concerning the Common Courts, Duda nevertheless went ahead and signed this bill.  

The decision to halt the judicial overhaul was not received well among Duda’s fellow partisans. Notably, the powerful chairman of PiS, Jarosław Kaczyński, told a party friendly news outlet that the double veto “was a mistake, a very serious mistake”. The Minister of Justice, Zbigniew Ziobro, in turn declared that it was “a sad day for all Poles who counted on real change in the system of justice”. But any gleaming hope that had spread among the opposition in the wake of President Duda’s defiant actions was short lived. It quickly became clear that Duda never intended to quash the reforms in any meaningful way. To the contrary, he immediately announced that he before long would present his own “fine-tuned” version of the bills, toeing the party line that “[c]hanges are absolutely essential: on the procedural and formal platform, but also the ethical one”.

During the preparation of his presidential draft acts, President Duda invited all opposition parties to discuss possible solutions going forward, but only after having had lengthy meetings with PiS chairman Kaczyński. On 26 September 2017, President Duda eventually submitted his two draft acts to the Sejm for their consideration. The presidential draft acts contained several changes compared to the two vetoed bills. Most notably, Duda scrapped a previous plan of making structural changes to the National Council of the Judiciary, he swapped out the provisions providing for the dismissal of all Supreme Court judges with a new retirement scheme, and he relocated several of the powers that the vetoed bills had placed at the hand of the Minister of Justice, over to himself. Moreover, Duda used the opportunity to fulfill one of his own campaign promises, namely to introduce a new type of legal remedy, named the “extraordinary appeal”.

Although the two presidential drafts did address some of the issues the critics previously had pointed to, the proposed changes were far from adequate to stifle the adversaries who were calling upon the authorities to drop the reforms in their entirety. The European Parliament set

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176 President of the Republic of Poland (2017b).
177 euractiv.com (2017).
178 tvn24 (2017).
179 President of the Republic of Poland (2017c).
180 President of the Republic of Poland (2017d).
181 The Sejm of the Republic of Poland (2017d; 2017e).
the tone in its resolution of 15 November 2017, stating that it was “deeply concerned at the redrafted legislation relating to the Polish judiciary, as regards specifically its potential to structurally undermine judicial independence and weaken the rule of law in Poland”. Following suit, the Venice Commission condemned the reforms, opining that the draft acts would “enable the legislative and executive powers to interfere in a severe and extensive manner in the administration of justice, and thereby pose a grave threat to the judicial independence as a key element of the rule of law.” In addition, a number of other influential expert groups delivered negative opinions on the drafts, including the OSCE Office for Democratic Institutions and Human Rights (ODIHR) and the Consultative Council of European Judges (CCJE). The two institutions at the center of the debacle – the National Council of the Judiciary and the Supreme Court – also spoke out against the reforms, claiming that their independence was endangered. The First President of the Supreme Court, Małgorzata Gersdorf, even gave a thundering speech during the parliamentary debates, pleading with the majority to stop the dismantling of the judiciary, and instead start a dialogue and fair discussion.

But despite the forceful opposition from stakeholders, including the civil and international society, the Sejm nevertheless proceeded with adopting the two acts on 8 December 2017. And just before Christmas, President Duda signed his drafts into law. This was the last straw for the European Commission, however, who after having seen no progress following its four previous Rule of Law Recommendations, on 20 December 2017 finally stepped up and triggered the Article 7 TEU procedure. In its reasoned proposal for a decision by the Council of the European Union, the Commission reiterated its previous conclusion that the adopted judicial reforms, in conjunction with the lack of an independent and legitimate Constitutional Tribunal, represented a clear risk of a serious breach of the rule of law referred to in Article 2 TEU.

Now, having been familiarized with the process leading up to the reforms, it is time to delve into the specifics of the different pieces of legislation, as well as their implementation and repercussions.

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184 OSCE/ODIHR (2017c).
185 CCJE (2017).
186 Krajowa Rada Sądownictwa (2017); Gersdorf (2017b).
187 Gersdorf (2017a).
188 Dz.U. 2018 items 3 and 5.
189 European Commission (2017d). See section 1.1 above.
3.2 Act on the Organization of Common Courts

3.2.1 Contents and Criticism

Let us first have a look at the one piece of legislation that President Duda did not veto, namely the Act of 12 July 2017 amending the Act on the Organization of Common Courts.\(^\text{190}\) The act introduced a couple of important changes to the ordinary court system. Firstly, article 13(1) of the amending act lowered the retirement age from 67 to 65 for male judges, and from 67 to 60 for female judges. According to the government, the purpose was to rid the judiciary of judges who collaborated with the communist regime, as well as to rejuvenate the judicial corps.\(^\text{191}\) On top of lowering the retirement age, the act also introduced a mechanism that granted the Minister of Justice the power to prolong a judge’s term beyond the retirement age, upon an application from the judge.\(^\text{192}\) In their legal analysis, the Venice Commission found this problematic, as it placed the career of senior judges in the hands of the Minister.\(^\text{193}\) The European Commission added that “[e]ven before the retirement age is reached, the mere prospect of having to request the Minister of Justice for such a prolongation could exert pressure on the judges concerned”.\(^\text{194}\) Interestingly, this scheme to lower the general retirement age for judges greatly resembles the move that the Hungarian government made five years previous, when a substantial lowering of the general retirement age for judges forced almost 300 judges into early retirement.\(^\text{195}\) The Hungarian offensive met resistance from both the Venice Commission and the Hungarian Constitutional Court, before the Court of Justice of the European Union eventually found the provision to be in violation of EU law.\(^\text{196}\)

Secondly, article 1(6) and (7) awarded the Minister of Justice new powers to dismiss and appoint court presidents of district courts, subject only to vague conditions such as “the interests of justice”. Admittedly, the National Council of the Judiciary was granted the power to veto such a dismissal, but only through a decision made by two-thirds of the Council. Moreover, article 17(1) prescribed a transitional period of six months from the entering into force of the act,

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\(^{190}\) Dz.U. 2017 item 1452.

\(^{191}\) The Chancellery of the Prime Minister (2018) para. 96.

\(^{192}\) Article 1(26).


\(^{194}\) European Commission (2017b) para. 32.

\(^{195}\) Halmai (2017) p. 471.

\(^{196}\) Case C-286/12. The judgment came as a result of an infringement procedure launched by the European Commission on 17 January 2012. The Commission based its case on the prohibition against age discrimination at the workplace, see European Commission (2012).
during which the Minister of Justice freely could dismiss court presidents, without any conditions or restraints. The European Commission, among others, strongly criticized this arrangement, arguing that it would provide the Minister of Justice undue influence over the court presidents, in a manner that could affect their personal independence. The Commission further asserted that the Minister’s new powers could influence other judges’ independence as well, for instance through the prospect of being promoted to a position as court president. The Polish government, however, has denied that the Minister’s increased influence over court presidents poses any threat to judicial independence, as the function of court presidents is only administrative in nature. Also, the government has argued that it is necessary for the Minister to have these powers, as they represent “the only tool at his or her disposal to react to organizational irregularities discovered in courts, notably as far as the excessive length of proceedings is concerned”.

3.2.2 Implementation and Repercussions

Following President Duda’s signature, the amendments to the Act on the Organization of Common Courts came into force on 12 August 2017. As soon as it became apparent that the Polish government would not adhere to their demands to retract the amendments, the European Commission launched an infringement procedure against the country, in order to induce compliance. The Commission based its decision on an assessment that the differentiated lowering of the retirement age – to 65 years for male judges versus 60 years for female – amounted to discrimination on the basis of gender under article 157 TFEU and Directive 2006/54. This somewhat resembles the approach the Commission previously had taken against Hungary, where the Court of Justice of the European Union ruled that the lowering of the retirement age constituted age discrimination. But in addition, the European Commission this time went one step further, also arguing that the increased influence afforded to the Minister of Justice would undermine the independence of the judiciary, contrary to article 19(1) TEU in combination with Article 47 of the EU Charter of Fundamental Rights. As of April 2019, the case is still pending.

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197 The provision neither required the Minister of Justice to give any reasons for his decision, nor did it provide any possibility for judicial review.
198 European Commission (2017b) para. 20.
199 Ibid., para. 21.
200 The Chancellery of the Prime Minister (2018) para. 80.
201 Ibid., para. 83.
202 Dz.U. 2017 item 1452.
204 See previous section.
before the Court of Justice,\textsuperscript{205} and so far there has been no indication that the government is willing to budge on the issue.

To date, the Minister of Justice, Zbigniew Ziobro, has been more than willing to exert his newfound powers to PiS’ advantage. In particular, Polish media have reported that in the course of 2017, more than 200 judges expressed a wish to continue their career beyond the lowered retirement age, but Minister Ziobro granted these requests only selectively.\textsuperscript{206} Furthermore, Ziobro made sure to take full advantage of the six months’ transitional period, during which he could dismiss court presidents and vice-presidents.\textsuperscript{207} A report published by a Polish NGO documents the manner in which Ziobro dismissed the court presidents: through a fax containing a one-sentence notice of dismissal, without giving any reasons for their forced departure.\textsuperscript{208} Roughly half of the dismissals were later justified in public announcements published on the Ministry’s website. These announcements suggested that Minister Ziobro had made his decisions based on a plethora of different factors, evidently without any systematic or consistent approach. Based on this, the report concluded that it was “difficult to avoid the impression that the Ministry of Justice did not perform an objective evaluation of the courts’ work, but sought out the weakest points in their operations, to find any way to justify the personnel changes being introduced”.\textsuperscript{209} Notwithstanding, the Polish government has denied any accusations that Ziobro ever intended to purge the courts, maintaining that he proportionately addressed pressing flaws in the country’s court management.\textsuperscript{210}

3.3 Act on the National Council of the Judiciary

3.3.1 Contents and Criticism

Let us move on to the second set of legislation, namely the amendments to the Act on the National Council of the Judiciary. For the sake of comparison, I first examine the Sejm’s initial bill – the one that was vetoed by President Duda – before looking at the one that eventually was adopted. Including a description of the initial bill not only provides some insight into PiS’ in-

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\textsuperscript{205} Case C-192/18.
\textsuperscript{206} Łukaszewicz (2018).
\textsuperscript{207} The Chancellery of the Prime Minister (2018) para. 86.
\textsuperscript{208} Grabowska-Moroz and Szuleka (2018) p. 17.
\textsuperscript{209} Ibid., p. 18.
\textsuperscript{210} The Chancellery of the Prime Minister (2018) para. 86.
\end{flushright}
tentions, it also sheds light on whether Duda’s vetoes in reality represented any substantial improvement. First, just a quick note on the body in question. The National Council of the Judiciary (hereafter referred to by its Polish acronym “KRS”, or simply “the Council”) is a key player in the Polish judicial system, and has a significant impact on judges’ careers through its central role in, *inter alia*, their appointments, promotions, disciplinary proceedings, and dismissals. The Council consists of 25 members, representing all branches of government, although a majority of the seats is reserved for active judges chosen from different levels of the judiciary.  

The Sejm’s bill of 12 July 2017 on the National Council of the Judiciary – the one President Duda later vetoed – proposed several substantial modifications to the Council’s organization. *The first concerned the structure of the Council.* Article 1(4) of the bill propositioned to divide the Council into two Assemblies. Under article 1(7), the First Assembly would consist of the Minister of Justice, the person appointed by the President of the Republic, the members from Parliament, as well as the First President of the Supreme Court and the President of the Supreme Administrative Court. The Second Assembly would consist of the 15 elected judge members. Article 1(10) combined this structural change with a new procedure for appointing and promoting judges. Under the intended procedure, each of the two assemblies would be given the power to veto any appointment, and such a veto could only be overruled through a unanimous vote by the First President of the Supreme Court, the President of the Supreme Administrative Court, and all 15 judge members. The lawmakers argued that this change would give the executive and legislative powers a greater say in the procedure, which in turn would lend democratic legitimacy to judicial appointments. However, in an expert opinion, the OSCE pointed out that the judiciary generally derives sufficient legitimacy from the constitution, combined with public confidence and appropriate accountability functions. Moreover, the expert group found that the new structure would increase the power of the political members of the KRS significantly compared to before the amendment. This risked to “unnecessarily polarize the process of appointing judges and may potentially subject judge members of the Judicial Council to

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211 Pursuant to article 187 of the Polish Constitution, the Council comprises the Minister of Justice, the First President of the Supreme Court, the President of the Supreme Administrative Court, four Sejm deputies and two Senators, an individual appointed by the President of the Republic, as well as 15 judges chosen from among judges of the Supreme Court, common courts, administrative courts, and military courts.

212 Under the previous system, the Council voted on candidates in plenary, and adopted resolutions with absolute majority, see article 37 of the act before its amendment.

213 OSCE/ODIHR (2017a) para. 65.
considerable pressure, to the detriment of merit-based selection and the effective functioning of
the Council overall”.  

The second revision concerned the procedure for electing the Council’s 15 judge members, i.e.,
a majority of the Council members. Under the prevailing act, judge members were elected by
the judiciary itself, through a complicated process that involved various court assemblies within
the different levels of the judiciary.  

In contrast, the new bill proposed to relocate this power from the judiciary over to the Sejm. Pursuant to article 1(1), judge members would be elected through a majority vote of the Sejm, from among candidates nominated by the Presidium of the
Sejm or at least 50 Sejm deputies. The legislators rationalized this amendment by asserting that
the prevailing procedure was not only unnecessarily complicated, but also failed to secure the
representation of all levels of the judiciary in the KRS. Conversely, the OSCE deemed the pro-
posed procedure entirely unfit to address either of these concerns, and further emphasized that

[t]he principle of having judge members of judicial councils selected by their peers exists
primarily to prevent any manipulation or undue pressure from the executive or legislative
branches, and to ensure that judicial councils are free from any subordination to political
party considerations, so as to be able to perform their roles of safeguarding the independence
of the judiciary and of judges.

Along these lines, the European Commission remarked that the new system would “signifi-
cantly increase the influence of the Parliament over the Council and adversely affect its inde-
pendence in contradiction with the European standards.”

The third and final noteworthy change entailed a premature termination of all the sitting judge
members’ terms. Pursuant to article 187(3) of the Polish Constitution, elected members of the
KRS enjoy a four year term of office. Nevertheless, article 5(1) of the bill ordered the tenures
of all current judge members to come to an end 30 days after the bill entered into force. The
purpose of the early termination was, according to Polish authorities, to allow the Sejm to elect

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214 Ibid., para. 74.
215 Two members were elected by the Supreme Court, two by the Supreme Administrative Court, two by the
courts of appeal, one by the military courts, and the final eight by the regional courts, see article 11 of the act
before its amendment. This procedure left out the district courts, who make up a majority of the courts in
Poland.
216 OSCE/ODIHR (2017a) para. 42.
the judge members for a “joint term”, in other words terms that commenced and ended simultaneously. In response, the European Commission noted that prematurely ending the term of all judge members would allow the government to “immediately gain a decisive influence on the composition of the Council to the detriment of the influence of judges themselves”.\(^{218}\) Moreover, OSCE noted that the legislature had procured no legitimate reason for the early termination, and asserted that doing so raised concerns as regards the independence of the Council, and consequently of the judiciary as a whole.\(^{219}\)

To summarize, the combined effect of the changes proposed in the bill would likely entail a tangible shift of power to the benefit of the government, and to the detriment of the judiciary. The European Commission neatly illustrated how a judge might be adversely affected by the bill:

For example, a district court judge who has to deliver a judgment in a politically sensitive case, while the judge is at the same time applying for a promotion to become a regional court judge, may be inclined to follow the position favoured by the political majority in order not to put his/her chances to obtain the promotion into jeopardy. Even if this risk does not materialise, the new regime does not provide for sufficient guarantees to secure the appearance of independence which is crucial to maintain the confidence which tribunals in a democratic society must inspire in the public.\(^{220}\)

After President Duda vetoed the bill, many hoped that the subsequent presidential draft act would take into account the pronounced criticism that the bill had received. Indeed, Duda did scrap in its entirety the Sejm’s previous attempt to politicize the Council through dividing it into two assemblies. In this respect, his proposal conformed to the wishes of the critics. However, Duda was not as inclined to accede to the demands concerning the mode of election of the judge members of the Council. Under his draft act, as under the Sejm’s original bill, judge members would be elected by the Sejm, instead of by the judiciary itself. But he did make a couple of alterations to the election procedure. First, he increased the required majority to elect a candidate from a regular majority to a qualified majority of three fifths.\(^{221}\) And second, he afforded the competence to nominate candidates to a group of at least 25 active judges or at

\(^{218}\) Ibid., para. 27.  
\(^{219}\) OSCE/ODIHR (2017a) para. 81.  
\(^{220}\) European Commission (2017b) para. 29.  
\(^{221}\) Article 1(1) of the amending act, adding article 9a to the Act on the National Council of the Judiciary.
least 2000 citizens, rather than to the Sejm itself.\footnote{Article 1(3) of the amending act, adding article 11a(2) to the Act on the National Council of the Judiciary.} According to the government, these changes alleviated previous concerns of politicization; increasing the majority requirement would ensure representation of candidates supported by opposition parties,\footnote{The Chancellery of the Prime Minister (2018) para. 122.} whereas involving the judiciary in the nomination process would allow judges of all instances a genuine possibility to influence the Council’s position.\footnote{Ibid., para. 124.}

This line of reasoning did not persuade any of the critical observers, however. As the European Commission noted in its fourth Rule of Law Recommendation, “[t]he fact that the judges-members will be appointed by the Sejm with a three fifths majority does not alleviate [the concerns relating to the Council’s politicization and independence], as judges-members will still not be chosen by their peers.”\footnote{European Commission (2017c) para. 32.} To this, the Venice Commission added that

\begin{quote}
[e]ven if several “minority candidates” are elected, their election by Parliament will inevitably lead to more political influence on the composition of the [Council] and this will also have immediate influence on the work of this body, which will become more political in its approach.\footnote{Venice Commission (2017) para. 24.}
\end{quote}

Also, neither the European Commission nor the Venice Commission found that the adjusted system for proposing candidates would grant the judicial community sufficient weight in the election process, as it failed to guarantee that the Sejm could only elect judge members endorsed by the judiciary.\footnote{Ibid., para. 26; European Commission (2017c) para. 32.}

Finally, Duda’s act also retained the provision providing for the early termination of the terms of all sitting judge members of the Council.\footnote{Article 6 of the amending act.} In response to previous reactions against this move, the government asserted that ordering the termination of the judge members’ terms was much less of a drastic move than their critics would have it, seeing that 13 of the 15 sitting judge members’ terms in any case would come to an end by the end of June 2018, i.e., within seven months from the act was adopted. As before, the legislators justified the early termination by contending that it was the only way to ensure that all elected judge members could serve a “joint
term”. Unlike before, however, the government now had managed to procure a proper legal argument to back up their position. Upon an application by Prosecutor General Ziobro, the Constitutional Tribunal – composed by five PiS-elected judges, including two of the illegally elected December judges – on 20 June 2017 ruled that the prevailing system, insofar as it allowed for “individual terms of office”, was unconstitutional. This judgment has later been criticized as groundless and merely serving as a pretext to pave the way for PiS’ projected reform. All the same, the government actively used the judgment to argue that the Constitution required the legislators to terminate the terms of all sitting judge members of the Council, as their only other option would be to postpone electing any new judge members until all individual terms of all current judge members had expired. This in turn would have rendered the Council paralyzed for several years.

The government’s newfound legal arguments did not persuade the Venice Commission, however. The Commission noted that a future “joint term” could easily be achieved through a transitional system where new members were elected for a shorter period, until the all positions could be renewed simultaneously. Unlike ordering an early termination of all sitting judge members, such an approach would achieve the contended goal, while simultaneously respecting the members’ security of tenure. In addition, the Commission was skeptical to the very idea of a “joint term of office”, arguing that such a system would disrupt institutional memory and continuity, as well as the body’s internal pluralism.

3.3.2 Implementation and Repercussions

After President Duda’s signature, the amendment to the Act on the National Council of the Judiciary entered into force on 3 January 2018. In accordance with article 7 of the amending act, the Speaker of the Sejm the following day announced the initiation of the procedure to nominate new judge members to the Council. In protest of the process, several institutions

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229 The Chancellery of the Prime Minister (2018) para. 132.
230 I.e., the Minister of Justice, see section 2.2.2 above.
231 Judgment of 20 June 2017, Ref. No. K 5/17. It is in no way obvious that the Polish Constitution prescribes a “joint term” of office. The relevant provision, article 187(3) reads, “The term of office of those chosen as members of the National Council of the Judiciary shall be 4 years.”
232 Sadurski (2018c) p. 31. See section 2.4 above.
235 Ibid., para. 29.
237 Monitor Polski 2018 item 10.
urged all judges to boycott the unconstitutional procedure and decline any nomination, including the KRS itself and Poland’s largest judges association, Iustitia. These appeals seem to have been quite effective, as only 18 judges received nominations to the Council. The Parliamentary opposition refused to take any part in the procedure, but the PiS majority on 6 March 2018 nonetheless went ahead and elected 15 new members. Consequently, the term of the sitting judge members of the Council came to an early end the following day. The new Council comprised eight district court judges, six regional court judges, and one administrative court judge.

In the aftermath of the election, several organizations have criticized the close ties between the new judge members and the Ministry of Justice. Most of them had recently either worked under Minister Ziobro, as a judge performing civil-servant activities in the Ministry, or had been appointed as court president or vice-president at Ziobro’s discretion. Additionally, the constitutionality of the new composition is questionable. Pursuant to article 187(2) of the Polish Constitution, the Council shall be composed of judges chosen from “amongst the judges of the Supreme Court, common courts, administrative courts and military courts”. Whereas the common courts and the administrative courts were represented in the new Council, none of the new members came from the Supreme Court or military courts. Ironically, the lack of proper representation was one of the arguments used by the government to justify the reform in the first place. The Constitutional Tribunal did not share these concerns, however. On 25 March 2019, the Tribunal – upon an application by the new KRS itself – ruled that the new election procedure was in line with the Constitution. Once again we can see how the Tribunal is being used as a way of supporting PiS’ policy goals.

The new KRS from the very beginning had more than enough on its plate. Not only was the Council tasked with assessing candidates for the numerous vacancies in the Supreme Court, which had been generated by the recent reforms – a controversial process that I will describe in

238 Krajowa Rada Sądownictwa (2018a); Iustitia (2017).
239 Iustitia (2018a).
240 Monitor Polski 2018 item 276.
241 Krajowa Rada Sądownictwa (2018b).
243 Iustitia (2018a).
244 Iustitia (2018b).
246 See sections 2.4 and 3.3.1 above.
more detail in section 3.4.2 below. But on top of this, the Council before long had to deal with an extraordinarily large amount of appointments to judge positions in the common courts.\textsuperscript{247} To find the cause for this unusually high workload, we must go back to November 2016, i.e., right about the time when the Ministry of Justice began planning the reorganization of the National Council of the Judiciary. Without any forewarning, Minister Ziobro abruptly ceased to announce any new vacancies in all levels of the common courts. His blockade of the appointment procedures lasted over a year, throughout 2017. For the sake of comparison, Ziobro had announced a total of 268 positions in the equivalent period the previous year. Come March 2018 – and with it the election of the new judge members – and Ziobro in one fell swoop announced 385 openings. And by the same token, Ziobro continued to steadily publish new vacancies in the time that followed; as of April 2019, the total amount of announced vacancies since the year-long hiatus was 763. The clear correlation between PiS’ capture of the KRS and the Minister’s sudden turn, leaves little doubt as to Ziobro’s intentions: By accumulating the number of vacancies, the new and politicized KRS would have an even greater opportunity to reshape the Polish judiciary to PiS’ liking.\textsuperscript{248}

And just as many expected, the Council did not let this opportunity go to waste. Notably, observers have reported that a “black list” prepared by PiS was distributed among the Council members, consisting of candidates not to the party’s liking.\textsuperscript{249} Accordingly, judges who have found themselves on this list have already received negative opinions by the Council when seeking promotions.\textsuperscript{250}

3.4 Act on the Supreme Court

3.4.1 Contents and Criticism

Let us move on to the last set of legislation, namely the acts on the Supreme Court. Once again, I include a description of the bill that was vetoed by President Duda, before examining the one that eventually was adopted. A little bit of context: The Supreme Court is positioned at the apex of the Polish common court system, and is the court of last resort of appeal against judgments in lower courts. In addition, the Court serves other important functions, such as adjudicating on

\textsuperscript{247} All data in this paragraph derive from a manual examination of the official gazette \textit{Monitor Polski}, where all judicial vacancies are published. Data on file with author.
\textsuperscript{248} Ironically, the government had used the inefficiency of the country’s courts as a justification for the need for reform.
\textsuperscript{249} Komitet Obrony Sprawiedliwości (2019) p. 20.
\textsuperscript{250} Ibid., p. 10.
the validity of parliamentary and presidential elections,\textsuperscript{251} determining the validity of referenda,\textsuperscript{252} as well as exercising supervision over common and military courts regarding judgments and other activities.\textsuperscript{253}

In its initial bill on the Supreme Court from 20 July 2017, PiS attempted to make several drastic changes to the Court’s composition, structure, and accountability mechanisms. Some of the most important changes concerned the system of disciplinary sanctions against judges. To justify the changes, the legislators argued that reforming the disciplinary system was absolutely necessary in order to address issues of partiality and ineffectiveness in disciplinary matters, and root out a culture of professional corporatism and cronyism.\textsuperscript{254} Hence, the bill prescribed changes to the mode of the disciplinary proceedings, as well as to the very structure of the Supreme Court. Article 2 of the bill reorganized the four chambers of the Supreme Court into two chambers – one dealing with public law and one dealing with private law – and established a brand new chamber named the Disciplinary Chamber.\textsuperscript{255} The new Disciplinary Chamber would have jurisdiction over all disciplinary proceedings against Supreme Court judges, as well as certain proceedings against other legal professions including judges, lawyers, legal counselors, notaries, and prosecutors.\textsuperscript{256}

Also, the bill granted the Minister of Justice/Prosecutor General an influential role in disciplinary proceedings against Supreme Court judges.\textsuperscript{257} \textit{Firstly}, the Prosecutor General was afforded

\textsuperscript{251} Polish Constitution articles 101(1) and 129(1).
\textsuperscript{252} Ibid., article 125(4).
\textsuperscript{253} Ibid., article 183.
\textsuperscript{254} The Chancellery of the Prime Minister (2018) para. 27.
\textsuperscript{255} Under the previous Act, the Court comprised four chambers: the Civil Chamber, the Criminal Chamber, the Labor Law, Social Security and Public Affairs Chamber, and the Military Chamber, see article 3(1) of the Act of 23 November 2002 on the Supreme Court.
\textsuperscript{256} Article 5 of the bill. Interestingly, the judges of the Disciplinary Chamber would enjoy a 40\% higher remuneration compared to the judges of the other two chambers, see article 41(7) of the bill.
\textsuperscript{257} As already mentioned, PiS had previously merged the offices of the Minister of Justice and the Prosecutor General, see section 2.2.2 above.
the power to initiate disciplinary proceedings, either through requesting one of the Court’s disciplinary officers to initiate an inquiry against a judge, or through appointing his own extraordinary disciplinary officer on a case-by-case basis. Secondly, The Minister of Justice would receive definitive influence over the conduct of an investigation, by being entitled to raise “an objection” against any decision by a disciplinary officer not to go forward with a case. Such an objection would not only bring about an obligation for the disciplinary officer to continue on with the case in question, but would also entail that “instructions of the Minister of Justice concerning the further course of proceedings shall be binding on the” disciplinary officer.

According to the European Commission, the new disciplinary system “would provide the Minister of Justice with an additional tool to put considerable pressure on judges”. The Commission further argued that “[t]he mere threat of disciplinary proceedings being initiated pursuant to the instructions of the Minister of Justice would directly affect the independence of judges of the Supreme Court”. And the OSCE similarly noted that the new system “not only creates severe issues of conflict of interest, but also undermines the principle of separation of powers”.

The most radical provision of the bill was article 87, which ordered the dismissal of all sitting Supreme Court Judges. Under article 88, however, the President of the Republic was afforded the discretionary competence to retain any dismissed judge on the Court, upon the proposal of the Minister of Justice and following a non-binding opinion of the National Council of the

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258 Article 56(1) of the bill. A disciplinary officer investigates and brings forward disciplinary cases before the court. Their role is somewhat comparable to that of a prosecutor in criminal cases. Under the Sejm’s bill, disciplinary officers would be elected by the General Assembly of the Supreme Court, for a term of three years.

259 Article 54(1) of the bill. Under article 54(3), the Minister of Justice could also appoint such case-by-case disciplinary officers to an already ongoing case, in which case all other disciplinary officers would be excluded from participating in the case in question, see article 54(2).

260 Articles 56(4) and 57(2) of the bill.

261 Ibid.

262 European Commission (2017b) para. 40.

263 Ibid., para. 42.

264 OSCE/ODIHR (2017b) para. 47.

265 Article 87 reads, “On the day following the date of entry of this Act into force, Supreme Court judges appointed pursuant to previous regulations shall be retired, except for the judges whose continued active status has been approved by the President of the Republic of Poland in accordance with the procedure referred to in Art. 88.”
Judiciary. In justifying this move, the lawmakers had recourse to article 180(5) of the Polish Constitution, which allows for judges’ retirement “[w]here there has been a reorganization of the court system or changes to the boundaries of court districts”. Unsurprisingly, this attempt to purge the Supreme Court met strong opposition from observers. The expert group from OSCE expressed its disapproval in the following fashion:

Such a mass replacement of judges sitting on the highest court of Poland is a radical step, with serious consequences not only for the individual judges, but for the continuity of the work of the Supreme Court and the credibility of the justice system as a whole. Moreover, implementing such extreme measures in the absence of compelling reasons to do so would raise serious concerns in relation to the executive’s and legislative’s respect for the existing composition and work of the Supreme Court.266

The European Commission in turn held that “[t]he dismissal and forced retirement of all judges of the Supreme Court, considered in connection with the rules allowing for their possible reappointment, would violate the judicial independence of Supreme Court judges”.267 Along similar lines, the OSCE found the proposed scheme inherently incompatible with the principle of security of judicial tenure and irremovability of judges,268 as well as providing “the Minister of Justice with wide discretionary powers, which may lead to potentially arbitrary or politically motivated application”.269

On top of this, the bill also conferred to the Minister of Justice a key role in the forthcoming appointment procedures concerning the Supreme Court judge positions that would become vacant following the mass dismissals prescribed by the bill. Pursuant to article 95 of the bill, the Minister of Justice – after having announced the vacancies in the official gazette, Monitor Polski – would be responsible for proposing one candidate for each vacant position.270 These candidates would thereafter be evaluated by the National Council of the Judiciary, and finally submitted to the President of the Republic for his approval. The process would allow the Minister of Justice considerable influence over the composition of the new Supreme Court, seeing as the KRS would only be competent to assess the limited proposals put forward by the Minister, instead of being able to choose from a larger pool of qualified candidates. Consequently, the

266 OSCE/ODIHR (2017b) para. 75.
267 European Commission (2017b) para 37.
268 OSCE/ODIHR (2017b) para. 70.
269 Ibid., para. 80.
270 Article 95(2).
OSCE retorted that the Minister’s intended involvement in the appointment procedure would amount to “an undue influence of the executive in this process and could undermine the independence and impartiality of the Supreme Court”. 271

As described in section 3.1 above, Duda on 26 September 2017 proposed his own presidential Draft Act on the Supreme Court, after having vetoed PiS’ initial bill. Duda’s draft contained several notable modifications of the Sejm’s previous bill. For one, Duda entirely removed the provisions that provided for the drastic dismissal of all Supreme Court judges. Instead, however, the act lowered the mandatory retirement age for the judges from 70 to 65 years, mimicking the aforementioned amendments to the Act on the Organization of Common Courts, which already had lowered the retirement age of ordinary judges (see section 3.2.1 above). 272 Under article 108 of the draft act, the new retirement age would also apply to currently sitting judges. 273 The Polish authorities argued that “[t]he reform of judicial retirement age is justified with historical experiences of communism, the failure to account for the past for many years, and pathological mechanisms of the functioning of courts that have been perpetuated for years”. 274 Moreover, they claimed that lowering the retirement age would favorably rejuvenate the Court, by getting rid of older judges who are “less efficient, could have more leaves of absence for health reasons, and could be less willing to improve their qualifications and align them with the changing legal environment”. 275

Conversely, both the European Commission and the Venice Commission found that retiring the currently sitting judges early would infringe on the judge’s security of tenure as well as the independence of the Court as a whole, 276 and could “undermine the operational capacity of the courts and affect continuity and legal security”. 277 The European Commission also asserted that the retirement scheme raised concerns in relation to the separation of powers – especially in light of the simultaneous reorganization of the National Council of the Judiciary:

Applying such a lowered retirement age to current judges of the Supreme Court has a particular strong negative impact on this specific Court, which is composed of judges who are

271 OSCE/ODIHR (2017b) para. 95.
272 Article 36(1) of the Presidential Draft Act on the Supreme Court (later adopted as article 37(1) in the Act of 8 December 2017 on the Supreme Court).
273 Adopted as article 111(1) in the Act of 8 December 2017 on the Supreme Court.
274 The Chancellery of the Prime Minister (2018) para. 99
275 Ibid., para. 102.
by nature at the end of their career. Such compulsory retirement of a significant number of
the current Supreme Court judges allows for a far reaching and immediate recomposition of
the Supreme Court.  

Similar to the vetoed bill’s radical dismissal scheme, the retirement scheme was coupled with
a possibility of allowing willing judges to continue serving beyond reaching their retirement
age. This time around, however, the Minister of Justice was not entrusted with any say in this
process, which instead would be subject to the President of the Republic’s full discretion. Under
article 36(1), judges who wished to continue beyond the new retirement age would have to
submit a declaration of intent to continue their service, along with a health certificate that con-

firms they are fit to perform a judge’s duties. The President of the Republic could then grant an
extension of three years, with a possibility of renewal for three additional years. Excluding
the Minister of Justice from the assessment procedure was not enough to satisfy the Venice
Commission, however, who expressed that the new system would “give the President excessive
influence over those judges who are approaching the retirement age”. Concurring, the Euro-

pean Commission also stressed that their concerns were even further exacerbated by the fact
that the President’s power was bound by “no criteria, no time-frame for taking a decision and
no judicial review provided for in the law”. According to the Polish government, on the other
hand, including a body outside the judiciary would be desirable from the point of view of the
balancing of powers, as judges might not be positioned to well assess their own qualifica-
tions. Furthermore, the President’s involvement would not threaten the judges’ independ-
ence, because a retired judge would either way retain most of their remunerations, and it
would be “hard to imagine that the perspective of keeping the position for an additional year or
a couple of years could make judges being at the peak of their professional careers susceptible
to pressure from the executive”.

For the most part, Duda’s presidential draft act maintained the idea of making structural changes
to the Supreme Court. Under article 3 of the act, the Supreme Court would thereafter comprise
a Civil Chamber, a Criminal Chamber, a Labor and Social Security Chamber, a Disciplinary
Chamber (as intended in the vetoed bill) as well as a brand new Chamber for Extraordinary

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279 Article 36 the Presidential Draft Act on the Supreme Court.
280 Ibid., article 36(4).
283 The Chancellery of the Prime Minister (2018) para. 105.
284 Ibid., para. 105.
285 Ibid., para. 104.
Control and Public Affairs. Accordingly, the Supreme Court would no longer have a Military Chamber, and under article 108(3), the judges of this chamber would be retired on the day the act entered into force.

Although Duda adhered to the Sejm’s conception of a chamber designated to hearing disciplinary cases against judges and other legal professionals, his draft act nonetheless made a couple of modifications to the newfangled disciplinary proceedings against Supreme Court judges, which had been proposed in the Sejm’s vetoed bill. Notably, Duda relocated the power to appoint an extraordinary disciplinary officer on a case-by-case basis away from the Minister of Justice, and over to himself.\textsuperscript{286} Granted, the Minister of Justice, qua Prosecutor General, retained the power to instigate disciplinary proceedings, through requesting one of the Supreme Court’s own disciplinary officers to initiate an inquiry against a judge,\textsuperscript{287} and the competence to complain upon a disciplinary officer’s decision not to initiate proceedings or to discontinue a proceeding.\textsuperscript{288} But unlike under the vetoed bill, such a complaint would neither entail an obligation for the disciplinary officer to continue on with the case in question, nor the power to instruct the disciplinary officer concerning the further course of the proceedings. Instead, the complaint would be heard and decided upon by a panel of three judges from the Disciplinary Chamber.

The draft act, although predominantly concerning the Supreme Court, also made a number of key changes to the disciplinary procedure against ordinary judges of the common courts. Under the new procedures, the Minister of Justice received greater influence over disciplinary proceedings, specifically the right to demand the initiation of an investigation against a judge,\textsuperscript{289} the right to appoint an extraordinary disciplinary officer on a case-by-case basis,\textsuperscript{290} and the right to appeal against decisions in the first instance.\textsuperscript{291} On top of this, the Minister of Justice also obtained the power to on certain terms reopen disciplinary proceedings that had been terminated.

\textsuperscript{286} Article 75(8) of the Presidential Draft Act on the Supreme Court. Under article 76(9) of the Act of 8 December 2017 on the Supreme Court, the Minister of Justice was afforded the power to notify the President of the Republic about the need to appoint an extraordinary disciplinary officer in certain cases.

\textsuperscript{287} Article 75(1) of the Presidential Draft Act on the Supreme Court.

\textsuperscript{288} Ibid., article 75(4) and (5).

\textsuperscript{289} Ibid., article 105(22), replacing article 114(1) of the Act on the Organization of Common Courts.

\textsuperscript{290} Ibid., article 105(19), adding article 112c(1) to the Act on the Organization of Common Courts.

\textsuperscript{291} Ibid., article 105(25), replacing article 121(1) of the Act on the Organization of Common Courts.
by a disciplinary officer prior to the entry into force of the act. The Polish government justified the increased authority of the Minister of Justice as follows:

Participation of the Minister of Justice in disciplinary proceedings of judges is to ensure that such proceedings will take place in cases where judges themselves would unduly refuse to initiate them. As was pointed out above, the Polish judiciary is struggling with inefficiency also as regards disciplinary proceedings, which makes the society perceive judges as a group protecting each other’s own interests. Addressing this problem should improve public trust in [sic] judiciary.

The government also emphasized that the Minister’s role would be strictly limited to the preliminary phase of disciplinary cases, he would in other words not have any sway over disciplinary judges’ decision over whether or not to impose disciplinary sanctions to an accused judge. Nonetheless, both the European Commission and the OSCE found that involving the executive – be it the President of the Republic or the Minister of Justice – in any part of disciplinary proceedings, would lead to concerns as regards the principle of separation of powers and would undermine judicial independence.

Under article 25 of the draft act, the new Extraordinary Control and Public Affairs Chamber would have jurisdiction over some of the Supreme Court’s most politically potent cases, including the examination and confirmation of the validity of elections and referenda. In addition, the chamber would preside over the examination of extraordinary appeals; a new legal remedy that would exist alongside the ordinary appeal and cassation processes. An extraordinary appeal could be lodged against “any final ruling […] if this is necessary to ensure the rule of law and social justice”, including judgments by the Supreme Court. Duda’s draft act bestowed the competence to lodge such an appeal upon the Prosecutor General, the Commissioner for Human Rights, a group of 30 Sejm deputies or 20 Senators, as well as certain other public

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292 Ibid., article 124(1).
293 The Chancellery of the Prime Minister (2018) para. 64.
294 Ibid., para. 66.
295 European Commission (2017c) para. 23; OSCE/ODIHR (2017c) para. 123.
296 In reality, the new extraordinary appeal was a reintroduction of a form of extraordinary revision that existed in Poland during communism, which was abolished in 1995 and replaced by ordinary cassation proceedings.
297 Article 86(1) of the Presidential Draft Act on the Supreme Court.
298 Ibid., article 91(2).
offices for cases falling within their jurisdictions. The time limit for lodging an appeal would be five years from the contested ruling became final, but under article 115(1), any ruling dating as far back as 17 October 1997 could be subject to review during a three-year transitional period from the date the act would come into force.

According to Polish authorities, the introduction of the extraordinary appeal aimed to expand the legal protection of citizens, and was intended to “ensure appropriate protection of fundamental rights and freedoms guaranteed by the Constitution”. In particular, they asserted that the appeal was necessary in order to overturn numerous final judgments which had grossly violated the principles of justice. However, the introduction of the extraordinary appeal has been strongly criticized for jeopardizing the principle of legal certainty, and thus the stability of the Polish legal order. The broad scope and vague criteria for revising final judgments caused the Venice Commission to remark that “no judgment in the Polish system will ever be ‘final’ anymore”. The OSCE found that granting public authorities – such as the Prosecutor General – the competence to lodge appeals, irrespective of the wishes of the parties to the case, “would allow these public and political figures to have a potential influence on the judiciary – at least from the public viewpoint,” which in turn could infringe upon judicial independence, as well as the principle of separation of powers.

A final new feature of the presidential draft act, was the introduction of lay judges to the two new chambers – the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber. The lay judges would be elected by a majority vote in the Senate for a four years term of office, and would participate in disciplinary proceedings, as well as in the examination of extraordinary appeals. According to the Polish government, the involvement of lay judges was part of a democratization of the judiciary, by means of increasing public influence over

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299 Ibid., article 86(2). The other public offices were the President of the General Counsel to the Republic of Poland, the Children’s Ombudsman, the Ombudsman for Patients’ Rights, the President of the Financial Supervision Authority, and the Financial Ombudsman. During the Sejm’s work on the draft act, this personal scope was reduced, by removing the Sejm deputies and Senators’ competence to lodge appeals.
300 Ibid., article 83(3).
301 17 October 1997 is the date the current Constitution of the Republic of Poland came into force.
302 The Chancellery of the Prime Minister (2018) para. 51.
306 OSCE/ODIHR, (2017c) para. 49.
307 Article 60(2) and (3) of the Presidential Draft Act on the Supreme Court.
308 Ibid., article 58(1).
important cases, and provide for greater transparency into the administration of justice.\textsuperscript{309} Several critics, however, noted that bringing in lay judges in proceedings before the apex court was unparalleled in contemporary European legal systems, and could threaten the efficiency and quality of justice, as apex courts usually deals with the most complex cases.\textsuperscript{310} And more seriously, they criticized the fact that the lay judges would be elected by the Senate, as this would risk politicizing the court – or at least give the appearance of such politicization – and potentially induce the elected lay judges to feel indebted towards the politicians who elected them.\textsuperscript{311} Conversely, the government has insisted that involving lay judges in no way would impair the guarantees of judicial independence, seeing as they would always form the minority of the adjudicating benches.\textsuperscript{312}

Last of all, opponents of the reform have criticized the fact that both of the new Supreme Court chambers possess characteristics that \textit{de facto} gives them a higher or special status, compared to the other chambers of the Court: \textsuperscript{313} The Extraordinary Control and Public Affairs Chamber was given the power to review any final and legally binding judgment issued by the other chambers, whereas the Disciplinary Chamber would decide on disciplinary cases against the other Supreme Court judges, as well as on complaints concerning overly lengthy proceedings before the other chambers.\textsuperscript{314} In addition, the Disciplinary Chamber was conferred a more autonomous position compared to the other chambers, in the sense that it would be supported by its own secretariat,\textsuperscript{315} and to some extent be isolated from the authority of the First President of the Supreme Court.\textsuperscript{316} The European Commission lamented that the higher and special status of the new chambers created “a risk that the whole judicial system will be dominated by these chambers which are composed of new judges elected with a decisive influence of the ruling majority”.\textsuperscript{317}

\begin{footnotesize}
\begin{enumerate}
  \item The Chancellery of the Prime Minister (2018) para. 62.
  \item European Commission (2017c) para. 26; The Chancellery of the Prime Minister (2018) para. 67.
  \item OSCE/ODIHR (2017c) para. 76; Venice Commission (2017) para. 79.
  \item The Chancellery of the Prime Minister (2018) para. 62.
  \item OSCE/ODIHR (2017c) para. 24 and 67; Venice Commission (2017) para. 36.
  \item Article 26 of the Presidential Draft Act on the Supreme Court.
  \item Ibid., article 97.
  \item Ibid., articles 14(3), 7(2)–(4), 19(1) and (2), 75(1), and 95.
  \item European Commission (2017c) para. 25.
\end{enumerate}
\end{footnotesize}
3.4.2 Implementation and Repercussions

On 3 April 2018, the Act on the Supreme Court entered into force. Simultaneously, the Military Chamber was closed down, and the chamber’s four judges was dismissed. Then three months later, the new and lowered retirement age came into effect. At that time, 27 judges – i.e., almost a third of all Supreme Court Judges at that time – had already reached the new retirement age of 65, and were therefore immediately affected by the new retirement age.

Prominent among these was the First President of the Supreme Court, Małgorzata Gersdorf, who had turned 65 the previous year. On the morning of 4 July 2018, however, Gersdorf arrived at work as usual. After thanking the crowd who had shown up to support her, she then declared that she was returning to continue her post as First President of the Supreme Court. When President Duda subsequently informed her by letter that she from then on was considered a retired judge of the Supreme Court, Gersdorf responded by asserting that in light of article 183(3) of the Polish Constitution – which prescribes that the First President of the Supreme Court is appointed for a 6-year term of office – her term would continue until 30 April 2020. Thus, Gersdorf stated, “there can be no doubt that once I have been properly appointed by the President of the Republic of Poland to such office, no decision of yours, Mr. President, may annul that effect”. At that point, Gersdorf had already received support for her position by the General Assembly of the Supreme Court, who on 28 June 2018 adopted a resolution stating that the Supreme Court would consider her as the head of the Court until the lawful end of her term.

But Gersdorf was not the only one of the senior judges who felt unlawfully dismissed. In a series of resolutions adopted throughout 2018, the General Assembly of the Supreme Court iterated its position that the retroactive lowering of the retirement age was inconsistent with the principle of irremovability of judges, as protected under article 180 of the Polish Constitution. But the Assembly also urged everyone to respect each judge’s individual decision as to whether to obediently either retire or apply for consent to extend their terms under the new act,

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318 Dz.U. 2018 item 5.
319 The Supreme Court of the Republic of Poland (2018a).
320 Act of 8 December 2017 on the Supreme Court, article 111(1).
321 The Supreme Court of the Republic of Poland (2018b).
322 Gersdorf (2018a).
323 Ibid.
324 The Supreme Court of the Republic of Poland (2018c).
325 The Supreme Court of the Republic of Poland (2018c; 2018d; 2018e; 2018f; 2018g).
or to disregard the act altogether and defiantly remain in their post.\textsuperscript{326} As of 4 July 2018, nine judges had decided to submit their applications to the President of the Republic to remain as judges, in accordance with the procedure in article 111(1) of the Act on the Supreme Court.\textsuperscript{327} Another seven judges gave statements expressing their will to continue, but instead of following the prescribed procedure in the new act, they based their stance directly on the Constitution.\textsuperscript{328} The remaining ten judges entered into their retirement without publicly expressing any objections.\textsuperscript{329} Subsequently, and after having consulted with the KRS, President Duda gave his consent to five of the nine judges who had followed the prescribed procedure,\textsuperscript{330} whereas the others promptly received letters informing them that their state of retirement would commence on 12 September 2018.\textsuperscript{331} The dismissed judges reacted by maintaining that their positions enjoyed protection by the Constitution, but they simultaneously recognized that the interest of justice and the parties to proceedings compelled them to recuse themselves from all current panels, and refrain from adjudicating until a final decision on the legality of their retirement had been established authoritatively.\textsuperscript{332}

However, the Supreme Court also found another way to oppose the ongoing purge. In a creative and unexpected move, a panel of the Labor and Social Security Chamber decided to refer to the Court of Justice of the European Union (hereinafter simply referred to as the “Court of Justice”) five questions for a preliminary ruling, regarding the compliance of the retirement scheme with EU law.\textsuperscript{333} Moreover, the panel declared that the relevant provisions of the Act on the Supreme Court would be suspended, until the Court of Justice had issued its ruling.\textsuperscript{334} This temporary suspension was not received well by everyone, however. For one, the Deputy Chief of the Chancellery of the President of the Republic, Paweł Mucha, publicly expressed that he found the decision “very surprising as the steps taken by the Supreme Court have absolutely no legal basis and can have no legal effects whatsoever”.\textsuperscript{335} Also the Minister of Justice reacted with

\begin{footnotesize} 
\begin{enumerate}
\item The Supreme Court of the Republic of Poland (2018d).
\item The Supreme Court of the Republic of Poland (2018h).
\item Ibid.
\item One of these was Andrzej Wróbel, who previously had left his post as judge of the Constitutional Tribunal in protest, see section 2.4 above.
\item The Supreme Court of the Republic of Poland (2018i).
\item The Supreme Court of the Republic of Poland (2018k).
\item The Supreme Court of the Republic of Poland (2018m; 2018n; 2018o; 2018p; 2018q).
\item Decision of 2 August 2018, Ref. No. III UZP 4/18, para I (Case C-522/18 in the Court of Justice’s system).
\item Ibid., para. III.
\item tvn24 (2018a).
\end{enumerate}
\end{footnotesize}
disapproval, and filed an application before the Constitutional Tribunal, in which he challenged the constitutionality of the suspension.336

None of this deterred the judges of the Supreme Court, however, who in the months that followed continued to refer more questions to the Court of Justice, not only concerning the lowered retirement age, but also the composition of the KRS and the new disciplinary system’s conformity to EU law.337 Mimicking this strategy, several lower instance judges soon began referring questions of their own to the Court of Justice, regarding the increased political influence over disciplinary proceedings against ordinary judges.338 This development prompted Minister Ziobro to go one step further, and on 4 October, he extended his pending constitutional complaint to challenge not only the suspension, but also the access to refer questions to the Court of Justice.339 As of April 2019, the Court of Justice has not yet delivered preliminary rulings in any of the cases.

Already on 24 May 2018, President Duda had commenced the procedure to fill the numerous openings in the Supreme Court, by publicly announcing as many as 44 vacancies in the official gazette Monitor Polski.340 Among these, 20 were allotted to the Extraordinary Control and Public Affairs Chamber, 16 to the Disciplinary Chamber, whereas seven and one was earmarked for the Civil and Criminal Chamber, respectively. Subsequently, Duda on 10 August announced an additional eleven vacancies, divided between the Civil, Criminal, and Labor and Social Security Chamber.341 Essentially, PiS’ reform provided Duda – in collaboration with the new National Council of the Judiciary – the opportunity to appoint 55 new Supreme Court judges in one go, i.e., 45 % of the total amount of judges.342

By the end of August, the KRS had begun the extensive task of assessing the candidates for the positions.343 Despite vigorous attempts by public protesters to block the Council members from

336 Motion of the Prosecutor General of 4 October 2018, Ref. No. K 7/18. As of April 2019, the Constitutional Tribunal has not yet set a date for the hearing of the case.
337 Decision of 30 August 2018, Ref. No. III PO 7/18 (Case C-585/18); Decision of 19 September 2018, Ref. No. III PO 8/18 (Case C-624/18), Decision of 19 September 2018, Ref. No. III PO 9/18 (C-625/18), and C-668/18.
338 See for instance Cases C-558/18, C-563/18, and C-623/18.
340 Monitor Polski 2018 item 633.
341 Monitor Polski 2018 item 831.
342 In paragraph 2 of the Regulations of 30 March 2018 on the Supreme Court, Duda set the total number of judges of the Supreme Court to 120.
343 Mazur (2018).
the premises, the Council nevertheless succeeded in interviewing all candidates, and presented its preferred candidates to the President of the Republic, Andrzej Duda. Then on 19 September 2018, the new Disciplinary Chamber came to life, when Duda appointed ten judges to the chamber, and on 10 October, he stacked the Extraordinary Chamber with 19 judges. The latter appointments were particularly contentious, because they were made in spite of an injunction ordered by the Supreme Administrative Court, which explicitly suspended the appointment process temporarily. In President Duda’s opinion, however, the Court did not have jurisdiction to interfere with his prerogative to appoint judges for the Supreme Court. Thus, the newly appointed judges were able to join the chambers’ lay judges, who had been elected by the Senate back in July 2018, and within two weeks, the new chambers were up and running.

The additional eight judges that Duda appointed on 10 October 2018 – to the Criminal and Civil Chambers, again in disregard of injunctions by the Supreme Administrative Court – would have more of a rocky start of their Supreme Court careers, however. On 5 November, the President of the Criminal Chamber, Stanisław Zabłocki, issued an order by which he removed the chamber’s novice judge, Wojciech Sych, from all cases he had been assigned. The order further declared that until the validity of Sych’s appointment had been authoritatively established, Zabłocki would refrain from assigning him any new cases. The reason for this, the order explained, was the need to care for the uniformity of court practice and the procedural security of the parties. Likewise, the President of the Civil Chamber, Dariusz Zawistowski, announced that the seven judges appointed to his chamber would not be allowed to adjudicate until their positions were confirmed.

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344 tvn24 (2018b).
345 Monitor Polski 2018 item 993.
346 Monitor Polski 2018 item 1029. Curiously, one of the 20 candidates proposed by the KRS, Aleksander Stępkowski, was refused by President Duda, seeing that he did not fulfill the statutory requirement of solely having a Polish citizenship, see Skory (2018).
348 tvn24 (2018c).
349 Monitor Polski 2018 item 674.
351 Monitor Polski 2018 items 1030 and 1031.
The National Council of the Judiciary quickly issued a statement in support of the omitted judges, asserting that withholding judges from adjudication was incompatible with the constitutional order of the Republic of Poland, and risked undermining the foundations of the rule of law. The Council even went as far as to suggest that the Chamber Presidents’ actions proved that they were unworthy of the office entrusted to them. Also the judges of the Extraordinary Chamber spoke out in defense of the excluded judges, through a statement where they accentuated that undermining the President of the Republic’s prerogative to appoint judges was extremely dangerous for the foundations of a state ruled by law, based on the division of power, the independence of courts, and the independence of judges.

Parallel to this domestic tug-of-war, the European Commission once again proved vigilant, and swiftly acted to prevent the negative effects of the Act on the Supreme Court. On 2 July 2018 – one day before the lowered retirement age took effect – the Commission launched an infringement procedure against the Polish government. Mimicking the ongoing infringement procedure that was launched back in July 2017 as a reaction to the Act on the Organization of Common Courts, the Commission again based its decision on the conviction that the new retirement scheme violated Poland’s obligations under article 19(1) TEU read in conjunction with article 47 of the Charter of Fundamental Rights of the European Union. When the Polish government’s response yet again failed to alleviate the Commission’s concerns, the Commission decided to refer the case to the Court of Justice. This time, however, due to the urgency and risk of serious and irreparable damage, the Commission asked the Court to handle the case in an expedited procedure, and moreover to order interim measures. Specifically, the Commission requested the Court of Justice to order Poland to suspend the provisions lowering the retirement age, to ensure that all affected judges could continue to perform their duties, and to refrain from taking any steps toward replacing the retired judges, including the First President. Accordingly, on 19 October 2018, the Vice President of the Court of Justice, Rosario Silva de Lapuerta, decided to provisionally grant the Commission’s request, without even hearing the Polish government’s arguments. In her decision, de Lapuerta found the urgency requirement to be met, as “the infringement of a fundamental right such as the right to an independent court or tribunal
is [...] capable, because of the very nature of the infringed right, of giving rise in itself to serious and irreparable damage.”

Already the following day, First President Gersdorf summoned all the retired judges to return to the Court.359 And by the end of October, all but one had reported back to work, most of them having already been assigned new cases.360 In similar fashion, the National Council of the Judiciary did their part to comply with the order without hesitation; Chairman Leszek Mazur informed the Polish media that the Council would freeze the ongoing process of assessing candidates for the eleven vacancies that President Duda had announced on 10 August, until the issue had been settled permanently.361 However, there was some apprehension as to whether or not the PiS government would acknowledge and respect the ruling. The answer came on 29 October, when Deputy Minister of Justice Michał Wójcik announced that the government would in fact implement the decision.362 Still, the government did not appreciate the fact that Gersdorf had taken the matter into her own hands, and declared that until the legislature had adopted an amendment to the Act on the Supreme Court, Gersdorf was no longer the First President of the Supreme Court, and the judges who had returned to the Court remained retired.363 President Duda in turn reacted to the returning judges by stating that “[w]e have a situation where some elitist judges consider themselves to be above Polish law just because they do not like it”.364

A draft amendment to the Act on the Supreme Court was submitted to the Sejm on 21 November 2018, and before the end of the day, the Sejm had adopted their solution to comply with the order by the Court of Justice.365 Through the amendment, the Sejm removed the retroactive effect of the lowered retirement age, instead applying it only to judges appointed after the new amendment would enter into force.366 Consequently, all judges who had been prematurely retired were prescribed to return to the Court, effectively the day of the entry into force of the amending act.367 For good measure, the amendments also explicitly stated that all the judges’ terms – as well as the position as First President – would be considered uninterrupted.368 Finally,

359 Gersdorf (2018b).
360 Gersdorf (2018e).
361 tvn24 (2018d).
362 tvn24 (2018e).
363 tvn24 (2018f).
364 tvn24 (2018g).
365 Dz. U. 2018 item 2507.
366 Act of 21 November 2018 amending the Act on the Supreme Court, article 1(5) and (6).
367 Ibid., article 2(1).
368 Ibid., article 2(1) and (4).
the act completely removed the President of the Republic’s much criticized discretionary power to allow judges to continue beyond reaching the retirement age. However, when President Duda was presented with the amending act, he hesitated for almost a month. But when the Court of Justice on 17 December 2018 upheld Vice-President de Lapuerta’s provisional order granting the European Commission’s request for interim measures, the President finally signed the Act into law.

Although respecting the Court of Justice’s order of interim measures was an important step toward complying with the European Commission’s demands, First Vice-President Timmermans of the Commission was quick to remind the Polish authorities that the Commission’s concerns also related to the numerous measures that had affected the common courts, the National Council of the Judiciary, as well as the independence of the Constitutional Tribunal. And even though the amendments fully conformed to the order for interim measures, the Commission chose not to withdraw the case pending before the Court of Justice. This in turn caused Minister Ziobro to accuse Timmermans of playing dirty, claiming that “it’s not about dispute over judiciary [sic] anymore, but about drawing out the decision until the European elections, in order to play Poland politically and to give the opposition a chance to exploit this case against Poland’s good image”.

Since the introduction of the new disciplinary system – in which Minister Ziobro attained substantial influence over the proceedings – observers have reported a number of instances where disciplinary procedures have been initiated against judges for political reasons. For instance, several lower instance judges have been subject to disciplinary investigations, ironically enough for sending preliminary questions to the Court of Justice regarding the legality of the politicized disciplinary procedures. Moreover, procedures have been initiated against judges for having acquitted activists who demonstrated against PiS and for not ruling in favor of the interest

369 Ibid., article 1(4).
370 Court of Justice of the European Union (2018b).
371 President of the Republic of Poland (2018).
372 tvn24 (2018h).
373 Case C-619/18. The case is expected to be heard around May 2019.
374 tvn24 (2019a).
375 For a detailed account of these procedures, see Mazur (2019) pp. 37–40 and Komitet Obrony Sprawiedliwości (2019).
376 Pech and Wachowiec (2019).
of key political figures. Finally, investigations have been carried out against judges for adopting resolutions criticizing the judicial reforms and the new KRS.

When the Polish judges’ association Iustitia presented First Vice-President Timmermans of the European Commission with these facts, he promptly replied that “if judges are being faced with disciplinary measures because they ask questions to the court in Luxembourg, then of course the Commission will have to act”. Correspondingly, on 3 April 2019 the Commission decided to launch its third infringement procedure against Poland to protect the judges’ independence. The Commission was of the opinion that the new disciplinary regime breached article 19(1) TEU, read in connection with article 47 of the EU Charter of Fundamental Rights, which guarantees the right to an effective remedy before an independent and impartial court. Furthermore, the Commission found that Poland failed to fulfil its obligations under article 267 TFEU – which enshrines the right of courts to request preliminary rulings from the Court of Justice – by subjecting judges to disciplinary proceedings for exercising this right.

At the time I am writing this, it is still too early to tell whether this final effort by the European Commission will prove efficient toward protecting the Polish judges from further political pressure. But the apparent success of the previous infringement procedure regarding the retirement of Supreme Court judges, provides some cause for optimism.

4 Institutional Analysis: Concepts and Beginnings

4.1 Introduction

At this point, we have attained considerable knowledge about what transpired in the wake of PiS’ rise to power. Now, it is time to go one step further, and see whether we can deepen our understanding of these events by subjecting the presented case to institutional analysis. However, in order to do this successfully, it is first necessary to take a step back and consider the Polish judicial institutions more generally.

This chapter is organized as follows. First, I present a general conceptualization of institutions, and discuss how to study them in a fruitful way (section 4.2). Then, I move on to initiating the analysis, i.e., by identifying the basic unit of analysis (section 4.3), before developing a concept of the behavior of interest to the analysis (section 4.4). Subsequently, I explore the history and constitution of the Polish judiciary, in order to identify the substantial issues that warrant further

380 tvn24 (2019b).
382 See section 3.2.2 above.
investigation (section 4.5). In the succeeding chapters, I apply these insights to analyze the specific cases concerning the Constitutional Tribunal and the ordinary judiciary (chapters 5 and 6).

### 4.2 Introducing Greif’s Theory of Institutions

Greif defines an institution as “a system of social factors that conjointly generate a regularity of behavior”.\(^{383}\) Characteristic for all institutions is that they are made up of *rules* that prescribe or proscribe behavior – be they formal or informal, implicit or explicit, tacit or articulated. Rules are necessary, because they enable and guide agents to follow specific behavior. The mere existence of a rule is not enough to induce such behavior, however. An agent also needs to be motivated to follow the prescribed behavior, to the detriment of other feasible behaviors. Therefore, institutional analysis should incorporate the social factors that provide such motivation, namely *beliefs* and *norms*. Beliefs can take two forms: either of cognitive models that provide explanations and understanding of the structure and details of the world (internalized beliefs), or of expectations about the behavior of others in various contingencies (behavioral beliefs). Beliefs motivate action because they imply the consequences that can be expected of any particular action, thus providing the agents the opportunity to act in line with their preferred outcomes. Norms, on the other hand, are socially constructed behavioral standards internalized through socialization, which motivate behavior by becoming part of an agent’s own preferences. Finally, institutions are often supported by *organizations*, be they formal or informal, which contribute toward generating regularities of behavior by producing and disseminating rules, perpetuating beliefs and norms, and influencing the set of feasible behavioral beliefs. In sum, institutions are made up of rules, norms, beliefs, and organizations, which I hereafter jointly will refer to as *institutional elements*.

Central to Greif’s institutional theory is the assertion that rules will only become *institutionalized* – i.e., be common knowledge, be expected to be followed, and correspond to behavior – when they are supported by beliefs and/or norms. An institution can persist only when each agent finds it optimal to follow the rules, given their private information, knowledge, and preferences; in other words, as long as the institution remains *self-enforcing* (or in economic terms, as long as the prescribed behavior and the associated beliefs constitute an *equilibrium*).\(^{384}\) In turn, institutionalized rules have a pervasive effect on behavior because they provide shared

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\(^{384}\) In the field of game theory, an equilibrium is defined as a strategy profile where all strategies constitute “mutual best responses”, see Watson (2013) p. 97.
cognition by aggregating information, frame the situation, give coordinative guidance by articulating expected behavior, and specify the normatively appropriate actions. The range of parameters within which the institution remains self-enforcing constitute its institutional support. The notion of institutional support highlights how an institution can persist in marginally changing environments, but also how exogenous parametric change that causes the institution to be outside its support will lead the institution to its demise.

Consequently, the aim of Greif’s empirical method of comparative and historical institutional analysis, which I employ in this paper, is to properly identify the institution under study – its rules, norms, and/or beliefs, as well as the organizations that make the necessary beliefs possible. One of the benefits of studying an institution as an equilibria phenomenon, while making explicit the mechanisms that render it self-enforcing, is that this simultaneously highlights the limits of these mechanisms. In other words, it exposes the conditions under which an exogenous parameter change will cause the institution to no longer be self-enforcing. Applied to the Polish case studied in this paper, the central question therefore becomes: What institutional elements – rules, beliefs, norms, and organizations – have contributed to generating a regularity of behavior within the Polish judiciary, and how has these institutional elements been affected by PiS’ rise to political power?

4.3 Identifying the Central Transaction: the Basic Unit of Analysis

The object of study in this paper is the contemporary Polish judiciary. However, because institutions by definition are systems made up of elements which at least in part are shrouded from direct observation, the institution itself cannot be the starting point of the analysis. In other words, since the goal of the analysis is to properly identify the institution, it would be self-contradictory to take said institution as the point of departure. Likewise, the analysis cannot begin with formulating a model, because doing so would entail assuming much of what needs to be established.

Instead, the first step of Greif’s empirical method of comparative and historical analysis is to pose the following question: what are the behavioral outcomes whose institutional underpinnings we seek to understand? To answer this question adequately, we need the assistance of the theoretical concept of a transaction, which is defined by Greif as “an action taken when an entity, such as a commodity, social attitude, emotion, opinion, or information, is transferred from one social unit to another”.\(^{385}\) The regularity of behavior we are interested in – i.e., behavior that is generated by institutions – will always occur within such a transaction, because an

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agent’s behavior will only be influenced by institutional elements in situations where something that others either have done, are doing, or are expected to do has an impact on an agent’s well-being from taking various actions. Notably, transacting is what makes a situation social, and thus prone to influence by social factors. Accordingly, the focus in the following is to combine generic theory and contextual knowledge to identify the transaction of interest, and subsequently the related regularities of behavior observed in this transaction.\footnote{386 This approach avoids functionalism as well; in Greif’s words, “[t]he analysis does not begin by considering an institution’s observable features, such as organizations and rules, and attempt to account for them based on the function they as postulated serve” (2006) pp. 359–360.}

With generic theory on courts and litigation as a starting point, we can identify a number of interesting transactions that lend themselves to closer investigation. At the fundamental level, the role of an ordinary judge is to function as a means of conflict resolution.\footnote{387 Shapiro (1981) p. 1.} The basic social logic behind judges’ ability to effectively resolve conflicts is the simple fact that they allow conflicts to be structured in triads: the two parties to the conflict summon a judge to act as a neutral third party that can assist them in resolving their dispute.\footnote{388 Aubert (1963) pp. 33–42.} Already from this simple observation a potential transaction for study surfaces, namely the transaction that occurs between the court and the litigants when the judge delivers her ruling. Adding to the mix the fact that litigants nowadays usually are represented by attorneys, new transactions appear, both between the judge and the lawyers, and the lawyers and their clients. Additionally, contemporary judiciaries are hierarchically structured, in order to allow litigants to appeal decisions to a court of higher instance.\footnote{389 Skoghøy (1998) pp. 48–53.} In consequence, yet another transaction emerges whenever an appeal judge delivers her decision – this time between the judges of higher and lower instance. Transactions also exist between judges within the same court, for instance between a court president and a subordinate judge.

Conflict resolution is not the sole function of the courts, however. For one, courts play a vital role in upholding social control.\footnote{390 Shapiro (1981) p. 17.} Secondly, courts inevitably exercise some lawmaking functions, as a minimum “supplementary and interstitial lawmaking, filling in the details of the statutory or customary law”.\footnote{391 Ibid., p. 28.} Consequently, not only the parties to the conflict, but also the government is to various degrees affected by a court’s decision – in other words, a transaction takes place between the court and the government as well. Needless to say, transactions between the court and the government also transpires in the numerous cases where a government is a
party to the conflict. The transaction between the court and the government is even more apparent if we look at adjudication within the domain of constitutional review. Whenever a court reviews legislation (which in the Polish context is reserved for the Constitutional Tribunal), the outcome of the case undoubtedly has a direct influence on the government’s ability to implement its preferred policy.

Moreover, transactions between courts and the government are not unidirectional. As Hamilton famously noted, the judiciary “has no influence over either the sword or the purse”, and is therefore reliant on the other branches of government to implement its decisions.\textsuperscript{392} Thus, the government transacts as well, through its reaction to the courts’ judgments.

All of the above-mentioned transactions, as well as many more that I have left out, could be made the object of study in this paper.\textsuperscript{393} However, contextual knowledge of the contemporary situation in Poland suggests that it is first and foremost the transaction between the court and the government that merits closer examination.\textsuperscript{394} To substantiate this assertion, it suffices to point to the fact that among the plethora of negative opinions that have been issued in the wake of PiS’ rise to power, the common denominator has been laments regarding the separation of powers and the judiciary’s independence from the other branches of government. In the subsequent sections, I will elaborate on the nature of this judicial–governmental transaction and the behavioral outcomes associated with it, as well as develop the substantive issues that warrant closer inquiry. For ease of exposition, I will hereafter refer to the transaction between the judiciary and the government simply as the “judicial transaction”.

4.4 The Judicial Transaction and Judicial Independence

The central question in this section is this: What features characterizes the judicial transaction? In order to examine this, we must return to the root concept of courts as a forum for conflict resolution. As already noted, judges serve the commonsensical function of providing a triadic structure to a conflict, and it is from this capacity courts derive their fundamental legitimacy. Inevitably, however, this triadic structure becomes threatened the moment a judge delivers her

\textsuperscript{392} Hamilton et al. (1842 [1788]) p. 356.
\textsuperscript{393} And all have already been subject to much research, although the term transaction is not used, see e.g., Cameron and Kornhauser (2006); Helmke and Staton (2011); Davis (1999); Johnson and Pryor (2018).
\textsuperscript{394} I do not, however, assert that the other possible transactions remain unaffected by PiS’ endeavors. For instance, it would be interesting to look into whether the transactions between court presidents and judges have been affected by Minister Ziobro’s increased powers vis-à-vis court presidents. Due to the scope of the paper, I will have to refer this inquiry to future research.
judgment; the loser could easily come to perceive the new situation as a dyad of “two against one”.  

Therefore, in order to preserve the courts’ legitimacy, a device with the ability of preventing the triad from breaking down is necessary. The most elementary method capable of maintaining the triad is prior consent from the parties – concerning both the judge and the norm to be applied. But as society’s complexity grows, relying on particular consent becomes ineffective, which in turn leads to what Shapiro calls “the substitution of law and office for consent”.

Thus, the evolution of a professional corps of judges, ready to resolve conflicts using pre-established norms, can be understood as modern society’s means for safeguarding the triadic structure in conflict resolution. However, the moment professional judges become an integral part of the nation state, another interest to the conflict is inevitably introduced, namely that of the government. And with it, a new set of destabilizing pressures is imposed on the triadic structure. In modern societies, the predominant solution to this apparent paradox has been to ensure that the judiciary, although an integral part of the state apparatus, remains independent from the other branches of government. In scholarly literature, this concept is theorized under the label judicial independence, which essentially refers to the situation where a judge, when delivering a judgment, remains uninfluenced by the government’s desires with regard to the case being decided. And this in turn requires that judges can expect that regardless of whether the decision is in the interest of the government, it will be fully implemented without any negative consequences being imposed on them. In sum, a successful judicial transaction occurs when 1) the judge decides the case at hand free from outside influence, and 2) the government fully respects and implements this decision.

Having established judicial independence as the relevant behavioral outcome in the judicial transaction as far as the ordinary judiciary is concerned, let us consider the same transaction in the context of a centralized Constitutional Court. Whereas the idea of judicial independence for ordinary court judges is derived from the notion of conflict-solving in triads, this logic is not

396 Ibid.
397 Ibid., p. 5.
398 Salzberger (1993) p. 351. The term judicial independence is sometimes also used to refer to judges’ independence from other entities than the government, for instance the litigants, the public, or other judges (Nelson 2015). In this paper, I will use the term judicial independence only to refer to judges’ independence from the government.
really applicable to Kelsenian-styled Constitutional Courts, who determine the constitutionality of legislation \textit{in abstracto}, i.e., unrelated to a specific conflict.\footnote{Sadurski (2002) p. 167.} Instead, judicial independence for Constitutional Court judges stem from the courts’ key purpose, namely to place effective counter-majoritarian constraints on the exercise of political power, thus fulfilling one of the central values of constitutionalism.\footnote{Ferejohn (1998) pp. 366–369.} From this core function, it follows intuitively that Constitutional Court judges must be independent of the government, as they otherwise would not represent any real check on legislative power. Consequently, although the underpinning rationale differs, judicial independence constitutes the relevant behavioral outcome in the judicial transaction concerning both the ordinary judiciary and the Constitutional Tribunal.

Before moving on to identifying the institution generating behavior in the Polish judicial transaction, it is necessary to make some terminological clarifications. The way I used the term judicial independence above, it denotes a specific type of behavior – and can accordingly be labeled \textit{substantive independence}. Analytically, we can differentiate this from a concept of \textit{structural independence}, which refers to the specific organizational arrangements that aim at enabling substantive independence, such as life-tenure, immunity, modes of appointing judges, etc.\footnote{Salzberger (1993) p. 352. A related distinction goes between \textit{de iure} and \textit{de facto} independence, where the former denotes the formal guarantees of independence, and the latter refers to the actual practice, see Nelson (2015) for a review of this literature.} Oftentimes, the term judicial independence is used in this latter sense, and much scholarly work has been devoted to developing normative standards of structural independence.\footnote{See e.g., Shetreet and Deschénes (1985).} Likewise, many of the statements by the European Commission and Venice Commission concerning judicial independence (or the lack thereof) quoted in previous chapters, is made in the context of comparing the Polish judiciary’s organizational arrangements to “European standards” of structural independence.

In contrast, throughout the rest of this paper, I will use the term judicial independence to denote a specific regularity of behavior in the judicial transaction, i.e., substantive independence. This is not to say that organizational arrangements necessarily are irrelevant to my analysis. But instead of holding such arrangements up against some normative standard, I will only be concerned with them insofar as they form part of the institutional elements that generate (or fail to generate) a regularity of behavior in the judicial transaction. Such an approach incorporates the conventional wisdom based on historical experience, that countries with little to no structural
independence may very well have judges acting independently of the government, while countries with elaborate catalogues of organizational safeguards may nevertheless fail to produce independent judges. In other words, a specific set of organizational arrangements is neither necessary nor sufficient to ensure that judges are independent. This circles back to Greif’s fundamental assertion that rules only correspond to behavior insofar as they are institutionalized, i.e., that they are supported by the proper beliefs and/or norms (see section 4.2).

4.5 Institutional Foundations: Establishing an Independent Judiciary

4.5.1 The Birth of the Polish Judiciary

With a better theoretical understanding of the nature of the judicial transaction, including its salient behavioral outcomes, it is finally time to delve into the specifics of the Polish judiciary. But before beginning the task of identifying the particular institutional elements, let us pay a short visit to the institution’s cradle. I think it uncontroversial to assert that the modern-day Polish judiciary arose from the 1989 Round Table Talks between the communist government and the Solidarity-led opposition, which facilitated the Polish transition from communism.404 Admittedly, certain rule of law tendencies prevailed as far back as the 18th century Polish-Lithuanian Commonwealth, but alas, the decades-long communist regime “almost completely destroyed the last remains of the rule of law tradition and replaced it with the ‘socialist’ concept of legality, which was antithetical to the core elements of the rule of law”.405 Following the fall of the iron curtain, the Solidarity movement – with its clear orientation toward western ideals and the “Washington Consensus”406 – quickly began the process of reshaping the legal system, including the judiciary, to conform to the new values of the radically changing society.407 A central part of this process involved an effort to establish an independent judiciary.

Exactly why the post-communist institutional designers decided to commit to the rule of law remains open to speculation. Larkins asserts that institutionalizing the rule of law can serve two important functions for a newly (re)established polity, namely “the realization of a clear break with the past, and […] the development of a constitutional culture which teaches state actors

406 The term “Washington Consensus” refers to policies advocating economic liberalization, privatization and fiscal austerity designed by the IMF, the World Bank and the US Treasury, see Bugaric (2015) p. 178.
that the legal bounds of the system cannot be transgressed for the achievement of partisan political gains”. Moreover, a successful commitment to the rule of law is associated with a range of long-term benefits, for government and citizens alike. Notably, empirical research suggests that independent judiciaries have a positive influence on real GDP growth per capita, lead to higher investments, and reduce income inequality. At the end of the day, the transformers might not have had many other choices, given their ambition to escape the Soviet bloc and become integrated into Western economic structures.

At the outset, the newfound commitment to judicial independence manifested itself through amendments to the communist Constitution of 1952, as well as subsequent legislation containing various guarantees for judicial independence. Moreover, several new organizations were established, including the National Council of the Judiciary and above all the Constitutional Tribunal – a Kelsenian-styled court with centralized/abstract judicial review powers. The endeavors toward establishing the rule of law were subsequently confirmed in the 1997 Constitution, and further enhanced throughout the process leading up to the 2004 accession to the European Union.

Seeing that the judiciary was established by way of intentional efforts, through formal legislative mechanisms, identifying the institution’s observable institutional elements – its rules – is straightforward enough. The very crux of the matter is found in articles 173 and 178 of the Constitution, which unequivocally state that “[t]he courts and tribunals shall constitute a separate power and shall be independent of other branches of power”, and that “[j]udges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes”. Held together, these provisions not only forbids judges from being influenced by extraneous pressures, but simultaneously prohibits the government from intervening in the judicial process. Moreover, the Constitution provides a number of arrangements aimed at securing

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409 Feld and Voigt (2003); Barro (2000).
411 For a thorough account of this process, see Morawska (1992).
412 The Tribunal was actually established a couple of years before the fall of communism, but not until after did it have any real freedom to overturn legislation, see Garlicki (2002) p. 265–266. Moreover, until the 1997 Constitution was adopted, the Sejm retained the power to overrule a decision of unconstitutionality with a two-thirds majority vote.
413 Article 195(1) proclaims the same for Tribunal judges: “Judges of the Constitutional Tribunal, in the exercise of their office, shall be independent and subject only to the Constitution”.

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judicial independence, such as judicial irremovability,\textsuperscript{414} immunity,\textsuperscript{415} a promise of “appropriate conditions for work and granted remuneration consistent with the dignity of their office and the scope of their duties”,\textsuperscript{416} and for Tribunal judges specifically: a fixed term of office and prohibition against reelection.\textsuperscript{417} The Constitution further provides that ordinary judges are appointed by the President of the Republic, on the motion of the National Council for the Judiciary,\textsuperscript{418} whereas Constitutional Tribunal judges are elected by the Sejm.\textsuperscript{419} On top of all this, a number of statutory procedural rules exist concerning jurisdiction, justiciability, how cases are raised before the court, when a judgment becomes final etc. Together, these rules define, articulate, and disseminate social positions, objectives, as well as expected behavior in the judicial transaction.

4.5.2 The Polish Judges

Before moving on to identifying the norms and/or beliefs required for these rules to become institutionalized, let us take a moment to ponder on the characteristics of the people who fill the institution, namely the judges. Going forward, a little knowledge about Polish judges is necessary, as all models of behavior inevitably bestow the interacting individuals with certain preferences. The judges themselves would perhaps have us think that the only thing they care about is deciding the case at hand in line with their soundest understanding of the law. Although this might be true for some judges, a more realistic account accepts that judges are mere humans after all. Acknowledging this, Posner argues that “[j]udges are rational, and they pursue instrumental and consumption goals of the same general kind and in the same general way that private persons do”.\textsuperscript{420} For simplicity, let us distinguish theoretically between three different ideal types of judges and their preferences: the policy seeking judge, the careerist judge, and the professional judge.\textsuperscript{421} The policy seekers always prefer to act in a manner that will maximize the probability of achieving their policy preference, or as close to this preference as possible. Above all, policy seekers will be aware of the possibility of being overturned by a higher instance court or the legislative. The careerists, on the other hand, are only concerned with their own career,

\begin{align*}
\text{\textsuperscript{414} Article 180.} \\
\text{\textsuperscript{415} Articles 181 and 196, for the ordinary courts and the Constitutional Tribunal respectively.} \\
\text{\textsuperscript{416} Article 178 of the Constitution.} \\
\text{\textsuperscript{417} Article 194(1).} \\
\text{\textsuperscript{418} Article 179.} \\
\text{\textsuperscript{419} Article 194(1).} \\
\text{\textsuperscript{420} Posner (1993) p. 39.} \\
\text{\textsuperscript{421} Helmke (2005) p. 31.}
\end{align*}
particularly gaining promotions.  

Finally, the professional judges only care about their personal reputation and the reputation of their institution. Of course, other preferences are conceivable as well, for instance a desire for deference, power, or even leisure.  

So what kind of judges inhabit the Polish judiciary? Seeing as the Polish legal culture is characterized by a somewhat mechanical and formalistic style of interpretation, inherited from socialist textual positivism developed during the Cold War, ordinary judges have much less opportunity to affect public policy than, say, U.S. judges. Intuitively, this might suggest that judgeships are less attractive to pure policy seekers. Also, the judiciaries in the post-communist region remains rather less prestigious than its Anglo-American counterparts, making the occurrence of professional judges less likely. Careerists, on the other hand, would be expected to thrive in the Polish judiciary, which follows the Continental tradition of a full-career judiciary. Conversely, the judges of the Constitutional Tribunal enjoy a great deal of leeway in their interpretations of the Constitution, and are generally highly respected among their peers. Hence, policy seekers and professional judges alike might be expected to seek appointment there.  

In reality, however, judges likely embody traits from several or all if the abovementioned ideal types. For the purpose of this paper, it is fortunately not necessary to map out the exact preferences of each judge – such an attempt would at any rate be futile. Instead, my objective is to highlight the fact that judges might very well, under specific conditions, place a higher value on extraneous considerations than they do on judging sincerely. Personally, I believe this holds true for judges everywhere. But confining ourselves to the Polish context, I at least find some support for this claim in the following sentiment:  

Personal courage has been a characteristic heavily lacking in the Central European judiciary. The reasons why the Communist government did not foster this value are obvious. However, the post-Communist judiciaries do not endorse it either. [...] With slight exaggeration, the overall situation could be summarized as one, in which there is (structural) judicial independence, but no (mentally) independent judges.  

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4.5.3 The Problem of Credible Commitment to Judicial Independence

Without judges willing to sacrifice everything to judge sincerely, institutional elements protecting their independence becomes all the more imperative. We have already seen that the post-communist government instituted a number of rules to facilitate judicial independence. But as we know, in order for these rules to become institutionalized, they must be supported by other institutional elements, notably norms or beliefs. Specifically, all individuals interacting in the judicial transaction must find it optimal to follow the prescribed behavior, given their private information, knowledge, and preferences. However, from our knowledge of the nature of the judicial transaction, we can derive the following truism: Although the government might indeed want to commit itself to respecting judicial independence in the long run, it is evident that a specific judgment might be less than ideal for said government in the short run. Critically, in certain situations the cost imposed by a detrimental judgment might in fact exceed the present day value of the expected long-term benefits from having an independent judiciary. The salient question therefore becomes: Even though a government has promised \textit{ex ante} that it will respect any decision, what stops it from reneging on its promise \textit{ex post}? Or stated from the judges’ perspective: How can a judge trust that an unfavorable decision will not be met with sanctions? This insight reveals that any government trying to institutionalize judicial independence from the outset is faced with a commitment problem. Grasping the nature of this problem is crucial, as the lion’s share of the remainder is used to discuss alternative ways of solving it.

To understand just how institutional elements can mitigate this commitment problem, it is necessary to introduce a little more terminology. Notably, a distinction must be made between central and auxiliary transactions. Whereas central transactions denote the transaction under study – in this case the judicial transaction – auxiliary transactions are any other transaction that either lead agents to internalize particular beliefs or norms, or enable the generation of beliefs about behavior in the central transaction. Specifically, institutional elements sometimes create links between the central transaction and auxiliary transactions, so-called intertransactional linkages. This notion is easier to grasp when illustrated by a simple example from commercial life: If an agent believes that a court will punish a contracting party who fails to uphold her commitments under a contract, it simultaneously becomes possible for the agent to believe that the contracting party will uphold her responsibility even in situations where she has an incentive to renege on her promise. In Greif’s terminology, the belief about the court’s behavior creates an intertransactional linkage between this auxiliary (potential) legal transaction and the central economic transaction between the contracting parties. Consequently, this behavioral belief constitutes an institutional element in an institution that facilitate impersonal trade.

Returning to the Polish judiciary, let us begin with the end. In spite of the fundamental problem sketched above, there are indications that the efforts to institutionalize judicial independence
were successful. Prior to PiS’ ascent to power, the consensus among scholars was that Polish judges of all levels of the judiciary in fact enjoyed a great deal of independence from the government. Illustrative is Bodnar and Bojarski’s assertion that the Polish judiciary was independent “in both the constitutional and practical sense”.428 A decade earlier, a freshly retired judge of the Constitutional Tribunal wrote this about the Tribunal’s independence:

In practice, the independence of [Tribunal judges] is respected. During the last decade, there were no instances of external pressure, or other threats to their independence, exerted by either politicians or the media. I have no doubt that a judge, if he had really so wished, was able to decide the cases without any external pressure.429

After PiS left the 2015 elections victorious, however, this opinion quickly changed: “Judicial independence, once quite strong [in Poland], is now a thing of the past”.430 The incidents chronicled in chapters 2 and 3 above plainly illustrate this. As regards the Constitutional Tribunal, we have seen that the government has refused on several occasions to acknowledge, implement, and publish its decisions. And concerning the ordinary judiciary, we have witnessed not only examples of the government disregarding judgments, but also incidents where judges have been sanctioned for their behavior, through politicized appointment procedures and disciplinary proceedings.

Consequently, my quest going forward is to investigate why the observed regularity of behavior (judicial independence) drastically changed shortly after PiS came into office. In order to answer this question, I will first endeavor to identify the institutional elements that allowed the post-communist governments to credibly commit to respecting the judges’ independence in the first place. Bringing to light the conditions facilitating judicial independence will presumably give important pointers toward how it could crumple so suddenly. Due to the special nature of the Constitutional Tribunal, it seems appropriate to discuss it separately from the rest of the judiciary. Accordingly, I will first consider the institution generating judicial independence of the Constitutional Tribunal (chapter 5), before repeating the exercise for the ordinary judiciary (chapter 6).

430 Kovács and Scheppele (2018) p. 190. Throughout the remainder, I assume that there in fact occurred a change in regularity of behavior in the judicial transaction after PiS assumed office; judicial independence prevailed prior to PiS’ electoral victory, but waned after. The validity of this assumption is briefly discussed in the concluding section of the paper
5 The Constitutional Tribunal

5.1 Developing a Conjecture

In this section, the goal is to combine generic theoretical insights with specific knowledge about the Polish context, in order to develop a conjecture about the institution generating behavior in the judicial transaction between the Constitutional Tribunal and the government. Subsequently, this conjecture will form the basis for the game theoretic model (section 5.2), and thereafter be subject to evaluation based on available empirical evidence (section 5.3). Following Greif’s methodology, the conjecture will comprise “a statement about the transactions that were or were not linked […] the institutional elements that link and influence behavior in these transactions, the important environmental features on which these institutional elements depend, and the causal relationships between the exogenous and endogenous features”.\footnote{Greif (2006) p. 364.} As advanced in the previous section, the key is to identify the institutional elements (norms or beliefs) that mitigated the commitment problem fundamental to the judicial transaction.

Intuitively, one might conjecture that the post-communist government was able to credibly commit to respecting judicial independence as a result of having internalized a norm prescribing a devotion to constitutionalism.\footnote{A little reminder: In Greif’s theory of institutions, norms are understood as socially constructed behavioral standards internalized through socialization. Norms motivate behavior by becoming part of an agent’s own preferences, see section 4.2 above.} Theoretically, if all relevant governmental actors had internalized such a norm, it could be possible for the Tribunal judges to believe that they could give a sincere judgment without risk of repercussions. To have this effect, the norm would have to be sufficiently strong to ensure that the intrinsic value of upholding the rule of law would outweigh the cost of having the politicians’ preferred policy blocked by the Constitutional Tribunal in all situations. I find it highly unlikely that such an institution prevailed during the transition from communism – or for that matter in the time since. For one, in order to offer stability, the norm would have to be shared by all governmental actors in a position to influence the judges, which in turn would make it reliant on an effective socialization process. Hypothetically, one could imagine that something like a comprehensive indoctrination program could achieve this, for instance through the public school system. However, I confidently assert that no such universal socialization process occurred at the relevant time in Poland. The mere fact that the relevant agents grew up during communist rule, a time when the rule of law and judicial independence was actively suppressed, should suffice to abandon such a conjecture.
Having rejected a conjecture relying solely on norms, I now turn to examine any potential behavioral beliefs with the potential to create the necessary intertransactional linkages. In the literature, several possible solutions have been proposed. Carrubba has demonstrated how governments in a federal state has incentives to maintain independent judicial review powers, in order to help the states overcome collective action problems under a common regulatory regime. In other words, a belief that courts function as “fire alarms” to facilitate compliance with the regulatory regime, can simultaneously allow the judiciary to believe that the governments will respect their independence. However, as Poland is a unitary state, this theory does not have the potential to explain the country’s independent judiciary.

Rogers has developed a different theory that judicial review can be in the governments’ (short term) interest, as a result of the court’s unique informational advantage stemming from its ability to review legislation on the basis of actual results rather than projected consequences. This represents a benefit for the government, because it reduces the transaction costs of a potential legislative repeal. However, the alleged informational benefits would only apply for instances of concrete review, whereas an important part of the Constitutional Tribunal’s activity is to review legislation in abstracto.

The common feature of the alternatives rejected above is that they focus on various short term benefits the government can derive from maintaining independent judicial review. Another theoretical possibility would be that the commitment problem instead was mitigated by the presence of exogenous threats of negative consequences in response to infringements on judicial independence. Notably, if any credible threat exists of sanctions sufficiently costly to outweigh the short term benefits from curtailing judicial independence, this in turn would enable judges to believe that their decisions will be respected. In the literature, public support of courts have been identified as the most potent source of such sanctions. As Salzberger put it, “pol-

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433 Another reminder: Behavioral beliefs are expectations about the behavior of others in various contingencies, which motivate action by implying the consequences that can be expected of any particular action, see section 4.2 above.
434 Carrubba (2009).
436 Moreover, as Vanberg (2008) points out, Rogers’ theory fails to explain why the government would prefer judicial review by an independent court as opposed to a dependent court – surely the preferential positioning would be the same for both.
438 See e.g., Caldeira (1986); Weingast (1997); and Stephenson (2004).
iticians are interested in having and in maintaining an independent judiciary because this situation can assist them in maximizing their political support". In other words, if the public is believed to punish the government whenever judicial independence is curtailed, this could allow judicial independence to prevail.

An institution based on public support would necessarily be dependent on several factors. Firstly, it would require a public that was willing to impose sanctions on the government. Secondly, the public would also have to be capable of imposing sufficiently significant costs on the government. And thirdly, such an institution would rely on a mechanism that allowed the public to monitor the government’s responses to the courts judgments, i.e., ensure that necessary information about any transgressions reached the public. Unlike the different theoretical possibilities rejected above, there is nothing about the Polish context that suggests that such an institution is unlikely to have arisen in the wake of the transition from communism. To the contrary, the establishment of a constitutional democracy entailed precisely the necessary environmental features on which the contended institutional elements depend. Through newfound privileges such as the right of assembly, freedom of speech, and most prominently free elections, the public attained effective tools which enabled them to coerce the government into deference. Similarly, the development of a free press could secure the necessary information to be shared efficiently among the public.

What about international organizations, such as the Venice Commission and the EU bodies? Could they play a part in supporting the institution? Plausibly, such organizations could serve the same coercive function as bestowed on the public – provided they are both willing to and capable of inflicting sufficient costs upon the government, and have access to the necessary information. Alternatively, international organizations might provide institutional support more indirectly. For instance, they could serve as “fire alarms”, coordinating the public by giving them reliable information about transgressions made by the government. Also, censure by an international organization could serve as a factor motivating the public to utilize their capacity to sanction the government. I will return to discuss the role of international organizations in section 5.3.5. For now, I will for simplicity and ease of exposition focus on the public as the salient source of sanctions. However, the conjecture presented below, as well as the corresponding model described in the next section, could easily be modified to include international organizations as an addition to or as a substitution for the public.

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441 Vanberg (2001).
In light of the above, I conjecture that the institution that generated judicial independence in the judicial transaction comprised a set of formal rules that defined, articulated, and disseminated social positions, objectives, as well as expected behavior in the institutional context. The judicial transaction’s inherent commitment problem was mitigated through behavioral beliefs that created intertransactional linkages between the judicial transaction and a coercive transaction between the government and the public, coupled with an information-sharing transaction between the press and the public.442 These linkages manifested themselves through beliefs that the public was both willing to and capable of sanctioning violations of judicial independence, and that the public would receive the necessary information to know when to sanction. Thus, the rules became institutionalized, as they were supported by appropriate behavioral beliefs; Tribunal judges were able to judge independently, and the government respected the judgments regardless of whether the result was to their liking. As a continuation of this, I suggest that the sudden change in behavior after PiS’ victory was enabled by a change in these beliefs, caused by an exogenous parametric change leading the institution to be outside its institutional support. Henceforward, I will refer to this institution as the “public support institution”.

In this section, I have argued that a specific institution – the public support institution – is both theoretically and contextually possible. This is not, however, paramount to establishing that this institution in fact prevailed. As Greif himself put it, the goal of the analysis is “to identify the relevant institution, not assert that a feasible one was relevant”.443 In order to pursue this goal, I will confront the conjecture with available knowledge and evidence (section 5.3). Before that, however, I will present and analyze a game theoretic model with the aim of sharpening the subsequent analysis, by making explicit the conditions necessary for the institution to remain self-enforcing.

5.2 Presenting and Analyzing the Game Theoretic Model

In this section, I will present a simple game theoretic model of incomplete and imperfect information, used to capture the conjecture laid out in the previous section. The game is adapted from Vanberg.444 After presenting the core components of the game, the relevant equilibria will be described and discussed.

The game has three players: nature, a Constitutional Court, and a government. The model treats as exogenous a public that under certain circumstances sanction the government if it tries to

442 This information-sharing could of course also happen via other channels beside the press, such as NGOs, interest groups, unions, and the like.
444 Vanberg (2001). All proofs can be found in the annex to Vanberg’s article.
evade a decision by the Constitutional Court. To capture the fact that the public needs sufficient information in order to monitor the government’s adherence to judicial independence, the model assumes two types of policy environments. One “transparent” \((T)\), where the necessary information about infringements upon judicial independence reaches the public, and one “non-transparent” \((\sim T)\), where the public misses this information. Furthermore, to capture the variance of preferences and leanings of judges, the model assumes three types of courts: A “friendly” court \((F)\), a “submissive court” \((S)\), and an “assertive” court \((A)\). The model treats both the court’s type and the policy environment parameters as incomplete information. I will return to the significance of the different court types after I have presented the rules of the game.

![Figure 1 Game tree](image)

Note: The government’s payoffs are listed first, the court’s second.

- **F**: Friendly court, **S**: Submissive court, **A**: Assertive court. **T**: Transparent, **~T**: Non-transparent.
- **L**: Legislate, **~L**: Not legislate. **c**: Uphold as constitutional, **~c**: Rule unconstitutional.
- **E**: Attempt to evade the decision, **~E**: Respect decision.

\(\alpha\): Political importance, \(\beta\): Public backlash, \(\varepsilon\): Legislative expenses, \(I_\text{i}\): Issue cost, \(C_\text{i}\): Institutional cost
The game tree presented in Figure 1, illustrates the sequence of moves and the payoffs for the government and all types of courts. The order of play is as follows:

- **Step 0.** Nature chooses the court type and the transparency of the policy environment. Let \( P(A) = r_A \in (0,1) \) be the common prior beliefs that the court is assertive; \( P(S) = r_S \in (0,1) \) that the court is submissive; and \( P(F) = 1-r_A-r_S < 0 \) that the court is friendly. Let \( p \in (0,1) \) be the probability that the policy environment is transparent (\( T \)), and with probability \((1-p)\) the policy is nontransparent (\( \sim T \)).

- **Step 1.** The government chooses to adopt a piece of legislation (\( L \)) or not to adopt it (\( \sim L \)). The government makes this choice without certain knowledge about the court’s type and the policy environment. If the government chooses not to adopt the act, there is no opportunity for judicial review, and the game ends.

- **Step 2.** If the government adopts the act, the court then decides whether to uphold it as constitutional (\( c \)), or declare it unconstitutional (\( \sim c \)). The court makes its choice knowing its own type, but being uncertain about the policy environment. If the court upholds the legislation as constitutional, the game ends.

- **Step 3.** If the judiciary declares the act unconstitutional, the government makes a choice whether to attempt to evade the decision (\( E \)) or accept it (\( \sim E \)). As the game tree illustrates, whether an attempted evasion is successful or not is determined by the transparency of the policy environment.

The payoffs for the **court** are determined by two factors. First, the court must pay an **issue cost** \( I_i > 0 \) (where \( i \in \{F, A, S\} \)), whenever the final outcome of the game with respect to the policy issue under consideration does not align with the court’s preference for or against the legislation. Second, whenever the government attempts to evade a judgment, the court pays an **institutional cost** \( C_i > 0 \) (where \( i \in \{F, A, S\} \)), representing a harm to the court’s institutional status caused by the attack. Whereas a friendly court’s issue preference is aligned with the government’s, the two other court types (submissive and assertive) prefers the policy not to be implemented.\(^445\) The difference between a submissive and an assertive court reflects how afraid they are of having their institutional status challenged by the government. A submissive court shies away from public confrontation, \((C_S > I_S)\), whereas an assertive court is willing to enter into confrontation, as long as it eventually prevails on the issue under review \((I_A > C_A)\).

\(^{445}\) The model does not assume anything about the reasons for the two court types’ reluctance toward the policy. Thus, the judges could be motivated by purely legalistic considerations or by divergent policy preferences.
The government’s preferred outcome is to have its policy implemented, in other words either to have the court uphold the legislation as constitutional, or to successfully evade a decision of unconstitutionality (i.e., without being met with a public backlash). If, however, the government respects a negative ruling, thus giving up its policy, it pays the cost of $\alpha > 0$, representing the political importance of the policy. Whenever the government attempts to evade the judgment, but is unsuccessful, it not only pays the cost of $\alpha$, but also inflicts a cost of $\beta \geq 0$, amounting to the severity of the public backlash. Finally, if the government chooses not to adopt the act in the first place, it pays the cost of $\alpha$, but “saves” any legislative resources it otherwise would have spent, captured by $\varepsilon$.\footnote{\varepsilon \leq \alpha(1-\tau_A).} This final postulation catches the intuitive assumption that if the government expects that it will not be able to successfully implement its policy, it would prefer not to adopt the legislation in the first place.

Since the goal is to determine the conditions under which the public support institution generates judicial independence, we are only interested in the strategies that conform to the notion of judicial independence as defined in section 4.4 above, i.e., that courts delivers their judgments unaffected by the government’s issue preference, and that the government respects the courts’ decision regardless of whether they agree with the result or not.\footnote{For the other equilibria that does not conform to these requirements, see Vanberg (2001).} Consequently, the only strategy profiles we have to consider are the ones involving the strategy where all court types decide the case in line with their preferred outcome ($\{c|F; \sim c|A; \sim c|S\}$), and the strategies where the government chooses not to evade a court decision ($\{(L; \sim E); (\sim L; \sim E)\}$).

The game is solved using the solution concept of Perfect Bayesian Equilibrium (PBE), which entails that “each player’s strategy specifies optimal actions, given his beliefs and the strategies of the other players, and the beliefs are consistent with Bayes’ rule whenever possible”\footnote{Watson (2013) p. 383.}. Before stating the equilibria, two definitions are necessary.

**Definition 1:** Let the governments updated beliefs at the last information set be denoted by $q(x, y)$, where $(x, y) \in \{F, A, S\} \times \{T, \sim T\}$.

**Definition 2:** Let $p^* \equiv \frac{\alpha}{\alpha + \beta}$. Henceforth, I will refer to this as the “transparency threshold”.

Table 1 contains the only two equilibria that fulfills the judicial independence requirements. The first, called “judicial supremacy”, captures the situation where the government adopts the legislation, and complies with the subsequent ruling. Also in the second equilibrium, labeled...
“autolimitation”, the government would comply with the court’s decision, but anticipating a ruling of unconstitutionality it decides not to legislate in the first place.

Table 1 Equilibria

<table>
<thead>
<tr>
<th>Equilibrium 1</th>
<th>Strategy profile</th>
<th>Parameters</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Judicial Supremacy”</td>
<td>Government: {L; \sim E}</td>
<td>( p \geq p^* ) and ( r_A + rs &lt; \frac{\alpha - \varepsilon}{\alpha} )</td>
</tr>
<tr>
<td></td>
<td>Court: {c</td>
<td>F; \sim c</td>
</tr>
<tr>
<td>Equilibrium 2</td>
<td>Government: {\sim L; \sim E}</td>
<td>( p \geq p^* ) and</td>
</tr>
<tr>
<td>“Autolimitation”</td>
<td>Court: {c</td>
<td>F; \sim c</td>
</tr>
</tbody>
</table>

Government’s updated beliefs at the last information set: \( q(A,T) = \frac{r_A p}{r_A + rs} \cdot q(A,\sim T) = \frac{r_A(1-p)}{r_A + rs} \cdot q(S,T) = \frac{r_S p}{r_A + rs} \cdot q(S,\sim T) = \frac{r_S(1-p)}{r_A + rs} \cdot q(F,T) = 0 \), \( q(F,\sim T) = 0 \).

Note that both equilibria holds only when the probability that the policy environment is transparent meets the transparency threshold \( (p^*) \). What separates the two equilibria from each other, is the probability of encountering a friendly court, vs. a hostile court. When the probability of meeting a hostile court is sufficiently low, the government passes the legislation because it is optimistic that the court will uphold the statute. These equilibria conditions generate the following observations. Given the definition of \( p^* \), the viability of the two equilibria rely on an interplay between three parameters: the probability of the policy environment being transparent, the expected severity of the public backlash, and the political importance of the policy issue under review. Firstly, the court is in a strong position when the transparency of the policy environment is high. Secondly, whenever the expected severity of the public backlash increases, the transparency threshold decreases; the equilibria hold even in less transparent environments.\(^{449}\) Conversely, when public support is lacking \( (\beta \leq 0) \), the equilibria hold only in the

\(^{449}\) Formally, \( \frac{\partial p^*}{\partial \beta} = \frac{-\alpha}{(\alpha + \beta)^2} < 0 \).
most extraordinary circumstances. Finally, the transparency threshold is affected by the political importance of the issue under review. The higher importance the government places on the issue under review, the more stringent the conditions for the equilibria becomes.  

In view of these observations, we can cautiously make a couple of additional predictions. First, given the fact that the government’s leeway is affected by the public’s access to information, a government facing a hostile court might attempt influencing the information that is transmitted to the public. And second, if a government expects a court to effectively place constraints on important policy, it might even want to undermine the court’s public support. With this in mind, let us move on to evaluating the validity of the proposed conjecture.

### 5.3 Evaluating the Conjecture

#### 5.3.1 Introduction

Like all social science models, the game presented above is necessarily stylized, simplifying the complex reality in order to highlight particular points. Nevertheless, the equilibrium analysis contributed toward exposing the conditions necessary for the conjectured institution to successfully solve the commitment problem, and thus enable judicial independence to transpire. However, the question still remains, did the public support institution actually prevail in post-communist Poland? And if so, what changed as PiS came into power? In order to attempt answering these questions, the goal in this section is to evaluate the proposed conjecture by confronting it with available knowledge and data. To the extent that the obtained evidence supports the conjecture, the validity of crediting the public support institution with generating the observed regularity of behavior increases. Furthermore, by comparing the situation before and after PiS won the 2015 elections, some additional support for the conjecture might be gained, notably if changes in the environmental parameters highlighted by the model can account for the observed changes in behavior.

I will in turn discuss each of the parameters highlighted by the game; to start, a few words about political importance (5.3.2), before moving on the two most salient parameters, namely public support (5.3.3) and transparency (5.3.4). Afterward, I will return to the question of the role international organizations might have had in supporting judicial independence (5.3.5). Finally, I will briefly discuss the two additional predictions derived from the model, i.e., that a government in certain situations might try to influence the information reaching the public and the court’s public support (5.3.6).

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450 Formally, $\frac{\partial p^*}{\partial \alpha} = \frac{\beta}{(\alpha + \beta)^2} > 0$.

5.3.2 Political Importance

The game demonstrates that as the political importance of the issue under review – i.e., the benefit the government expects to gain from the policy – increases, the transparency threshold rises as well. Commentators have noted that key figures within PiS perceive the post-1989 constitutional system as an illegitimate system based on elitist and liberal values that emphasize *procedural justice* rather than “real” or material justice. Specifically, they see the liberal rule of law as an “unwanted technicality that at best protects the disgusting elites while oppressing the real people”. Correspondingly, it is reasonable to assume that PiS expected resistance from the Tribunal on issues upon which they place a high political importance.

However, although PiS for idiosyncratic reasons might indeed perceive the Tribunal as representing a particularly strong nuisance, there have certainly been a number of instances where previous governments have had policy issues of great political importance blocked by the Tribunal. As these governments nevertheless respected the court’s decisions, it seems unlikely that a rise in the political importance of the issues under review is the sole or decisive factor that facilitated the observed breakdown of judicial independence.

5.3.3 Public Support

For the public support institution to persist, a public who is ready and willing to sanction the government is crucial. Without such a threat, the institution can survive only in the most extraordinary circumstances, specifically where the court knows that the government places no political importance on the issue under review. Moreover, for the institution to remain stable over time, it is likely not sufficient for the court to enjoy the public’s support only whenever the public share the court’s preference over the issue under review. After all, more often than not, the public’s preference is likely to be more closely aligned with that of the democratically elected government than a group of elite judges. Thus, instead of a mere *specific support*, the viability of the institution relies on a form of *diffuse support*, i.e., an “institutional commitment,” or an “unwillingness to make or accept fundamental changes in the functions of the institution”. In the scholarly literature, this often referred to as a court’s *legitimacy*. The following statement sums this notion up nicely:

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452 Matczak (2018) pp. 9–12. To describe this phenomenon, PiS chair Kaczyński himself coined the phrase “legal impossibilism”.
Diffuse support is loyalty to an institution; it is support that is not contingent upon satisfaction with the immediate outputs of the institution. Easton’s apt phrase ‘a reservoir of goodwill’ captures well the idea that people have confidence in institutions to make, in the long-run, desirable public policy. Institutions without a reservoir of goodwill may be limited in their ability to go against the preferences of the majority”.456

The mechanisms leading to legitimacy is not clear, and to date, no comprehensive theory of how courts’ legitimacy emerges is available, although a couple of tendencies can be identified.457 Firstly, the more citizens are aware of a court, the more they tend to support it.458 Secondly, citizens who subscribe to liberal ideals such as individual liberty, is more likely to support the courts.459 Finally, a court’s longevity is positively correlated with the public being supportive of the court, irrespective of their satisfaction with specific decisions.460

So, did the Constitutional Tribunal ever accumulate such “a reservoir of goodwill” among the Polish citizens? Achieving this is not necessarily an easy task. As Howard notes, “[p]articularly in Central and Eastern Europe, where the judiciary was long seen as a tool of the state, creating and nurturing an understanding of and respect for judicial review is a serious hurdle”.461 Nonetheless, scholars have contended that the Constitutional Tribunal’s diffuse support among the public is high:

Clearly, constitutional courts in the region enjoy a high level of social acceptance and recognition, despite occasional disagreements and criticisms of its particular decisions. Constitutional courts in [Central and Eastern Europe] emphatically do not have a problem of legitimacy.462

Finding empirical evidence for this claim is not a straightforward matter, unfortunately. Intuitively, one might begin by examining the past, looking for examples of governments being sanctioned by the public. This is not necessarily a fruitful approach, however. In the model describe above, sanctions by the public is off the equilibrium path, which means that if all players act as they are expected to act, the public would never have to actually take the step and

457 Ibid., p. 526.
impose sanctions on the government. Instead, it is the credible threat of such sanctions that deters governments from evading decisions. As Greif et al. notes, in the somewhat comparable context of contract enforcement:

Indeed, the effectiveness of institutions for punishing contract violations is sometimes best judged like that of peacetime armies: by how little they must be used. Thus, when one reads the historical record to determine whether a major role of merchant institutions was to ensure contract compliance, the number of instances of enforcement is not a useful indicator.\footnote{Greif et al. (1994) p. 746.}

Given the postulation that the Constitutional Tribunal enjoyed judicial independence, one would correspondingly not expect to find many examples of public uprising against attempts by governments to curtail this independence. The best indication available is perhaps the public’s response to PiS’ crusade against the Tribunal. Indeed, the massive public demonstrations in the wake of the constitutional crisis reveal that heaps of Poles were in fact ready and willing to take to the streets to defend the court.

Assuming then – admittedly without solid proof – that Sadurski’s claim about the Constitutional Tribunal’s high level of legitimacy is true, it becomes pertinent to ask why the institution crumpled so quickly after the 2015 elections. Was there a sudden fall in the public support after the 2015 elections? This seems highly unlikely, especially considering the insight that legitimacy is accumulated over time. I propose that in order to make sense of the abrupt change, it is necessary to take into account the distinction between a willingness to sanction, and the capacity to do so. Notably, a willingness to sanction only translates into an expected cost for the government insofar as the ones who are willing to sanction also have the opportunity to do so. Let us consider, then, the means available to the public for imposing costs on a government infringing on judicial independence. In a representative democracy, such as Poland, elections stand out as the most salient tool available for the public. Of course, the public can also resort to demonstrations in-between elections, and the mere occurrence of public demonstrations may in itself be seen as a cost for the government. However, I assert that unless demonstrations translate into a fall in political support for the incumbents, the inflicted cost is likely too low to be effective in deterring the government from curtailing judicial independence. This holds true especially whenever the political importance of the issue under review is high. Thus, I maintain that there is no contradiction between the occurrences of massive public demonstrations, and the fact that PiS repeatedly infringed on the Tribunal’s independence.
Let us concentrate on the elections, then. Intuitively, we can assume that for the incumbents, retaining political power is considered a good, whereas losing it is regarded as a cost. Thus, the electorate can use their votes as a means to sanction the government, simply by choosing not to reelect it in the subsequent elections. Historically, the high levels of electoral volatility observed since the 1990s indicate that Polish voters have been willing to change their party allegiance. But does every voter have the same ability to sanction an incumbent government? I argue that this is not the case. Notably, voters who already have committed themselves to the opposition, do not really have much capacity to sanction the incumbent government in the succeeding elections. To illustrate this point, let us consider the case at hand. Undoubtedly, many voters never have, and would never consider, voting for PiS – regardless of the party’s lack of commitment to the rule of law. Thus, seeing as the party already won a parliamentary majority without them, these voters cannot really use the subsequent elections as an effective means of inflicting further costs on the party. Instead, it is predominantly the voters who helped PiS gain power in the first place, including the voters who chose not to vote for anyone, who in the next election have the means to take that power away. Consequently, it is chiefly if PiS expected these constituencies to react negatively to their maneuvers, we would anticipate PiS to abandon their confrontation with the Tribunal. A closer look at PiS’ constituency might shed some light on how reasonable it would be to expect this.

The exit polls from the 2015 parliamentary elections showed that PiS excelled especially among the elderly, the rural population, and voters with lower of education. Some scholars have maintained that there is a crisis of liberalism exactly within these parts of the Polish society. Matczak, for instance, asserts that certain strata of the Polish population exhibit symptoms of an “authoritarian personality”, embodying a wish to dissipate in something larger than oneself, e.g., “some grand plan imposed by a charismatic leader”. Liberalism, of course, is inherently unable to supply this kind of guidance, as creating plans for people’s lives would be a way of limiting their freedom. Normative ideologies such as patriotism or nationalism, on the other hand, offer ready-made narratives that provide clear paths for thinking and acting, and

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466 The term was coined by Erich Fromm in his seminal work *Escape from Freedom*, published in 1941.
Kaczyński has been successful in creating a compelling narrative based on xenophobia, anti-establishmentarism and illiberal impatience.\textsuperscript{468}

In the Polish context, such narratives are especially appealing to the rural population, who to a somewhat lesser extent than the urban population feel that they have benefited from the integrated market economy. These might be more concerned with having the “freedom to” than the “freedom from”, and this might explain why many people buy into the government’s narrative of, \textit{inter alia}, historical injustice and the dangers of globalization.\textsuperscript{469} PiS has to a large extent managed to retain the support of these constituencies, partly by implementing tangible welfare reforms, such as the “Family 500+”-program, and reversing the unpopular retirement reform introduced by the opposition in 2012.\textsuperscript{470} This illustrates an inherent weakness in the public support institution: elections are about so much more than just protecting the rule of law. For many voters, increased welfare benefits outweigh attacks on the judiciary.

From PiS’ perspective, it seems plausible then that the demonstrations were dominated by individuals who never supported them in the first place. Moreover, the electoral volatility among PiS’ supporters is unusually low:

PiS appears to have succeeded in creating an electorate with a strong and lasting positive sentiment toward itself, and with a larger affective distance toward all of its competitors. [This] might have played some role in it its calculations, in that having a uniquely committed electorate gave its leaders the confidence that they might just get away with a brazen power grab.\textsuperscript{471}

Taken together, these factors suggest that PiS could reasonably expect not to be severely punished for their infractions. And certain evidence suggest that they were right in this assumption. Although far from being a perfect gauge of the public’s response to the constitutional crisis, the results of the 2018 local elections show that PiS’ support grew compared to the previous elections in 2014, especially in rural areas.\textsuperscript{472} Also, the polls for the upcoming parliamentary elections indicate that the party retains equivalent support as when they came to power in 2015.\textsuperscript{473}

\begin{flushright}
\textsuperscript{468} Sadurski (2018a) pp. 59–60.
\textsuperscript{469} Matczak (2018) p. 20.
\textsuperscript{470} Sadurski (2018b) p. 273. The program offers families with two or more children a monthly tax-free benefit of PLN 500 per child, see European Commission (2018c).
\textsuperscript{472} Berendt (2018).
\textsuperscript{473} Tworzecki (2019) p. 100.
\end{flushright}
To summarize, then, the discussion supports the conjecture that previous governments were checked by a constituency both willing and able to sanction any transgressions toward judicial independence. The minute PiS managed to secure a majority on their own, however, the threat of sanctions changed – not necessarily as a result of a shift in the overall public’s willingness to sanction, but in which parts of the public had the capacity to do so.

5.3.4 Transparency

The model highlights the transparency of the policy environment as one of the key parameters in the public support institution, i.e., the probability that sufficient information about any transgression by the government will reach the public. Notably, the equilibria only hold whenever the probability that the policy environment is transparent exceeds the transparency threshold. If we consider the Polish policy environment, it seems reasonable to characterize it as highly transparent. Ever since Freedom House in 2002 began publishing its annual report on the Freedom of the Press, Poland has achieved the highest classification “free”.\textsuperscript{474} And with a free and active press corps, the government would presumably expect that any blatant attempts to evade a Tribunal ruling would be widely reported in the media, at least if the issue under review is of public interest. In retrospect, the massive coverage by the media of every step of the constitutional crisis is a testament to this. Consequently, the conditions for the public support institution to prevail were present, which in turn lends some support to the conjecture.

Did anything happen to the transparency of the policy environment as PiS came to power? Above, I argued that the capacity to inflict costs upon the government is unevenly distributed among Polish citizens, and that this could account for the sudden change in behavior following PiS’ electoral victory. The same argument also applies to the transparency parameter. Notably, a government would mainly be concerned about the transparency of the policy environment encircling the people with the capacity to sanction them; predominantly its supporters. Incidentally, during the last decade, the Polish media landscape has become highly polarized, roughly mirroring the divide between PiS supporters and the opposition.\textsuperscript{475} As a result, the information reaching the Polish population via the news is highly divergent. Therefore, although the PiS leadership likely expected the government’s transgressions to be widely reported, it

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\textsuperscript{474} That is, until 2017, when it was downgraded to \textit{partly free}, due to “government intolerance toward independent or critical reporting, excessive political interference in the affairs of public media, and restrictions on speech regarding Polish history and identity, which have collectively contributed to increased self-censorship and polarization”, see Freedom House (2017).

\textsuperscript{475} Chapman (2017) p. 11.
would not be outlandish for them to assume that vis-à-vis their base, their behavior would be reported on in a completely different light. This seems, in fact, to have been the case; according to an IPSOS survey from June 2016 – i.e., while the constitutional crisis was at its peak – as much as 44 percent of the respondents replied that they agree with the statement that PiS “respects the rule of law”.\(^{476}\) In other words, the polarized media seems to have translated into a lowered transparency of the relevant policy environment. And this, coupled with the lowered threat of sanctions, could certainly lead the public support institution to fall outside its institutional support.

### 5.3.5 International Organizations

In section 5.1, I outlined a few different roles international organizations might play in the public support institution. Let us consider the most salient one, namely as an instrument for sanctioning the government for infringing on judicial independence (next to or in place of the public). As already argued in section 5.1 above, three conditions must necessarily be met before an organization can fill this role: it must be both willing to and capable of inflicting sufficient costs upon the government, and have access to the necessary information. There is no shortage of international organizations willing to fight against assaults on the rule of law, as evident from the plethora of opinions and recommendations in the wake of PiS’ activities. Organizations capable of inflicting substantial costs, on the other hand, are further apart. Even the opinions by the Venice Commission are not formally binding; disregarding them entails no real consequences. Consequently, the institutional bodies of the EU stand out as the most salient contenders, and I will therefore limit the following discussion to these.

In the period leading up to the accession into the Union in 2004, the EU institutions were perfectly positioned to impose significant costs on the government – by simply denying Poland entry into the Union. The strict Copenhagen Criteria, as well as the close monitoring through the PHARE program, showed that the Union was willing and ready to impose such a sanction.\(^{477}\) Consequently, it is certainly possible that this credible threat played a role in securing judicial independence, especially in the early years after the transition while the Constitutional Tribunal was building up its own legitimacy.

The minute Poland was accepted into the Union, however, the tools available for sanctioning transgressions by the government shrunk drastically. In light of this, it should come as no surprise that the many attempts by both the European Commission and the European Parliament to persuade PiS to respect the independence of the Constitutional Tribunal have had little to no

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\(^{476}\) Pacewicz (2016).

\(^{477}\) Orenstein (2013).
effects. The European Parliament’s resolutions, as well as the numerous Rule of Law recommendations by the European Commission, have in common that they entail no tangible sanctions, instead relying on a “dialogic approach”. In contrast, the few available alternatives involving real consequences – such as the “nuclear option” in article 7(2) TEU – rely upon an unrealistic and impractical participation by the often reluctant European Council.\textsuperscript{478}

5.3.6 Incentives to Affect the Parameters
Near the end of section 5.2, I suggested that provided the public support institution actually prevailed, one might in certain circumstances expect the government to seek to affect the parameters upon which the institution relies. Specifically, whenever a government expects that it is facing a hostile court, it may try to influence the transparency of the policy environment, or even question the court’s legitimacy. Have this occurred in Poland?

When PiS came to power in 2015, it was reasonable to assume that the Constitutional Tribunal was hostile to many of the party’s reformist policy issues – seeing as practically all the sitting judges had been appointed by the opposition. Consistent with the predictions, the PiS government from the very beginning engaged in public discourse in order to frame the situation to their benefit, arguing that all their actions were in line with the Constitution. To achieve this, the party leadership actively used the government-friendly media: “TVP’s evening news program Wiadomości, one of the two most popular in the country, has become a mouthpiece for the PiS leadership”.\textsuperscript{479} Moreover, the party consistently painted the political opposition, as well as the people who had taken to the streets, as self-centered elites, or even as traitors and enemies of the nation.\textsuperscript{480} The government also went out of their way to brand the President of the Constitutional Tribunal Rzepliński as an illegitimate political figure, only concerned with his own political agenda.

Also when faced with criticism from international organizations, the government actively and publicly dismissed the denunciations. For instance, in reaction to the Venice Commission’s second negative opinion, the Minister of Foreign Affairs publicly stated that “we did not receive an objective assessment”, and labeled the opinion biased, untruthful, and one-sided.\textsuperscript{481} Similarly, in response to the European Commission’s active resistance, the Minister accused the

\textsuperscript{478} Kovács and Scheppele (2018).
\textsuperscript{479} Chapman (2017) p. 12.
\textsuperscript{480} Tworzecki (2019) p. 100; Lipiński and Stępińska (2019) p. 77.
\textsuperscript{481} Ministry of Foreign Affairs (2016a).
Commission – and First Vice-President Timmermans in particular – of being politically motivated, and acting in breach of the principles of objectivity and respect for sovereignty and national identity.  

In sum, the available knowledge and evidence lend support to the conjecture. The discussion highlights how the environmental features necessary for the public support institution to prevail was in fact present in post-communist Poland, and suggests how these changed after PiS won the elections. Moreover, my account of why PiS endeavors to violate judicial independence encompasses the different explanations offered elsewhere, including both those focusing on the “supply-side” as well as those focusing on the “demand-side”.

6 The Ordinary Judiciary
6.1 Developing a Conjecture

Turning now to the ordinary judiciary, I pose the same question as before: What institution generated the observed independence of the judiciary following the transition from communism? And more specifically, how was the government able to credibly commit to respect and implement judgments, regardless of whether the decisions would be beneficial in the short term?

In the literature, the predominant approach to this issue has been to maintain that judicial independence is secured through designing organizational arrangements that insulate the judiciary from the other branches of government.  

The rationale is that by reducing its possibilities to interfere with judges’ independence – tying itself to the mast if you will – the government avoids the commitment problem altogether. Prima facie, this explanation seems to apply neatly to the Polish system (that is, before the judicial overhaul described above occurred), where a number of constitutional and statutory provisions aim to insulate the judiciary from the elected branches of government. These include judicial irremovability, immunity, and charging the autonomous National Council of the Judiciary with recruitment and advancement procedures.

However, I conjecture that insulation, although having some potential to limit the government’s toolkit, will never in and of itself be sufficient to secure an independent judiciary. For one, a complete insulation is unlikely to be accepted by any rational government, among other things because a total lack of accountability easily could lead to an unfortunate culture of cronyism. This was recognized by the Polish post-communist institutional designers, who instead created a system of partial insulation. For instance, it is the President of the Republic who appoints

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482 Ministry of Foreign Affairs (2017a).
judges, and the Minister of Justice retains administrative oversight over the ordinary judiciary. Moreover, the judiciary will always be dependent on the government to secure implementation of their judgments. Taking this argument one step further, I assert that even if a complete insulation was formally implemented, a government would always have the option of using informal channels to sanction judges, like giving defamatory statements to the media, or in extreme cases resort to blackmail or bribery. So what stops the government from using its available, though limited, means to put pressure on judges? That is not to say that I do not acknowledge the benefits of having organizational structures insulating the judiciary – my thesis is merely that it fails to adequately solve the commitment problem, without the support of other institutional elements. I therefore turn to other alternatives in the literature.

Chávez et al. have argued that a system of fragmented power among the elected branches is capable of facilitating an independent judiciary. The rationale behind their argument is that whenever undermining judicial independence requires coordinated action between several political actors, the cost of doing so increases because it involves securing agreement among actors with potentially divergent interests. It is unlikely, however, that an institution relying on a divided government would emerge in the Polish political context – a semi-presidential system where the Prime Minister and the Council of Ministers rely on the confidence of Parliament. Indeed, the Polish polity is characterized by unified governments, as illustrated by the situation today, as well as the period before PiS came into power.

Another account, put forward by McCubbins and Schwartz, hypothesizes that governments have a short term interest in upholding an independent judiciary, because independent judges help mitigate principal-agent problems between the government and the bureaucracy; by allowing constituents the right to sue the government before independent courts, the government can effectively monitor bureaucrats with lower costs than performing routine controls. Again however, this theory cannot account for the institution generating independence of the ordinary judiciary, seeing as the Polish legal system has a separate system of administrative courts.

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484 Chávez et al. (2011).
486 Gwiazda (2016), pp. 119–120.
488 This theory may, however, explain why the administrative courts so far have been practically untouched by the judicial reforms.
Finally, Landes and Posner have theorized that a government has incentives to allow the judiciary to be independent, because an independent judges will increase the value of politics “sold” by politicians to *interest groups*, whose payment take the form of campaign contributions, implicit promises of future favors, or even bribes. The logic behind this theory can be summarized as follows:

Legislation is perceived as a commodity that is sold by the legislature and bought by interest groups. The demand for it and, consequently, its market price and profits for both parties to the deal, are dependent upon its durability. Since a long-term contract benefits the legislature, it will maintain an independent judiciary that extends the duration of legislation.

In other words, the belief that a government reneging on its promise of judicial independence would discourage interest groups from giving their support in the future, allows the authorities to credibly commit to respecting judgments they disagree with. Although such a linkage between the judicial transaction and an auxiliary transaction between politicians and supporting interest groups might in theory be able to facilitate an independent judiciary, contextual knowledge of the Polish political culture once again suggests that it is unlikely to be the case. Interest groups play a much less prominent role in financing Polish political campaigns than they do in the U.S., which is the context for which the theory was developed.

Thus, we are again left with the alternative that the institution we are trying to identify rests on an exogenous threat, capable of deterring the government from curbing the courts. And once again, public support, potentially coupled with threats from international organizations, stand out as the obvious contenders. Correspondingly, I conjecture that the rules promising judicial independence for ordinary judges became institutionalized because the judges as well as the government believed that the public (or alternatively international organizations) were both willing to and capable of sanctioning violations of the rules, and would receive the necessary information to know when to sanction. This means that the lion’s share of what was said in section 5.1 applies with equal credence. Conveniently, this also means that the model presented in section 5.2 is applicable to this conjecture as well, albeit with a minimal reinterpretation of some of the variables. I will therefore not repeat the points I have already made, but instead confine myself to pointing out a couple of relevant differences between the Constitutional Tribunal and the ordinary judiciary.

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Whereas the Constitutional Tribunal is perfectly positioned to wipe out a government’s favored policy at a single stroke, judgments by the ordinary judiciary is often of interest to the government in a more subtle way. There are certainly exceptions to this, for instance where the government or individual politicians are parties to important cases. For the most part, however, the government will likely be more interested in a judge’s overall inclinations, rather than the outcome of a single judgment. Thus, in order to have the model fit the ordinary judiciary, the game should be interpreted as to not necessarily represent one single case, but instead a series of cases.

As pointed out in section 4.5.2 above, the Polish judiciary is organized as a full-career judiciary. This entails that affecting a judge’s career progression might be a potent carrot and stick for Polish judges. Similarly, the use of disciplinary proceedings might affect judges’ behavior, as such proceedings not only involve inherent costs, but also have a potential negative effect on future career advancement. To take these realities into account, the court’s payoff parameter $C$ in the model should be reinterpreted to include potential costs of disciplinary actions or having career opportunities negatively affected.

Notwithstanding these minor reinterpretations, applying the game to the ordinary judiciary yields the same results as presented in section 5.2. Notably, the judges’ independence is dependent on the interplay of three parameters, namely the issues’ political importance, the public support, and the transparency of the policy environment. In the following section, I will evaluate the conjecture, as well as discuss the prediction that a government facing a “hostile” judiciary might attempt to influence the relevant parameters.

### 6.2 Evaluating the Conjecture

As indicated above, the political importance of cases decided by the ordinary judiciary is often-times lower, compared to cases decided by the Constitutional Tribunal. Still, through exercising its social control and lawmaking functions, as well as adjudicating the occasional case of high political importance, also the ordinary judiciary is from time to time in jeopardy of having its independence threatened. However, seeing as this is the case no matter what government is in office, it once again seems unlikely that a change in this parameter is what caused the downfall of judicial independence after PiS came to power.

Let us move on to the question of public support. Interestingly, the legitimacy of the ordinary judiciary seems to have reached a relatively high level, fairly quickly after the transition from communism, at least as far as the Supreme Court is concerned. Gibson et al. measured the public’s diffuse support of 20 National High Courts in Europe (plus the U.S.), based on mass
surveys executed in 1993–96. According to their findings, the Polish Supreme Court did very well, ranking number 5 overall – scoring higher than the U.S. Supreme Court, and surpassed only by Greece, Germany, Denmark, and The Netherlands. This supports the conjecture that public support of the judiciary generated the judicial independence. Also, the impressive turnout of people demonstrating against the dismissal of the Supreme Court judges was a testament to the public’s support. These demonstrations even seemed to bear fruits, namely President Duda’s vetoes of the original acts on the Supreme Court and the National Council of the Judiciary. We cannot, of course, be certain of the real reasons behind Duda’s vetoes. But seeing as Duda himself pointed to the public outrage as the grounds for his actions, it is plausible that worries about his own reelection was a motivating factor.

As we have seen, Duda’s vetoes represented only a small victory, and ultimately did little to protect the independence of the Polish judges. As documented above, there have been a number of transgressions of judicial independence since PiS came to power, including not respecting rulings by the Supreme Court, politicized appointment procedures, the aggressive use of disciplinary actions, as well as the removals of court presidents and attempted removal of Supreme Court judges. Again, it seems that having the faithful support of a constituency whose primary concerns lay elsewhere than lofty principles of constitutionalism, made the public support institution fall outside its institutional support.

Concerning the transparency of the policy environment, what was said in section 5.3.4 applies with equal weight to the ordinary judiciary. Admittedly, the Constitutional Tribunal generally attracts more attention than lower instance courts. But at least where an overt attempt at curtailing judicial independence is concerned, a government would reasonably expect the media to report it to the public. In retrospect, we can see that PiS’ actions received broad coverage in the media, particularly the early retirements of Supreme Court judges. Nevertheless, the polarization of the media landscape discussed above, could very well have a negative effect on the policy environment’s transparency after PiS came to power.

So what about the role of international organizations? As noted above in section 5.3.5, EU’s capacity to sanction the government changed radically the moment Poland was accepted into the Union. This is clearly reflected in the minimal results that the considerable efforts by the European Commission have produced. There is, however, one notable exception, namely the

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491 Gibson et al. (1998).
government’s backpedaling concerning the retirement of the Supreme Court judges, following the Court of Justice’s ruling. Interestingly, what separates this from the other efforts is precisely the fact that it came with a threat of real and tangible sanctions. Ignoring a ruling by the Court of Justice leads to penalty payments, but more importantly, refusing to acknowledge the court’s decision would be paramount to putting oneself outside the Union’s whole legal system.

Also in relation to the ordinary judiciary, we can see clear tendencies of the PiS government trying to influence the information transmitted to the public. Notably, the government has painted the judiciary as a group of inefficient and corrupt people, with strong affiliations to the old communist regime, and has correspondingly framed their actions as legitimate attempts to fight these deficiencies. To effectively broadcast this message, the government even resorted to a media campaign titled “fair courts”. The campaign consisted of billboards, a website, as well as TV spots, in which judges were accused of drunkenness, driving under the influence, and thievery. Also, prominent figures within the party have used their air time to effectively discredit the judiciary. For instance, President Duda publicly expressed that “significant people in the judiciary […] overtly violate the effective law and constitutional provisions and disregard the binding legislation”, and further claimed that “a given group of the judicial elite deems itself unpunishable and unbound by the Polish law only because it doesn’t like a particular law”. Moreover, a number of false accusations regarding Supreme Court judges’ judicial activities during martial law have circulated, which the Supreme Court Spokesperson have had to rebut a number of times. Obviously, such public smearing of the country’s judges not only has the potential to affect the transparency of the policy environment, but could also over time reduce the legitimacy of the judiciary.

7 Closing Remarks

Throughout this paper, I have argued that a specific institution, which I labeled the public support institution, was responsible for generating the judicial independence observed in Poland after the transition from communism. I contended that the institution comprised a system of institutional elements, i.e., rules, beliefs, and organizations, which together provided shared cognition, framed the situation, and gave coordinative guidance by articulating expected behavior. The rules of the institution, entrenched in the Polish Constitution and statutes, became
successfully institutionalized, despite the commitment problem inherent to the judicial transaction, because a particular set of behavioral beliefs created the intertransactional linkages necessary to motivate the individuals to follow the rules. Specifically, the judicial transaction was linked with a coercive transaction between the public/international organizations and the government, as well as an information-sharing transaction. Moreover, I made the case that the observed downfall of judicial independence following PiS’ ascent to power, came as a result of an exogenous change in the parameters, which led the institution outside its institutional support; it ceased to be self-enforcing. Notably, PiS’ electoral victory involved a shift in the public’s capacity to inflict substantial costs on the government. Combined with a reduced transparency of the policy environment, this resulted in the government’s expected costs of impinging on judicial independence being outweighed by the short term benefits of curtailing the judiciary.

The primary value of this argument, is that it shifts the focus away from a normative discussion of desirable organizational make-ups, and over to the institutional elements capable of rendering judicial independence self-enforcing. Although my analysis in no way undercuts the positive effects of establishing an insulated judiciary, it highlights the fact that insulation in and of itself is neither necessary nor sufficient to secure an independent judiciary. In line with this, I submit that the Polish government’s comprehensive dismantling of organizational fortifications is best understood not as the cause for the collapse of judicial independence, but instead as a symptom of the fact that the institution guarding judicial independence had fallen outside its institutional support. When a government is in a position to impinge on judicial independence with impunity, it only makes sense that it would want to expand its repertoire. Illustrating this point is the fact that the independence of ordinary judges were challenged already before the judicial reforms were initiated. For instance, when President Duda on 22 June 2016 refused to appoint ten judge candidates presented for promotions by the National Council of the Judiciary, several of whom had adjudicated in politically sensitive cases involving, inter alia, PiS chairman Kaczyński.497

Instead of focusing on structural arrangements, my analysis highlights the importance of a public both willing and able to keep the government in check, as well as the significance of a free (and preferably not polarized) press. Unfortunately, the current situation in Poland illustrates that even when a large portion of a country’s population eagerly supports the rule of law, judicial independence can be in danger if a political party is able to rally the support of the particular parts of society that are less concerned with liberal ideals of constitutionalism. On the bright side, revealing the institutional elements necessary to generate judicial independence enables

us to distinguish real progress from mere diversions. For instance, it becomes apparent that isolated concessions – such as President Duda’s vetoes or the government giving up their scheme to retire the Supreme Court judges – involve little cause for celebration. Judicial independence can only truly rise from the ashes when the institution returns within its institutional support.\textsuperscript{498} In turn, this insight has certain policy implications for how actors such as the EU should proceed when trying to thwart rule of law backsliding. Notably, the EU institutions should abandon the “dialogic approach” and concentrate on the instruments that entail real costs for the government. Or perhaps equally effective, they could focus on spreading credible information to the Polish population and fostering public support for the judiciary.\textsuperscript{499}

I have argued that the breakdown of judicial independence happened as a result of the public support institution falling outside its institutional support – it ceased to be self-enforcing. A difficult question remains, however: What exactly happens to an institution when it is no longer self-enforcing? According to Greif’s theory of institutions, such a situation will eventually lead to the institution’s demise. But exactly how and when this will happen is far from clear. We have already seen that the government’s behavior has changed; it has on multiple occasions failed to respects the judges’ independence. But what about the judges’ own behavior? The model presented above predicts that when a government fails to respect judicial independence, the judges’ behavior will change as well. However, the model does not take into account the fact that once a particular pattern of behavior has become institutionalized, this behavior tends to become habitual and routine, no longer relying on reason and calculations. Specifically, when a judge has been adjudicating independently for years, this might have become incorporated into the judge’s identity, causing the behavior to linger past the institution’s downfall.

Consequently – according to the theoretical perspective employed in this study – the future of the institution will depend on whether it remains outside its institutional support for a longer period of time, which in turn likely depends on whether PiS wins or loses the subsequent elections. If the party remains in office, we would over time expect that fewer judges will judge sincerely, i.e., without being influenced by the inclinations of the incumbent government. Conversely, if the opposition manages to overthrow PiS at the upcoming parliamentary elections,

\textsuperscript{498} Or alternatively, that the public support institution is replaced by another institution capable of the mitigating commitment problem.

\textsuperscript{499} Similarly, Kirchmair (2019) urges the EU to speak directly to the Polish electorate via information campaigns in Polish.
my analysis indicates that judicial independence likely will be restored. In such a case, the sa-
lient question becomes whether the temporary turmoil caused the institution any permanent
damage. This question should be investigated if and when that time comes.

Despite several interesting discoveries, the present study has many weaknesses. Notably, in its
current state it remains speculative; a lot more empirical evidence is required to validate the
key findings. Due to the scope of the paper, I will have to refer this to future research. Validating
the conclusions will not necessarily be an easy task, however, as the conjectures presented rest
on several parameters that are difficult to measure, including the public support of the judiciary
and the transparency of the policy environment.

Moreover, there is good reason to question one of the key assumptions upon which my analysis
rests. Notably, based on assertions in the scholarly literature, I simply assumed that judicial
independence in fact prevailed in the period before PiS came to power; a fact that should be
established empirically. Unfortunately, whereas documenting impingements on judicial inde-
pendence can be straightforward enough, empirically establishing the opposite is very difficult.
This is a familiar problem in the empirical literature on judicial independence.500

In sum, the benefits of employing Greif’s theoretical framework to study the Polish judiciary
was first and foremost that it provided an integrative framework that proved to be able to incor-
porate many of the fragmented explanations offered elsewhere. By allowing a unified analysis,
Greif’s approach simultaneously facilitates conducting comparative studies of institutions gen-
erating behavior in judicial transactions both across national borders and across time. The the-
eoretical framework was not, however, able to mitigate the familiar challenges of the field,
namely the difficulty in empirically measuring the important parameters. Thus, until the con-
jecture have been better tested, my account arguably remains a “just-so story”. Taking account
of these weaknesses, I conclude that that the contribution of the paper is more taking a step
toward asking the right questions rather than providing the right answers.

500 See e.g., Tiede (2006) and Voigt (2012).
# Table of Legislation

The Constitution of the Republic of Poland of 22 July 1952


Act of 12 April 2018 amending the Act of 13 December 2016 – the Introductory Provisions to the Act on the Organization and the Mode of Proceedings before the Constitutional Tribunal and
to the Act on the Legal Status of the Judges of the Constitutional Tribunal, Dz.U. 2018 item 849.


Act of 8 December 2017 on the Supreme Court, Dz.U. 2018 item 5.

Act of 8 December 2017 amending the Act on the National Council of the Judiciary, Dz.U. 2018 item 3.

Regulations of 30 March 2018 on the Supreme Court, Dz. U. 2018, item 660.


**Vetoed acts**


**Draft acts**


**Table of Cases**

**Court of Justice of the European Union**

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