The Good Name Redoubt
The Polish League Against Defamation

The reform of the justice system in Poland (the judiciary)

Summary

The reform of the justice system was among the most important reforms in the program of the Law and Justice party (PiS), which was already announced before the Polish parliamentary election in 2015. The reform is of a comprehensive nature, so it was introduced in stages. Its first element was the reform of the prosecution, which took place in early 2016. As regards the reform of the judiciary, which is analyzed in this paper, its key elements were adopted in 2016-2017 and are being implemented in 2018.

This paper is aimed at offering a comprehensive and fact-based picture of the judiciary reform in Poland, because it has often been presented in a quite one-sided and biased manner, both in Poland and abroad. The paper consists of four sections.

Part 1. Pathologies in the judiciary before the reform

The need for the reform stemmed from the numerous pathologies in the judiciary, which had emerged after the political transformation of 1989, and which had been ignored or tolerated for many years by the subsequent Polish governments. The most severe pathologies include no decommunization of the judiciary, oligarchic structure and no democratic control of the judicial community, inefficiency of courts and excessive duration of court proceedings, injustice and leniency towards criminals, fostering financial scandals, corruption and unethical behaviour, politicization and partiality, etc.

Part 2. Public opinion on the justice system

The reform is widely supported by the Polish society that has been dissatisfied with the functioning of the domestic justice system for many years. In 2017, more than half of respondents were critical of it, and 5 years earlier this proportion had reached 60%. The vast majority of citizens believe that the justice system should be reformed. In summer 2017, over 80% respondents expressed their support for the judicial reform.

Part 3. Reform of the judiciary – legal and institutional changes

The reform involves changes to both the law (inter alia, the Criminal Code) and the operation of courts and key institutions of the judiciary. The acts on tightening criminal law and the acts on common courts entered into force in spring and summer 2017. By the end of 2017, the Parliament passed the presidential laws on the National Council of the Judiciary and on the Supreme Court, which entered into force in January and April 2018. In late 2017, plans for the reform of the civil procedure in courts were also presented. The Polish judiciary reform has introduced solutions, which are similar to those in other EU Member States and in the USA. They are compliant with the Polish Constitution.

Part 4. Attempts at blocking the judiciary reform

Some opposition parties (the so-called "total opposition", including the former ruling party) have made attempts at blocking the judicial reform. While the street protests in July 2017 were quite numerous, those in November and December had a very low turnout. Pressured by the "total opposition", the EU institutions also attempted to block the reform. Those attempts, however, have met with criticism for applying double standards, interfering with areas that fall exclusively within the competence of EU Member States, etc. Since the beginning of 2018, a dialogue between the Polish Government and the European Commission has been continued in order to find a compromise and end the conflict.

Warsaw, January 2018
(update: 15 April 2018)

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Part 1. Pathologies in the judiciary before the reform

The need for the reform stemmed from many pathologies in the judiciary, emerged after the political transformation of 1989 and ignored or tolerated for many years by the subsequent Polish governments.

No decommunization

The political transformation in Poland took place more than a quarter-century ago, but it was not followed by the judiciary decommunization. At the beginning of the transformation, the President of the Supreme Court declared that the judicial community would cleanse itself. However, it was not the case. Nowadays, more than 35 years after declaring martial law in Poland (1981), **judges who convicted anti-Communist opposition activists in the 1980s still sit in the Supreme Court and other courts**. Some of them have been awarded distinctions (e.g. a Supreme Court judge who, during the times of Communist Poland, collaborated with the military special forces and convicted opposition activists during the martial law, was awarded by the National Council of the Judiciary the prestigious *"Medal of Merit for the Judiciary"*). After 1989, 55 cases of Communist Poland's judges were submitted to the disciplinary court at the Supreme Court. Most of those cases were rejected – hearings were held in only 4 cases and only one judge was expelled from the judiciary.

Besides, as a result of the Supreme Court's rulings, **holding criminally liable judges who committed crimes during the Communist period is virtually impossible**. The resolution of the Supreme Court of 2007 resulted in the lack of ability to wave the immunity of judges who had unlawfully accused, convicted and extended the imprisonment of "Solidarity" activists during the martial law period of 1981-1983 (many judgments were political – issued despite the lack of a legal basis, lack of evidence, etc). Therefore, the Institute of National Remembrance (IPN) cannot file charges against them. In 2015, the Supreme Court rejected a request filed by the IPN to waive the immunity of a retired Supreme Court judge who, back in 1982, had unlawfully convicted "Solidarity" activists pursuant to the decree on martial law. The IPN wanted to prosecute more than 20 judges and prosecutors, including two retired Supreme Court judges, for the abuse of power. With lustration being the only form of holding them liable for that period, **judges who admitted to having collaborated with Communist Poland's security service can freely hold their offices**.

Oligarchy and no democratic control

After the 1989 political transformation, the judicial system was handed over to a corporation of judges, which could not be controlled in any way. This resulted in the emergence of a kind of "state within a state" – an **oligarchic judicial community** that called itself "a judiciary cooperative" or "an extraordinary caste".

The judicial community alone appointed individuals who could become judges, decided about the careers of judges, etc (connections within the community, including nepotism, often determined careers). The judicial community also conducted **disciplinary proceedings concerning other judges**. The fact that judges were judging themselves constituted, as a matter of fact, a violation of the rule that no-one should be a judge in their own cause (*nemo iudex in causa sua*). This resulted in **the lack of impartiality and the sense of impunity of judges**. Between 2005 and 2015, the Supreme Court received 136 claims for the waiver of immunity and consented to the prosecution of judges only in 53 cases (48 cases were rejected and 29 were referred for re-consideration). Moreover, it should be stressed that the Supreme Court considers only those cases, which have passed a selection by disciplinary courts. Furthermore, even after the disciplinary courts actually pass judgments on guilty judges, the punishments are abnormally lenient.

In order to justify the existence of this oligarchic structure in the judicial system, the judicial community and the media favouring them have argued that this is the only way of guaranteeing "the independence of courts and judges", "the tripartite separation of powers", etc. In reality, such an approach has infringed on the rule of the separation of powers, in accordance with which the **individual powers (legislature, executive, and judiciary) should remain separate, while controlling and balancing each other**. However, as indicated above, the judiciary has found itself outside any democratic control.

Inefficiency of courts and excessive duration of court proceedings

According to the Ministry of Justice data (2016), in most first-instance cases the average duration of district and regional court proceedings is less than one year, but there are also **hundreds of thousands of cases where court proceedings last many years** (often more than 2-3 years, and sometimes even more than 5 or 8 years). There were also extreme cases of abnormally long court proceedings resulting, for example, in 14 years of waiting for the enforcement of an imprisonment sentence, 17 years of waiting for the return of a deposit, or 26 years of waiting for a court decision to dissolve co-ownership.

As revealed by the recent reports of the European Commission and the World Bank (2015-2017), the **excessive duration of court proceedings can be observed mainly in consumer and bankruptcy cases**. Consumer cases take about 750 days in the first instance, and 350 days in the second instance, i.e. about 3 years in total. This puts Poland in one of the last places among the analyzed EU Member States. Things look similar in bankruptcy cases, which also take about 3 years (from bankruptcy being declared to the bank receiving part/whole of the sum due). This results in Poland's being ranked sixth from the bottom in the EU.

Swift and fair courts form the basis for entrepreneurs to do their business. According to the latest **World Bank *"Doing Business"* report** (2017), the time of claiming amounts receivable from contracting parties before the court (which includes the filing of claims, court proceedings and recovery) is 685 days in Poland. To compare, it is 370 days in Lithuania, 395 days in France, 437 days in the United Kingdom, and 499 days in Germany. Furthermore, a Polish entrepreneur has to complete more than 30 procedures and spend one-fifth of the amounts claimed (this puts Poland in the top 60 out of 190 states under analysis).

The excessive duration of court proceedings is one of the problems faced by **entrepreneurs who pursue their claims in courts against the State Treasury for damages resulting from decisions of state officials**, e.g. for the unlawful destruction of their companies by tax or customs offices. The main reported problems include court trials lasting many years, repealing rulings which are favourable for entrepreneurs by higher instances and repeated examination of the same cases by various courts (regional courts, courts of appeals, the Supreme Court), making cases reach their limitation periods, failing to take into account opinions of experts or drawing erroneous conclusions, ignorance of business rules by judges, etc. Whenever the court awards **compensation**, it is **completely inadequate to the losses sustained by the company**. In 2012-2016, entrepreneurs claimed more than PLN 400 million in compensation, and received less than PLN 30 million (2013 was particularly unfavourable in this regard, as the total claims amounted to PLN 114 million, and the awarded compensation equalled PLN 14,000, i.e. about 0.01%) [€ 1 = PLN 4.20; $ 1 = PLN 3.40]. Some entrepreneurs have pursued their claims for 11, 17 or 20 years, with their cases still remaining unresolved.

Injustice and leniency towards criminals

The domestic justice system is regarded by the Polish society as unfair, i.e. too lenient towards criminals, including those committing the most serious crimes, and too strict towards people culpable of minor offences (***"strong towards the weak and weak towards the strong"*** citing Jaroslaw Kaczynski, President of the Law and Justice party).

It is common that **courts impose punishments within the lower limit envisaged by law**. It is also common for courts to pass **suspended sentences** (e.g. in the case of punishment for rape in 2012-2016, suspended sentences accounted for 34% to 43% of all sentences). In Scandinavia, the United Kingdom and Germany

suspended sentences are rare (ranging from several to a dozen or so percent). Such an approach of Polish courts results in **increased recidivism** since many criminals view a suspended sentence as no punishment. More than one-fourth of people with suspended prison sentences commit their next crime within 5 years of passing the first sentence (half of whom do so within one year). Between 2009 and 2015, the percentage of repeat offenders, in relation to the total number of convicts, increased materially (from 3.5% to 5.6%).

As to the most serious crimes (rape, murder, etc), Polish courts are much more lenient than courts in other EU countries. According to the *European Sourcebook of Crime and Criminal Justice Statistics,* only 13% of all convicted of rape in Poland receive long-term punishment, i.e. from 5 to 10 years in prison. In Germany, this percentage amounts to 25% (which is also the EU average), while in the Czech Republic, Hungary and France it ranges from 32% to 34%. In 2016, in Poland no criminal received a sentence exceeding 10 years of imprisonment whereas the EU average is about 6% of 10-year sentences for rape, and in France it is as high as 50%. In 2016, in more than half of all cases, Polish courts imposed punishments within the lower statutory limit (2 years of imprisonment) or passed even more lenient sentences, with every fifth criminal receiving punishment from 2 to 3 years of imprisonment (with the upper limit being 12 years).

This is also the case of murders, for which Polish law envisages such punishment as **25 years** in prison and **life imprisonment**. However, in recent years, **Polish courts passed much more lenient sentences**, e.g. 5 and 10 years in prison for a couple convicted of murdering a 2-year-old child, and for the criminals of a brutal battery resulting in the death of a 62-year-old man (who, as established by investigators, "was being hit for fun" by the criminals). Another bandit was sentenced to 7 years in prison for a brutal murder of a 34-year-old man, and two security guards who beat to death a 38-year-old store customer received 4 years in prison sentences. Even more lenient sentences, i.e. 3.5 years and 2 years of imprisonment, were passed by the court on 3 young individuals who beat to death a 19-year-old student. A couple convicted of causing death (by strangulation) of a 3-month-old child were sentenced to only 8 months in prison, even though the prosecutor demanded 25 years of imprisonment.

Fostering financial scandals

The conduct of some courts has contributed to various financial scandals, including three major scandals, which took place during the rule of the PO-PSL coalition (2007-2015) with Donald Tusk as Prime Minister (2007-2014). Those scandals were brought to light after the Law and Justice party had come to power in 2015. The first scandal concerned **Amber Gold**, a **financial pyramid** whose activity (2009-2012) resulted in 19,000 people losing a total of PLN 850 million. Between 2005 and 2009, the founder of Amber Gold was convicted several times of fraud (document forgery, mis-appropriation of funds, credit swindling). These were, however, suspended sentences even though the first suspension should have been annulled after the subsequent crime, and the perpetrator should have been imprisoned. Nevertheless, courts allowed the head of Amber Gold to continue his illegal activity.

Another scandal involved so-called **"wild reprivatization"**, i.e. acquiring, at extremely low prices, Warsaw's real property (tenements, schools, plots) worth millions of zlotys (even PLN 160 million), or fraudulently obtaining high compensation from the city (the record amount was PLN 38 million). This shady business involved a group of attorneys, judges and officials. The courts passed absurd sentences, e.g. appointing administrators for the deceased former owners of property, who would had been 130- or 140-year-old when the decisions were issued. As a result of "wild reprivatization", thousands of people were evicted (40-55 thousand in Warsaw, but evictions were also performed in other cities – Krakow, Poznan, Lodz).

The courts attitude also appeared **greatly beneficial for tax offenders**. The Penal and Fiscal Code provides for several to dozen or so million zloty in fines for such offences, but the courts were more inclined to adjudge fines of no more than tens of thousands of zlotys. For example, in 2014, district courts in Krakow and Rzeszow found presidents and deputy presidents of various companies guilty of tax fraud (issuing blank invoices, dishonest bookkeeping, stating excessive tax-deductible expense, not making advance personal income tax payments, etc). Despite the state budget losing enormous amounts of money (up to PLN

25 million), and the offenders facing penalties reaching PLN 16 million in fines and 3-5 years of imprisonment, the courts-imposed punishments of only PLN 20-40 thousand.

Also, the **judgment of the Supreme Court** of 2008 was **favourable for organized crime groups fraudulently obtaining VAT refunds from the state budget** (so-called VAT mafias, VAT carousel schemes, etc). Since 2004 both the Penal Code and the Penal and Fiscal Code had been applied to cases of tax fraud. Conviction based on the Penal Code meant imprisonment for up to 10 years, and the limitation period was 15 years, while the Penal and Fiscal Code provided for more lenient punishment and the limitation period of 5 years. In 2008, the Supreme Court – having accepted the arguments of a criminal who had been convicted of VAT fraud based on the provisions of the Criminal Code – stated that issuing fictitious VAT invoices was a fiscal matter and should be examined solely under the Penal and Fiscal Code (which provided for lighter penalties). This judgment, considered odd and scandalous, was passed at the time of implementing major projects for the EURO 2012 football championship in Poland and Ukraine (including the construction of sports stadiums and roads), which created **very favourable conditions for VAT mafias** (e.g. in the steel sector). It is estimated that during the rule of the PO-PSL coalition, the state budget was losing several dozen billion zloty yearly due to fraudulent VAT returns (in total PLN 200-300 billion over an 8-year period).

Corruption and unethical behaviour

An example of large-scale corruption that took place during the rule of the PO-PSL coalition is the Court of Appeals in Krakow, which became the venue for the **misappropriation of property of great value**. A network of several dozen companies having capital, social or family relationships with the court's directors was established. Those companies had received numerous orders for counselling services, analyses, training, etc. The orders were never implemented but the companies were paid. The businessmen shared some of the illegally earned money with court employees and corrupted them to ensure their discretion and favourable attitude. Over a period of several years, the court in Krakow lost at least PLN 35 million. The case also concerned at least 10 other courts (in Tarnow, Wroclaw, Kielce, etc). From December 2016 to November 2017, 26 people were arrested, including the president of the Court of Appeals in Krakow, court director, purchase centre director, former and present directors of courts in other cities, head accountants and specialist, former deputy director at the Ministry of Justice, and businessmen. Further arrests of people involved in this organized crime group (accused of the misappropriation of public money, accepting and giving financial benefits, money laundering, etc) are likely.

Unethical activities and suspected corruption in the Supreme Court were revealed in 2014. This concerned a businessman who in 2008 lost a PLN 17 million civil case in the Regional Court in Wroclaw. Following the unsuccessful appeal, the businessman was contacted by lawyers who promised to settle the matter favourably in the Supreme Court in exchange for a **bribe** (worth PLN 2 million). The network of connections within the lawyer community led to a **phone conversation** (later revealed in the media) between a Supreme Court judge and a Supreme Administrative Court judge about the cassation appeal of the businessman. The Supreme Court judge provided confidential advice by phone on how to write the cassation appeal to avoid being rejected and promised to contact the Supreme Court Judge sitting on this case. A **meeting between both judges and the businessman** was also arranged. Eventually, the businessman did not pay the demanded bribe and his cassation appeal was rejected by the Supreme Court in 2009. The case was then investigated by the Public Prosecutor's Office in Krakow and the Central Anti-Corruption Bureau (CBA), but the investigation was discontinued in 2015. Despite the recordings and clear suspicions, no disciplinary proceedings were instigated, and the judges concerned faced no consequences.

Another example of poor ethics was the **re-election** of MP Jan Bury **to the National Council of the Judiciary** in 2011 **despite he had clearly violated the Anti-Corruption Law**. This prominent member of the PSL party and the PO-PSL coalition (Deputy Treasury Minister in Donald Tusk's government) remained in the Council until autumn 2015, when he was arrested by the CBA in relation to the corruption scandal in his native Subcarpathian region. The scandal involved politicians, entrepreneurs and employees of the justice system. The Subcarpathian scandal was related to **money laundering in tax havens** (including the Panama Papers affair). In April 2018, other people involved in this scandal were arrested by the CBA.

In 2017 and 2018, the media revealed information about **judges who had committed theft and fraud** in various stores (including electronic, clothing, grocery, construction stores, etc) and, once caught red handed, they used their immunity or explained they behaviour by "absent-mindedness". This kind of behaviour, which hardly befits the seriousness and dignity of a judge, serves as an example of a **disastrous ethical and moral condition** of some members of the judicial community. It should be added that some of those judges were to be expelled from the judiciary, but the court judgements were annulled by the Supreme Court despite evident proofs of guilt.

Politicization and partiality

The notorious case of MP Beata Sawicka, a member of the Civic Platform party, had political implications. The Central Anti-Corruption Bureau (established by Law and Justice (PiS) in 2006) staged a provocation in 2007, as a result of which **the MP accepted a bribe** of PLN 50,000 in exchange for attempting to "set" a public procurement procedure. In 2012, the Regional Court in Warsaw sentenced her to 3 years in prison. However, in 2013, **the Court of Appeals in Warsaw acquitted the MP**, stating that despite her moral responsibility, the CBA used illegal operational techniques. The Supreme Court, despite the obvious evidence, upheld the acquittal in 2014, recognising that the CBA acquired evidence illegally. At that time (2013), a prominent Civic Platform senator described the MP in question as a "matrimonial and financial crook" and admitted that the judge who had acquitted her "undoubtedly favoured" Civic Platform.

In 2007, the CBA conducted another operation aimed at arresting persons involved in the so-called land scandal. Under the operation, a controlled bribe was offered (about PLN 3 million). The arrested business-men were found guilty and convicted in 2009. In 2010, the Public Prosecutor's Office accused the former CBA head Mariusz Kaminski (PiS) and three CBA directors of illegal operational activities, etc. In 2012, the court dismissed the case, but the proceedings were soon re-instituted. The media spoke about the **political pressure on the Public Prosecutor's Office** (the PO-PSL coalition ruled the country at that time), **"manual" appointment of judges without guaranteeing their impartiality** (designated judges were biased against PiS), **procedural irregularities** (e.g. refusing to interrogate a key witness), etc. In March 2015, during the presidential campaign, the court sentenced Kaminski to 3 years in prison and banned him from holding any public office for 10 years, while the former CBA directors were sentenced to 2.5 years in prison (the prosecutor applied for a suspended sentence of one-year imprisonment). Having passed the sentence, the court delayed the presentation of a reasoning of the judgment. It was finally presented in September 2015, during the parliamentary election campaign. It was also unusual that the judge was very active in the media (numerous interviews) and the reasoning of the judgment had been published by "Gazeta Wyborcza" (a newspaper favouring the PO-PSL coalition) before it was delivered to the judged parties. The harshness of the judgment and its reasoning, as well as the **intensification of court activities during election campaigns**, clearly indicated the political nature of the judgment. Given the situation, in November 2015, President Andrzej Duda pardoned the convicts in accordance with the Polish Constitution.

Another example of the politicization of some judges was brought into light in 2012, when a journalist pre-tending to be an employee of the Prime Minister Chancellery (with Donald Tusk serving as Prime Minister at that time) made a phone call to the judge adjudicating in the Amber Gold case (see page 4). During the conversation, **the judge** (president of the Regional Court in Gdansk) **offered far-reaching flexibility** and suggested accelerating the proceedings if needed, setting hearing dates **in accordance with political needs**, etc. Also, the court president wanted to arrange a meeting with Prime Minister Tusk.

* * *

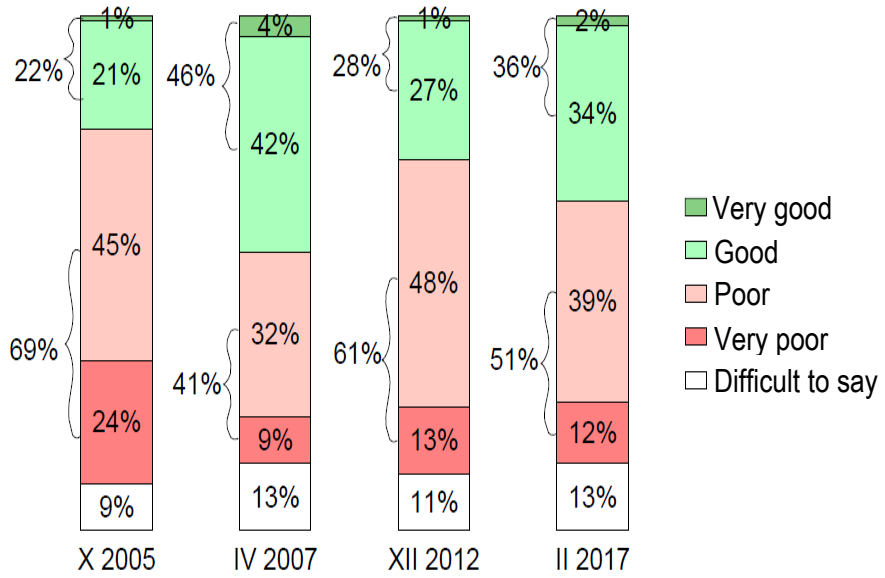
Finally, it should be stressed that **the above allegations do not concern the entire judicial community**, which associates many fair judges (there are about 10 thousand judges in Poland). These accusations apply to **the most depraved and, at the same time, most influential members of this community**, whose actions have made the society perceive the justice system as "the injustice system". Keeping in mind the above pathologies in the Polish judicial administration, people often give up their claims in court, which lets many criminals get the sense of impunity. The judiciary reform aims at eliminating those pathologies, of course, without imposing collective responsibility.

Part 2. Public opinion on the justice system

As indicated by an opinion poll conducted by the CBOS Public Opinion Research Centre (dated March 2017), just **over half of the surveyed people** (51%) **negatively assessed the functioning of the justice system** in Poland, and every eight respondent (12%) stated that it functioned very badly. Just over one-third of respondents (36%) assessed it positively, including very few people (2%) declaring that it functioned very well (see Chart 1). The assessment was even more negative in 2012, i.e. during the rule of the PO-PSL coalition, when the judicial administration was assessed negatively by 61% of respondents, and positively by only 28%. In spring 2007, at the end of the rule of Law and Justice (PiS), the public assessment of the judicial administration was the best – indicating a clear improvement as compared to the assessments made at the beginning of the Law and Justice rule that started in autumn 2005.

Chart 1
Results of public opinion polls on the justice system

What is your general assessment of the justice system in Poland?

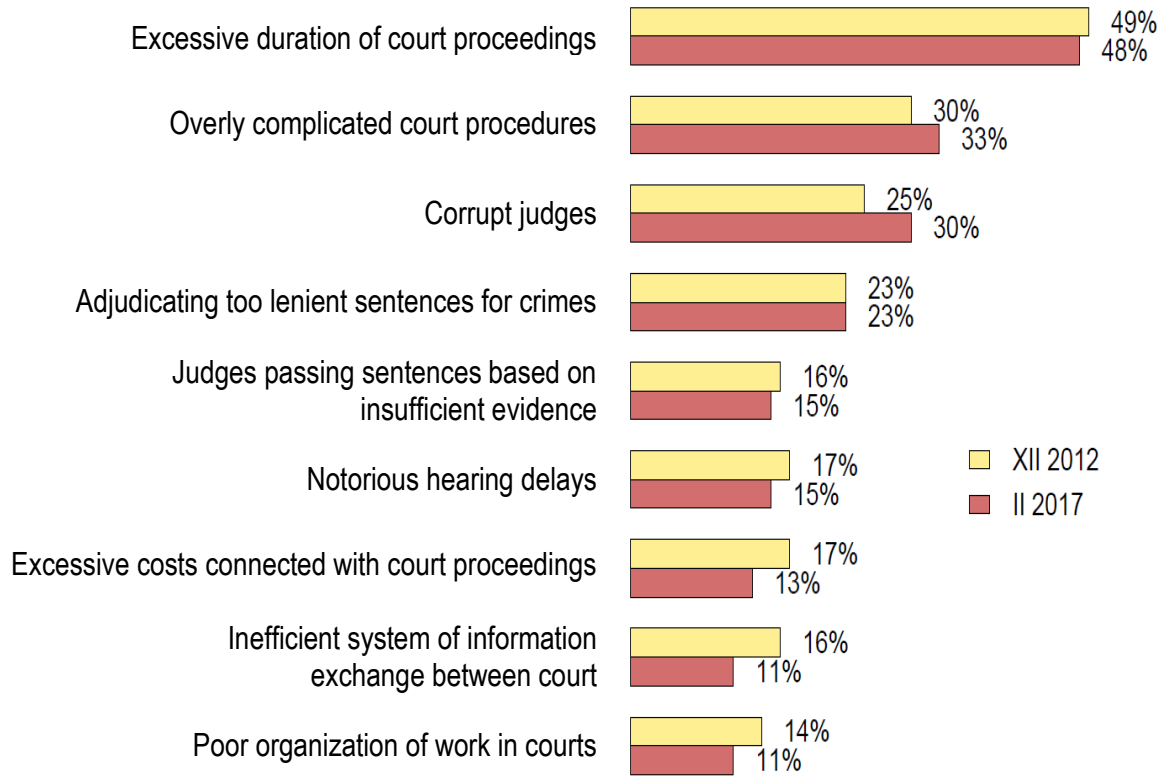


Source: CBOS, March 2017

One could also infer from the same opinion poll that **the most pressing issues in the justice system** included the **excessive duration of court proceedings** (48% of respondents), **overly complicated court procedures** (33%), **corrupt judges** (30%), and **adjudicating too lenient sentences for crimes** (23%) (see Chart 2). The order of problems of the judicial administration, as diagnosed by Polish citizens, seems to vary slightly, depending on the main source of their information about the domestic judiciary (personal experience, opinions of other people, the media). Nevertheless, the excessive duration of court proceedings was recognised as the main problem in all groups – notably, it was invoked most often by those who made their opinions on Polish courts based on personal experience. On the other hand, respondents who based their views on the judiciary on the opinions of other people, saw overly complicated court procedures and corrupt judges as the major problems in the judicial administration. Finally, people who based their opinions on the judiciary on media coverage, tended to indicate more often the issue of adjudicating too lenient sentences for crimes.

Chart 2
Results of public opinion polls on the justice system

From the list below, please indicate three problems that currently concern the Polish judicial system, which in your opinion are the most important:



Source: CBOS, March 2017

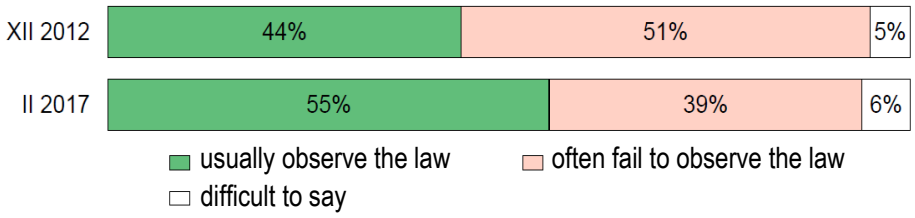
The poll also presented Polish citizens' opinions on law and its enforcement. According to more than half of respondents (55%), **the majority of Polish people usually observe the law**. 39% of respondents thought otherwise, while 6% had no opinion on the matter. Four years earlier, i.e. during the rule of the PO-PSL coalition, the proportions were quite opposite – more than half of respondents believed that most citizens did not respect the law. The recent results indicate an 11-point increase in the belief on the lawfulness of the Polish society (see Chart 3a).

At the same time, the penal sanctions in force still raise reservations of the majority of the Polish society. Last year, nearly three-fourths of respondents (70%, a 6-percentage-point drop since 2012) stated that **punishments for breaking the law were too lenient** in Poland. The opposite view was expressed only by one in twenty respondents (5%). According to one-fifth of respondents (20%, a 6-percentage-point increase), punishments were often inadequate in relation to the committed crimes, i.e. too lenient or too harsh (see Chart 3b).

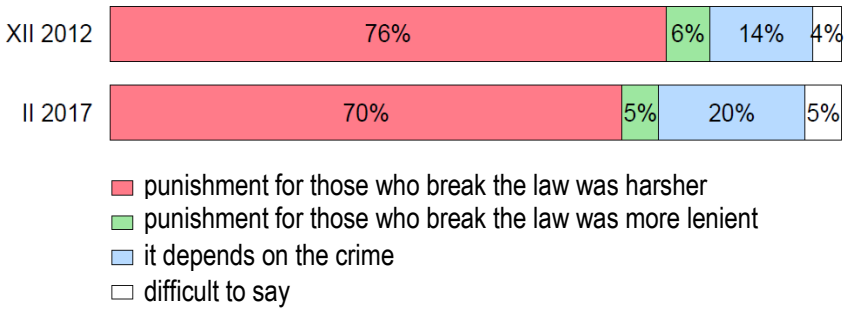
Last year, the vast majority of Poles were of the opinion that the justice system in Poland needed to be reformed. As revealed by another CBOS poll (dated September 2017), the judiciary reform was supported by more than four-fifths of respondents (81%), and only every tenth respondent was against it (see Chart 4). It is worth noting that the poll was conducted in August 2017, i.e. after President Duda vetoed the laws on the National Council of the Judiciary and on the Supreme Court.

Chart 3
Results of public opinion polls on the justice system

a) Do you think that the majority of ordinary people in Poland:



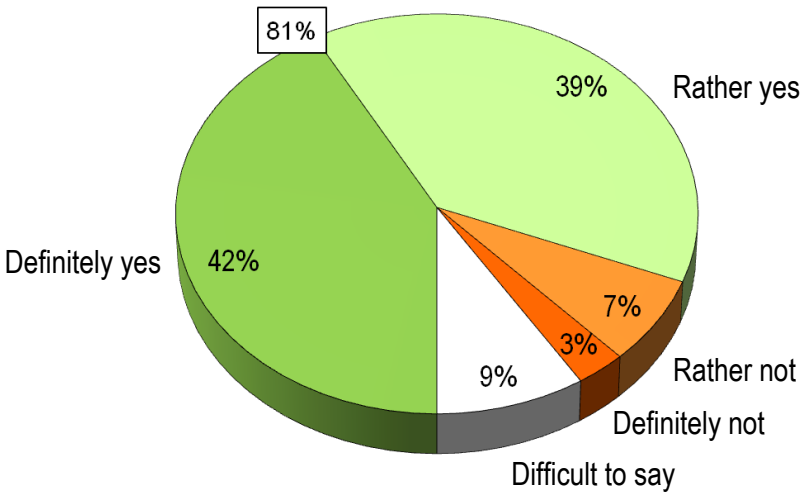
b) Do you think that the general situation in Poland would improve if:



Source: CBOS, March 2017

Chart 4
Results of public opinion polls on the justice system

Do you think that the judiciary reform in Poland is needed or not?



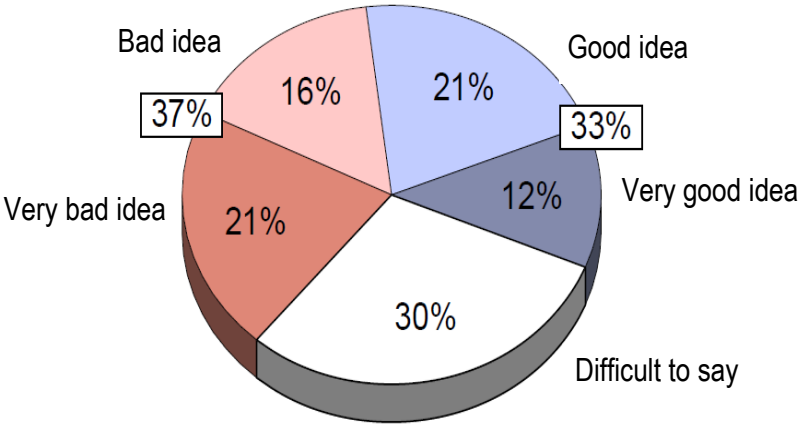
Source: CBOS, September 2017

The need for a judiciary reform was recognised by the majority of respondents in all surveyed socio-demographic categories. **Supporters of all major political fractions, including the ruling and opposition parties, were in favour of the reform**, including 93% of supporters of Law and Justice, 89% of people sympathising with the Kukiz'15 movement, and 74-76% of individuals supporting Civic Platform and Modern.

The public views were more **divided on the way of appointing judges for the National Council of the Judiciary**. According to a CBOS poll (dated March 2017), one-third of respondents (33%) supported the idea of KRS judges being appointed by the Parliament, a slightly higher percentage of people (37%) deemed it a bad idea, and slightly less of them (30%) had no opinion on this matter (see Chart 5).

Chart 5
Results of public opinion polls on the justice system

Do you think it is a good idea to leave the appointment of the judges for the National Council of the Judiciary to the Parliament, instead of the assemblies of judges, as before?

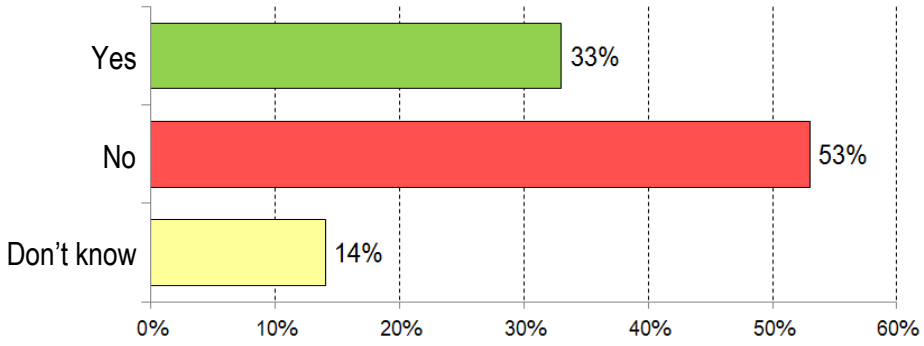


Source: CBOS, March 2017

Moreover, as to the National Council of the Judiciary, according to a Kantar Millward Brown's opinion poll (dated November 2017), **more than half of respondents** (53%) **did not trust this institution**, one-third of them (33%) declared their trust, and every seventh respondent (14%) had no opinion on this issue (see Chart 6). The poll also concerned the KRS decision "preventing young assistant judges from working in courts" (see page 19). Most respondents (43%) expressed critical opinions on that decision, and only every seventh respondent (14%) regarded KRS activities in this regard as positive. At the same time, 30% of respondents were not aware of the decision on assistant judges (assessors), and 13% had no opinion on it.

Chart 6
Results of public opinion polls on the justice system

Do you trust the National Council of the Judiciary?



Source: Kantar Millward Brown, November 2017

Part 3. Reform of the judiciary – legal and institutional changes

In response to the pathologies described above and the inefficiency of the judiciary, the Law and Justice party (PiS) decided to carry out a thorough reform of the justice system (first announced back before the 2015 elections). The fundamental elements of the reform were introduced in 2016 and 2017. They involved both legal changes (to, *inter alia*, the Criminal Code and the Code of Criminal Procedure) and changes to the operation of courts and key institutions of the judiciary (common courts, Supreme Court, National Council of the Judiciary). In late 2017, plans to reform the Code of Civil Procedure were also presented.

Criminal law tightening

In 2016, the Ministry of Justice presented plans to tighten the criminal law (VAT invoices, extended confiscation, alimony). Also, the Polish President presented his draft act (crimes against minors). The relevant acts, passed by the Parliament in February and March 2017, entered into force in the subsequent months.

In March 2017, **harsh penalties were introduced for issuing and using false VAT invoices** to fraudulently obtain tax refunds from the state budget. Using false invoices with a value of more than PLN 5 million (or if the perpetrator has been using fraud as a regular source of income) is punishable with **3 to 15 years** of imprisonment, with no possibility of penalty suspension. False invoices with a value of more than PLN 10 million are punishable – like the most serious crimes – with **5 to 15 years** of imprisonment, and even **25 years** for the gravest cases (the latter is reserved in the Criminal Code for counterfeiting money, and fabricating invoices causes much greater damage to the state budget). A fine up to PLN 6 million may also be imposed. The harsh penalties described above **only relate to intentional crimes** and will not be imposed for errors in issuing invoices, which might happen to honest entrepreneurs.

In April 2017, new regulations entered into force on the so-called **extended confiscation**, which allowed for **the seizure of any property obtained through crime**. Perpetrators will be required to prove the legality of all property acquired within the preceding 5 years (in other EU countries this period is longer, up to 15 years). This amendment also allows for declaring the forfeiture of property in respect of third parties to prevent the transfer of illegal property to other people, e.g. family members. The forfeiture of property will not require a judgment of conviction, e.g. when court proceedings in a criminal case must be discontinued or suspended following the perpetrator's death or escape. **Such a solution has also been envisaged in other EU countries** (in the EU, 40% of all recovered resources are obtained through confiscation without conviction, and 13% come from traditional confiscation). The new law also provides for the forfeiture of an enterprise that may not belong to the perpetrator but served the purpose of conducting criminal activities, e.g. money laundering. However, such forfeiture cannot be effectively applied if the illegal actions constituted only a marginal part of the company's activities (this aims at protecting honest entrepreneurs).

In May 2017, new provisions stipulating **more severe punishment for evading alimony payments** were introduced. A person failing to make such payments for at least 3 months will be subject to a fine, restriction of personal liberty or imprisonment for up to 1 year. Even harsher punishment (up to 2 years in prison) may be imposed if the person evading alimony payments makes the beneficiary unable to satisfy his/her basic needs (purchase of food and clothing, payment for medical services, etc). Alimony debtors will be able to avoid punishment if they settle their dues within 30 days of their first hearing as suspects. The alimony due in Poland amount to PLN 11 billion. However, a report of October 2017 confirmed a significant **drop in the number of such debtors** (in March 2017, it increased by 2,500, while in September 2017, the rise amounted to 600, i.e. over 4 times less). In addition, a considerable **improvement in alimony collection** was recorded (from 12% in 2015 to 26% in autumn 2017, which means an over two-fold rise).

In July 2017, new regulations entered into force, providing for **more severe punishment for serious crimes against minors (children under 15 years of age) and against incapable people**. This includes harsher penalties for crimes, which put children's life, health or freedom at risk (mutilation, kidnapping, child trafficking,

abandonment, pedophilia, etc). A person causing a severe detriment to child's health, previously punishable with 1 to 10 years in prison, may now face imprisonment for no less than 3 years. Moreover, if any such act results in human death, the previous punishment entailing 2 to 12 years in prison has been replaced with imprisonment for no less than 5 years, imprisonment for 25 years, or even life imprisonment. Failing to report a crime, e.g. if a person was aware of a pedophilic act but did not report it immediately to a law enforcement agency, will also be punishable with imprisonment for up to 3 years. In addition, pursuant to another act, in October 2017, a **register of sex offenders (including pedophiles)** was introduced – part of the register is publicly available (on the internet).

The above examples accurately reflect the general attitude of the PiS Government to the justice system, which should **strike on the most dangerous criminals, including organized crime, while protecting the weakest society members**. This clearly contrasts with the situation during the rule of the PO-PSL coalition when the judiciary was lenient to criminals but ruthless to ordinary citizens. The above attempts at tightening the criminal law meet the prevailing expectations of the Polish society. According to an opinion poll, 70% of respondents viewed the punishment for people violating the law as too lenient, whereas contradicting views were expressed by as few as 5% of respondents (see Part 2 – Chart 3b).

Common courts

In March 2017, the Parliament adopted the amended **Act on common courts organization** (the draft act was drawn up by the Ministry of Justice). Under the amended act, which entered into force in May 2017, **court directors will be appointed and dismissed by the Minister of Justice**. Before, court directors were appointed by the Minister as well, but the Minister had to wait for the selection committees (appointed by court presidents) to complete the lengthy competitive selection procedures. This made it impossible to fill in directorial positions quickly, thus compromising the efficiency of court administration. Hence, it was decided to replace the competitive procedure with the appointment procedure (as defined in the Labour Code) to make the system more orderly and efficient in terms of personnel and financial management. This change is aimed at **relieving court presidents from the burden of court administration**, and thereby to give them more time to fulfil their role as supervisors of the adjudication work of courts.

In July 2017, another amendment was passed to the Act on common courts organization (the draft act was drawn up by Law and Justice MPs). The act entered into force in August 2017, except for the retirement provisions, which became effective in October 2017. Its basic aim is to make courts work more effectively, shorten their proceedings, and build Poles' trust by issuing better judgments. The changes are also meant to protect judges from being pressured by their superiors, thus fostering their independence. To this end, the act introduces a number of new rules. First of all, it provides for the **randomized assignment of cases to judges, using a special electronic system** patterned after a similar German one (since October 2017, the system has been tested in three courts (in Warsaw, Gliwice and Suwalki), and in January 2018, it was introduced countrywide). This is intended to reduce the impact informally exerted on judgments by court presidents who used to select judges at their own discretion. This is also to ensure the even distribution of cases among judges. Moreover, the rule of the **invariability of the adjudicating panel** has been introduced, which stipulates that an adjudicating panel, once randomly chosen, must not be changed until the case is closed (exclusions to this rule are possible in exceptional cases, such as a judge's illness).

The above act grants **more power to the Minister of Justice for appointing and dismissing court presidents and vice-presidents**, however, any court president dismissal will require prior consultation with the National Council of the Judiciary (which may effectively object to the Minister's decision by the 2/3 majority of votes). Moreover, the act provides for the clarification of the rules on **asset declarations** of judges and prosecutors and extends this disclosure obligation to court directors and deputy directors. Finally, the act provides for adjusting the **retirement age** of judges and prosecutors to the general retirement age in Poland. Following the 2016 reform, the retirement age in Poland is 60 years for women and 65 years for men (binding since October 2017). At the request of a judge or prosecutor, the Minister of Justice may consent to a further holding of his/her position on attaining the retirement age.

The Supreme Court

In July 2017, together with the above act on common courts, the Parliament adopted two other acts – on the Supreme Court (a new act) and on the National Council of the Judiciary (an amending act). However, both acts were **vetoed by the President of Poland** who announced that over the next two months he would put forward his own draft acts to reform the judiciary system. In September 2017, the President provided the Parliament with the promised drafts, which in October and November were the subject of consultation between the President and the leader of the Law and Justice party (PiS), and also between the Chancellery of the President and the parliamentary Justice and Humans Rights Committee. In December 2017, both acts were adopted by the Parliament and then signed into law by the President. At the beginning of January 2018, the acts were officially promulgated in the Journal of Laws.

The **Act on the Supreme Court** was adopted in December 2017 and replaced the previous act of 2002. The new act entered into force after 3 months of its promulgation, i.e. at the beginning of **April 2018**.

The act opens the way for filing **"extraordinary appeals"** with the Supreme Court, i.e. appeals against final judgments passed by Polish courts, including those delivered over the last 20 years. This solution is aimed at ensuring the rule of law and social justice. An extraordinary appeal will be possible if: (a) a court ruling violates the principles or human/citizen freedoms and rights enshrined in the Polish Constitution, (b) a court ruling grossly violates the law through its erroneous interpretation or incorrect application, or (c) an obvious contradiction is identified between the essential court findings and the content of evidentiary material. Extraordinary appeals may be lodged by the Attorney General, the Commissioner for Human Rights, the President of the General Counsel to the Republic of Poland, the Ombudsman for Children, the Commissioner for Patients' Rights, the President of the Polish Financial Supervision Authority, the Financial Ombudsman, and the President of the Office of Competition and Consumer Protection.

Two **new chambers** are to be established in the Supreme Court, i.e. the **Extraordinary Control and Public Affairs Chamber**, and the **Disciplinary Chamber** involving **lay judges**. The latter is to examine disciplinary cases against judges and other lawyers. Disciplinary cases will be examined jointly by professional and lay judges (first instance – 2 Disciplinary Chamber judges and 1 Supreme Court lay judge, second instance – 3 judges and 2 lay judges). This mixed solution is aimed at increasing social participation in the examination of disciplinary cases regarding the lawyer community. Lay judges will be each time appointed by the First President of the Supreme Court, from among the Supreme Court lay judges selected by the Polish Senate for a 4-year term of office. Candidates for lay-judge positions can be nominated by associations, social and professional organizations (except for political parties), and at least 100 citizens with voting rights.

As regards the **retirement age**, in principle, Supreme Court judges will retire on attaining the age of 65 (as compared to 70 before the reform). If, within 6-12 months before attaining the retirement age, a judge submits a statement expressing his/her willingness to continue his judicial career (together with a medical statement confirming a good health condition), the President of Poland may grant a consent to do so. Such a consent may be given no more than twice, each time for a period of 3 years. The act also stipulates that a female Supreme Court judge will be allowed to retire at the age of 60. Similar to common court judges and prosecutors, this solution is aimed at adjusting the retirement age of Supreme Court judges to the general retirement age in Poland (i.e. 60 years for women and 65 years for men).

The National Council of the Judiciary

As mentioned, in December 2017, together with the new Act on the Supreme Court, the Parliament also passed the amendment to the **Act on the National Council of the Judiciary (KRS)**. The KRS act entered into force after 14 days of its official announcement, i.e. in mid-**January 2018** (except for several provisions, which became effective on the day following the promulgation of the act).

The reform is to make the KRS more democratic (according to the Polish Constitution, the KRS is to protect the independence of courts and judges). The reform is also aimed at ensuring a more efficient verification of future judges. To this end, it was deemed necessary to **change the way of appointing KRS members**, keeping in mind that they select judge candidates and present them to the President of Poland for approval (the KRS also has influence on judges' promotions). Therefore, it was decided to introduce a **democratic and objective procedure for the appointment** of KRS members, which would replace the current complicated and non-transparent procedure. This is expected to give representatives of the general public actual influence over the appointment of KRS members (and, indirectly, over the selection of judges). Before, it was an exclusive privilege of the judicial community being outside any democratic control.

In accordance with the Polish Constitution, the KRS consists of 25 members, including 15 judges (Article 187(1) – see Box 1). However, **the Constitution does not specify the mode of appointing the 15 judges who are KRS members**. Before the reform, they were appointed by judicial associations, whereas from now on they will be appointed by the Parliament (Sejm). A group of at least 2,000 citizens or at least 25 judges (excluding retired judges) will be entitled to put forward KRS member candidates.

In line with the President's suggestion, the appointment of judge-members of the KRS will be carried out by the Parliament by **the 3/5 majority of votes** in the presence of at least 50% of the statutory number of MPs (with no party in the Parliament having such majority). If the appointment cannot be made by the 3/5 majority of votes, the ultimate choice will be made by an **absolute majority of votes**. This implies that the ruling party would be able to appoint 9 KRS members, and the opposing parties – the remaining 6 members. It should, nonetheless, be stressed that judges appointed by any political party remain impartial.

The 15 judge-members of the KRS will be appointed for a **joint 4-year term of office** (replacing the previous **individual terms of office**, which were found **unconstitutional** by the Constitutional Tribunal in June 2017). In accordance with the Constitution, they will be appointed from among the judges of the Supreme Court, common courts, administrative courts and military courts (Article 187(1)(2)). While making the choice, the Parliament – where possible – will take into consideration the need for different court types and levels to be represented in the KRS. Competence, rather than connections within the judicial community, will be the sole criterion, so all judges will stand equal chances of being elected, regardless of the level of the court in which they sit (so far, **for almost 30 years** of the KRS existence, **only 4 judges from district courts** – the lowest level of the judiciary but also the one that handles most cases – **have been KRS members**).

The KRS act has been criticized by both the opposition and judicial community on the grounds of moving towards "the politicization of courts", "undermining independence of courts" etc. The Ministry of Justice considers those claims ill-founded since **similar solutions exist in other EU countries**. Actually, in many of them, the legislative or executive authorities (parliament, president, government) play a significant role in the process of appointing judges and have a say in the appointment of members of institutions equivalent to the Polish KRS (see Table 1). A **similar situation is encountered in the Unites States**. Moreover, judges of the EU Court of Justice are appointed by governments of EU Member States, i.e. by politicians.

* * *

In end-March and early April 2018, bearing in mind the European Commission's recommendations (see pages 19-20), the MPs of Law and Justice (PiS) prepared draft **amendments to the laws on common courts, on the Supreme Court, and on the KRS**. The amendments were adopted by the Parliament in mid-April 2018. According to the new provisions, the KRS rather than the President of Poland will have the power to prolong a judge mandate after reaching the retirement age by the judge. The Minister of Justice would not be able to dismiss a court president or vice-president without a consent of the court's council or a consent of the KRS. In principle, the retirement age of judges will be 65 years for men and women (although female judges will be allowed to retire at the age of 60). The new provisions secure the financial (budgetary) independence of the Disciplinary Chamber of the Supreme Court. The Parliament also adopted provisions that stipulate publishing the 3 unpublished judgments of the Constitutional Tribunal of 2016 (with the reservation that the Tribunal issued them in violation of the law).

Table 1
The organization and functional principles of the judiciary in the EU and in the USA (selected examples)

	Judge appointment procedure	Institution supervising the judiciary
Austria	Candidates for judicial positions are put forward by court senates (commissions comprising judges), but their proposals are not binding. Judges are appointed by the Federal President at the request of the Federal Government, or by his/her duly authorised Federal Minister. The President appoints higher-instance judges, and the Minister of Justice lower-instance ones.	There is no national council of the judiciary (which would correspond to the Polish KRS). Ministry of Justice is in charge of the administrative supervision of the judiciary.
Czech Republic	Candidates for judicial positions are put forward by presidents of regional courts, but their proposals are not binding. Ministry of Justice decides which candidates are presented to the President for appointment (usually twice a year). President may refuse to appoint a given judge only in exceptional circumstances.	There is no national council of the judiciary (which would correspond to the Polish KRS). Ministry of Justice is in charge of the administrative supervision of the judiciary.
Denmark	Judges are appointed by the ruling monarch at the request of the Minister of Justice. The request is presented under a recommendation from the Judicial Appointments Council, which are not binding. Traditionally, for over 200 years, judges have been recruited from the official corps of the Ministry of Justice.	The Danish Court Administration has 11 members: 8 representatives of the judiciary, 1 representative of legal professions, and 2 management and social affairs specialists. The term of office is 4 years (renewable). The Danish Court Administration is accountable to the Ministry of Justice.
France	Judges are appointed by the President, at the request of the High Council of the Judiciary. In special cases, candidates for judicial positions are put forward by the Minister of Justice, following which the Council gives its opinion, and the judge is eventually appointed by the President, in consideration of the Council's opinion.	The High Council of the Judiciary comprises 22 members, and is divided into the judicial and prosecutorial sections. Its members include the first president and the attorney general of the Court of Cassation, 6 judges, 6 prosecutors and 8 individuals from outside the judicial community, i.e. 1 member appointed by the Council of State, 1 representative of legal professions, and 2 members appointed by each of the following: the President, and chairpersons of both chambers of the Parliament.
Spain	Judges are appointed under a royal decree, at the request of the General Council of the Judiciary. The decree is issued by the Minister of Justice who sanctions judicial appointments.	The General Council of the Judiciary consists of 20 members appointed by the Parliament for a 5-year term of office, by the 3/5 majority of votes. Each chamber of the Parliament appoints 10 members, including 6 judges and 4 lawyers (judges are appointed from among the 36 candidates proposed by judicial associations or non-associated judges).
Netherlands	Judges are appointed under a royal regulation, at the request of the Minister of Justice. A candidate is put forward by the judge retiring from his/her position. If there is more than one candidate, the ultimate choice is made by the Minister.	The Dutch Council for the Judiciary comprises 3 to 5 members (their number is determined by the Council itself) who are appointed by the King, at a ministerial request, for a 6-year term of office. Currently, the Council has 4 members, including 2 judges.
Germany	Federal judges are appointed and recalled by the Federal President. Judges of high courts are appointed by the Federal Minister together with a committee comprising ministers of states (lands) and members appointed by the Federal Parliament. As to common court judges, half of the states have electoral committees (comprising judges, representatives of the state legislature and the Federal Government, etc). In the event of any dispute between the committee and the Minister of Justice regarding a given candidate, the 3/5 majority of the committee votes is required for that candidate to be appointed.	There is no national council of the judiciary (which would correspond to the Polish KRS). Ministry of Justice is in charge of the administrative supervision over the judiciary.
Sweden	Common court judges are appointed by the Minister of Justice at the request of the Judicial Appointments Council.	The National Courts Administration, accountable to the Minister of Justice, is in charge of courts organization. The Judicial Appointments Council consists of 9 members: 5 judges, 2 lawyers selected by the Government after consulting the lawyer community, and 2 representatives of the public appointed by the Parliament.
Italy	Competition procedures and the High Council of the Judiciary, which is a collegial body supervising the justice system, play the most significant role in the process of appointing judges.	The High Council of the Judiciary consists of 27 members, i.e. the President (also acting as the chairperson), the first president of the Court of Cassation, the attorney general, 16 members appointted by judges and prosecutors from among their community, and 8 members who are neither judges nor prosecutors, and who are appointed by both chambers of the Parliament at a joint sitting. The term of office is 4 years (renewable).

	Judge appointment procedure
EU	The Court of Justice of the European Union is one of the EU's seven institutions. It consists of two courts of law: the Court of Justice proper and the General Court. The Court of Justice has 28 judges and 11 advocates-general. Both the judges and advocates-general are appointed by common accord of the governments of EU Member States after consulting a panel responsible for giving an opinion on candidates' suitability to perform the duties of judge. Their term of office is 6 years and is renewable. The General Court has at least one judge from each EU Member State (in June 2017, there were 45 judges sitting in this Court). Judges are appointed by common accord of the governments of Member States after consulting the above panel. Their term of office is 6 years and is renewable.
USA	Federal judges (including Supreme Court judges) are appointed by the President after consulting and obtaining the consent of the Senate (by the 2/3 majority of votes). In accordance with the Constitution, judges are appointed for a life term, and the only possibility to recall a judge is by launching the impeachment procedure that has been designed to allow for removing the President or federal officials from their positions. State judges are appointed by means of one of the three methods, which have evolved over time. These are: (1) the procedure of appointing judges by the state's governor or legislature from among the candidates proposed by judges or judicial associations; (2) elections – both partisan and non-partisan (in the former case political affiliations of the judges voted in by the electorate are known, whereas in the latter case they are not stated); (3) merit appointment – candidates for judges are appointed by a legislative committee, and finally appointed by the governor (the state's legislature approval may sometimes be required).

Sources: Information on judge appointment procedures in selected EU Member States, Parliamentary Bureau of Research, October 2016; Justification of the draft act on the National Council of the Judiciary, March 2017; the EU Court of Justice (curia.europa.eu)

The judiciary reform compliance with the Polish Constitution

Pursuant to the Polish Constitution, the National Council of the Judiciary (KRS) is composed of 25 members. It includes, *inter alia*, *"15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts"* (Article 187(1)(2)). This provision **does not determine the manner of appointing those 15 members of the KRS**, which is why the method proposed in the amended KRS act – i.e. appointment by the Sejm (Parliament's lower chamber) – should be viewed as compliant with the above rule of the Constitution. Sometimes the argument is raised that the Sejm may elect only 4 members of the KRS, as the Constitution states that the KRS includes *"4 members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its Senators"* (Article 187(1)(3)). This is not true, as this provision refers solely to those members of the KRS who are appointed from among the deputies (MP), and not to the remaining members of the KRS. Therefore, **the Sejm has the right to appoint both 4 KRS members from among its deputies, as well as 15 members from among the judges**.

The Constitution stipulates that *"the term of office of those chosen as members of the National Council of the Judiciary shall be 4 years"* (Article 187(3)). The solution proposed in the amended KRS act, in line with which KRS members are to be appointed for a **joint** 4-year **term of office**, is compliant with the above rule of the Constitution. On the other hand, as mentioned, the appointment of KRS members for individual terms was unconstitutional, which was confirmed by the Constitutional Tribunal in June 2017.

The Constitution states that *"judges shall not be removable"* (Article 180(1)) and *"the First President of the Supreme Court shall be appointed by the President of the Republic for a 6-year term of office"* (Article 183(3)). At the same time, the Constitution provides that *"a statute [act/law] shall establish an age limit beyond which a judge shall proceed to retirement"* (Article 180(4)), and *"where there has been a **reorganization of the court system** (...), a judge may be allocated to another court or retired with maintenance of his full remuneration"* (Article 180(5)). The new Supreme Court act specifies the retirement age of judges to be 65 years, as this is the general **retirement age** in Poland. The present First President of the Supreme Court was 65-year-old in November 2017. Furthermore, the Constitutional Tribunal in its jurisprudence has envisaged a possibility of introducing **restrictions during the term of office** of the constitutional and statutory bodies, on the grounds of **important public interests** (reasoning of the Tribunal judgment no. K 25/07 of 18 July 2007). This also applies to the expiry of the terms of office of the 15 KRS members, based on the amended KRS act that – similarly to the Supreme Court act – has introduced significant changes to the court system.

Box 1
Constitution of Poland – key provisions on the judiciary

Chapter VIII

COURTS AND TRIBUNALS

Article 173

The courts and tribunals shall constitute a separate power and shall be independent of other branches of power.

(...)

Article 176

1. Court proceedings shall have at least two stages.
2. The organizational structure and jurisdiction as well as procedure of the courts shall be specified by statute [act / law].

Article 177

The common courts shall implement the administration of justice concerning all matters save for those statutorily reserved to other courts.

Article 178

1. Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes [acts / laws].
2. Judges shall be provided with appropriate conditions for work and granted remuneration consistent with the dignity of their office and the scope of their duties.
3. A judge shall not belong to a political party, a trade union or perform public activities incompatible with the principles of independence of the courts and judges.

Article 179

Judges shall be appointed for an indefinite period by the President of the Republic on the motion of the National Council of the Judiciary.

Article 180

1. Judges shall not be removable.
2. Recall of a judge from office, suspension from office, transfer to another bench or position against his will, may only occur by virtue of a court judgment and only in those instances prescribed in statute [act / law].
3. A judge may be retired as a result of illness or infirmity which prevents him discharging the duties of his office. The procedure for doing so, as well as for appealing against such decision, shall be specified by statute [act / law].
4. A statute [act / law] shall establish an age limit beyond which a judge shall proceed to retirement.
5. Where there has been a reorganization of the court system or changes to the boundaries of court districts, a judge may be allocated to another court or retired with maintenance of his full remuneration.

(...)

Article 182

A statute [act / law] shall specify the scope of participation by the citizenry in the administration of justice.

Article 183

1. The Supreme Court shall exercise supervision over common and military courts regarding judgments.
2. The Supreme Court shall also perform other activities specified in the Constitution and statutes [acts / laws].
3. The First President of the Supreme Court shall be appointed by the President of the Republic for a 6-year term of office from amongst candidates proposed by the General Assembly of the Judges of the Supreme Court.

(…)

Article 187

1. The National Council of the Judiciary shall be composed as follows:
   1) the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic;
   2) 15 judges chosen from amongst the judges of the Supreme Court, common courts, administrative courts and military courts;
   3) 4 members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its Senators.
2. The National Council of the Judiciary shall choose, from amongst its members, a chairperson and two deputy chairpersons.
3. The term of office of those chosen as members of the National Council of the Judiciary shall be 4 years.
4. The organizational structure, the scope of activity and procedures for work of the National Council of the Judiciary, as well as the manner of choosing its members, shall be specified by statute [act / law].

Source: Constitution of the Republic of Poland of 2 April 1997

Other planned reforms – civil procedure

In November 2017, the Ministry of Justice presented assumptions of a civil procedure reform to simplify and accelerate court proceedings. It will be consulted with judges, attorneys, legal advisors, academics, etc.

The reform is expected to ensure the objectivity of court proceedings by offering the **possibility to preclude judges or entire courts from examining specific cases, if their impartiality was put into question**. It is also aimed at limiting the possibility of obstructing trials (no need to consider groundless motions, repeated complaints, etc). Also, the **courts should get "closer to ordinary people"**. This is related to e.g. individuals filing lawsuits against companies, banks, or State Treasury agendas, which have their seats located far from the petitioner's place of residence. In such cases, lawsuits filed by citizens/consumers, who are *de facto* weaker parties of a dispute, would be examined before courts located close to their place of residence.

Under the proposed solution, each case in a civil court would begin with **preparatory proceedings** attended by both parties, during which the judge would act as a **mediator** and seek to arrange a settlement. Failing this, the judge would set the hearing dates and the estimated date of the ruling, along with specifying the documents and evidence to be presented by the parties, etc. In principle, **less complex civil cases would require no more than one hearing** during which the judgment would be delivered. Should this be impossible, the judgment would be expected to be given at one of the subsequent hearings (held within a short period of time). Reasoning of judgments should also be more concise, as currently they are rather lengthy.

Part 4. Attempts at blocking the judiciary reform

Some opposition parties, calling themselves a "total opposition", have made several attempts aimed at blocking the judiciary reform. These include Civic Platform (PO) that used to rule the country for 8 years as part of the PO-PSL coalition, and the Modern party (ideologically close to PO). Both parties have been jointly resorting to the confrontational "street and foreign action" method towards the Government.

Domestic actions

In 2017, several **street protests** were organized in various Polish cities and towns (demonstrations, marches, pickets, etc). The most numerous protests took place in Warsaw in July 2017, attracting from 14,000 (as estimated by the Police) to 50,000 participants (according to the Warsaw City Hall, chaired by the former Civic Platform Vice-President and known to have often overestimated the number of street demonstrators). The **very fast pace of work** on the legal acts on the judiciary reform (KRS, Supreme Court), coupled with **insufficient public communication**, invoked concerns among some citizens who decided to join the street protests. However, the legal acts were eventually vetoed by the President. In the subsequent months, the pace of work on the new legal acts was much slower, and the key assumptions to the judicial reform were widely commented on and explained in the media, both favouring and opposing the Government. As a result, the **subsequent manifestations** in November and December 2017 had a **much lower turnout**, gathering from over a thousand to several hundred, or even a few dozen, attendees.

Along with the opposition, the street protests were attended by prominent representatives of the judicial community (e.g. present and former presidents of the Supreme Court and the Constitutional Tribunal) despite the fact that the Constitution prohibits them from performing *"public activities incompatible with the principles of independence of the courts and judges"* (Article 178(3) – see Box 1). During the street protests in July 2017, **a group of judges** (including present and former presidents of the Supreme Court, Constitutional Tribunal, KRS, Polish Judicial Association) **met with the top politicians of Civic Platform** in the party's headquarter office in Warsaw, which has put into question impartiality of those judges.

The **National Council of the Judiciary** (KRS) has also attempted to **obstruct the judiciary reform**, e.g. as to **assessors** (young lawyers commencing their career as judges). In October 2017, the KRS rejected all 265

assessor candidates put forward by the Ministry of Justice, who were meant to fill in some of the nearly 800 judicial vacancies. The candidates allegedly failed to satisfy formal requirements (missing documents), but those allegations were only viewed as an excuse to block the 2016 reform restoring the office of court assessor (which had been liquidated in 2009 during the rule of the PO-PSL coalition). Two weeks later, the KRS re-examined the case and reversed its objections against 252 candidates.

In January 2018, the KRS President announced his resignation in protest against the reform, and was replaced by the First President of the Supreme Court, who resigned in March 2018 (both of them participated in the above meeting with the opposition politicians). Moreover, the KRS and the Polish Judicial Association asked judges to refuse being candidates to a new KRS that was to be appointed soon by the Parliament (Sejm). Nevertheless, 18 judges submitted applications. **In March 2018, the Sejm appointed 15 new judge-members of the KRS**, including 9 judges recommended by the ruling party (PiS) and 6 judges by part of the opposition (Kukiz'15). Other opposition parties (PO, Modern, PSL) **boycotted the vote**. The appointment was made by a 3/5 majority of votes. Of the 15 judges appointed, 13 are district court judges, 1 regional court judge, and 1 judge of a provincial administrative court (which represents a big change as to the composition structure of the KRS – see page 14). **The work of the KRS was blocked for over a month by the First President of the Supreme Court** who was not convening a meeting of the new KRS. She did it only in April 2018 – after adopting new provisions that empower the oldest KRS member to convene a meeting of the KRS, if the First President of the Supreme Court did not do it within a certain period of time.

As revealed by opinion polls, the above **protests have hardly done any harm to the ruling party**. In July and August 2017, following the largest street demonstrations, social support for Law and Justice (PiS) fluctuated between 30% and 40%. The following months it saw an upward trend, with the support exceeding 40% and ultimately reaching 50% in December 2017 (after the acts on the judiciary reform had been passed). In the same period, the support for the major opposition party (Civic Platform – PO) revolved around 20%. Also, the polls results in the first months of 2018 (January-April) were quite similar.

Foreign actions

The "total opposition" – supported by Donald Tusk, President of the European Council and former Prime Minister of the PO-PSL Government – have repeatedly exerted pressure on the EU institutions to take measures against the current Polish Government and impose sanctions on Poland. They justified their attempts by the alleged "threat to the rule of law and democracy" in Poland, with the judiciary reform as a contributing factor. Those actions of the Polish opposition against their own country had rather limited effects.

In November 2017, the **European Parliament** adopted a **resolution** criticizing the rule of law in Poland, in which it expressed its concerns about the judiciary reform. Votes in favour of the resolution were cast mainly by the political fractions reluctant to the conservative Polish Government, i.e. the EPP (whose members include MEPs from PO and PSL), Liberals (allies of the Modern party), and the left-wing fractions (Socialists, Greens). There were 438 votes for and 152 votes against the resolution, with 71 abstentions. Most of the Polish MEPs from the opposition parties (PO, PSL, SLD) abstained from voting or did not attend it. However, there were six **MEPs of Civic Platform (PO)** who **supported the resolution against their own country**, which was surprising and caused negative reactions not only in Poland but also abroad. The vote has proven **the lack of unity** as to political actions against Poland at the EU forum.

In December 2017, the **European Commission** launched **"the rule of law procedure" against Poland** (based on **Article 7 of the EU Treaty**). The Commission had decided to launch that procedure before the acts on the KRS and on the Supreme Court were signed into law by the President of Poland, i.e. before they became binding legal acts. Similarly, in early December 2017, the Venice Commission had issued its opinions on those acts before they were adopted by the Parliament, i.e. before their final content was known. The Commission also set certain rule-of-law **recommendations** for the Polish authorities as to the acts on Supreme Court, on the KRS, and on common courts. They were related to, *inter alia*, different gender-dependent retirement age for judges (on this issue, the Commission also brought the case against Poland to the EU Court of Justice). Other recommendations concerned the power of the President of

Poland to prolong a judge mandate after reaching the retirement age, the power of the Minister of Justice to dismiss court presidents, extraordinary appeals, etc. The Commission also recommended to publish the 3 unpublished judgments of the Constitutional Tribunal of 2016.

In the context of the above actions of the EU institutions, it is worth recalling **the European Commission's opinion of 2008 on the organization of justice systems in EU Member States**: *"The Commission cannot take action in domestic cases. Under the Treaty establishing the European Community and the Treaty on European Union, the Commission does not have any general power to intervene in individual cases relating to problems of general administration of justice or inefficiency of the judicial system. In particular,* ***the Commission cannot assess either the domestic law regulating the administrative supervision over the courts by the Ministry of Justice****, or the issues regarding judges' salaries, since both topics have* ***no link to Community law****."* Therefore, it seems that 10 years ago, when Poland was ruled by the PO-PSL coalition, the Commission claimed to have no power to intervene in the domestic law on the judiciary, whereas now, with the Polish Government being led by Law and Justice (PiS), it claims to have such authority.

Moreover, in the context of the above actions, the EU institutions are accused of abusing their power and **interfering with the areas falling within the exclusive competence of EU Member States**. These include the organization of the national justice system (as well as social policies regarding, *inter alia*, retirement age, including that applicable to judges). Also, the EU institutions apply double standards, i.e. they willingly attack Poland for the alleged problems with the rule of law while neglecting actual threats to the rule of law and human rights in other EU countries. Moreover, as mentioned before, **politicians in many EU countries (legislative or executive authorities) exert strong influence on the organization of the national judiciary** but, contrary to Poland, these countries face no charges regarding the politicization of the justice system, the violation of the principle of tripartite separation of powers, threats to the rule of law, etc.

The Article 7 procedure (referred to as "the atomic option", as it may lead to a Member State being deprived of its voting rights) has been launched for the first time in the EU history. However, further procedural steps, which could eventually lead to imposing sanctions on a EU country, require the qualified majority, the 4/5 majority of EU Member States, or even their unanimity. This might be difficult since the **actions taken against Poland by the EU institutions are viewed as politically motivated and are disapproved by some Member States**. This means that the imposition of any sanctions is virtually impossible. Nevertheless, the procedure has been launched by the Commission since this is a tool to put governments under pressure. And there are opinions that the entire affair has nothing to do with the Polish judiciary reform, but merely reflects a "tug-of-war" between the EU institutions and Member States, i.e. an **attempt to make the governments of EU countries subordinated to the EU institutions**. This is important in the context of the ongoing debate on the EU future, i.e. whether the EU should evolve towards a "European superstate" headed by supranational and technocratic EU institutions (dominating over EU Member States) or remain a "Europe of fatherlands" with EU institutions performing a coordinating and auxiliary role, and with sovereign Member States and their democratically elected governments performing the major function.

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In March 2018, the Polish Government presented a "***White Paper***" on the reform of the Polish judiciary, which explained why the reform was necessary and referred to the main allegations of the European Commission (see summary). Also in March, the Government submitted to the Commission its **official position** on the recommendations of December 2017, explaining that the reform is a response to social expectations and the solutions adopted in Poland are similar to those existing in other EU countries. Nevertheless, Poland has proposed a **compromise solution**: amendments to the judiciary acts that would take into account some of the Commission's recommendations while retaining the main elements of the reform. The amending acts were adopted in mid-April 2018 (see page 14). Moreover, in the first months of 2018 (January-April), there were several **political and technical meetings** between the Polish Government and the Commission (including at the top political level) aimed at finding a compromise and ending the conflict.

Warsaw, January / April 2018