III.
Reestablishing the Judiciary

Poland After Elections in 2023: Transition 2.0 in the Judiciary

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Abstract:
Since 2015, Poland has been in the midst of a rule of law crisis. Changes affected operation of different 'checks and balances' institutions. But there is a chance that after parliamentary elections, to be held in October 2023, Poland may try to repair its justice system. The purpose of the paper is to analyze the possible reforms, including the methods to implement them. The question is whether and how the transition of the Polish legal system back to compliance with rule of law standards is possible, and what could be potential obstacles and chances. It is unlikely that an amendment to the Polish Constitution will be possible. Therefore, most of the changes will have to be carried out through legislative amendments. The role of the European Union as a possible "agent of change" is analyzed, as well as potential use of transitional justice and accountability instruments.

Keywords: Rule of law, democracy, illiberalism, democratic backsliding, authoritarianism, judicial independence, courts, European Union, transitional justice, constitutional amendments, prosecution service, ECtHR, CJEU, Polish Constitutional Court, elections, Venice Commission, European Commission

I. Introduction

Since 2015, Poland has been in the midst of a rule of law crisis. After winning parliamentary elections, the 'Law and Justice' (*Prawo i Sprawiedliwość*) party has made numerous legislative changes affecting the operation of constitutional organs and bodies, including the Constitutional Court and the judiciary.[1] Those reforms have been made without amending the Polish Constitution, since the ruling party never had a constitutional majority. As a result of new laws and practical political actions, including actions which violate the Constitution (nomination of so-called 'double judges', refusal to publish verdicts of the Constitutional Court),[2] the Constitutional Court stopped being an independent judicial review organ. In consequence, the role of the Parliament has been marginalized as regards its relationship with the executive power. Laws were adopted without any real constraints and without any threat that, one day, they could be declared unconstitutional. The ruling majority secured total control over the Prosecution Service, civil service, public media and secret services. Judicial independence has been curtailed. The road towards illiberal democracy led to numerous protests and reactions domestically[3] and internationally, most importantly by the European Union institutions.[4] Some of the changes have been frozen. Nevertheless, the turning point could be parliamentary elections, planned to be held in October 2023. The current parliamentary opposition declares that reforms aimed at securing rule of law would be the major task for the new government, in case it won the elections.[5] The purpose of this paper is to analyze the possible reforms, including the methods to implement them. The paper considers whether and how the transition of the Polish legal system back to compliance with rule of law standards is possible, and what could be potential obstacles and chances.

1 Wojciech Sadurski, *Poland's Constitutional Breakdown* (Oxford: Oxford University Press 2019).

2 ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland*, judgment of 7 May 2021, no. 4907/18.

3 Adam Bodnar, 'Polish Road toward an Illiberal State: Methods and Resistance', Indiana Law Journal 96 (2021), 1059–1087.

4 Armin von Bogdandy et al. (eds), *Defending Checks and Balances in EU Member States* (Berlin: Springer Verlag 2021).

5 Civil society organizations have prepared 'Porozumienie dla praworządności' (Covenant for Rule of Law) that was signed in November 2021 by major opposition parties, https://wolnesady.org/files/2021.11.05-Porozumienie-dla-praworzadnosci-_logos_final.pdf.

II. Constitutional and Political Constraints of Potential Judicial Reforms

According to different polls made between 2022 and 2023, the democratic opposition has a chance to win parliamentary elections in Poland, planned for October 2023. However, the Polish Constitution provides for a two-thirds majority threshold in order to change the Constitution. There is a very limited chance that the opposition may achieve such significant success. Rather, the possible winning majority could be just above the threshold of an absolute majority in the Parliament. Such victory may allow for the creation of the government and for a parliamentary majority, but it does not allow for any constitutional changes. Therefore, the scope of potential reforms would be limited.

The process of transitional justice could be complicated due to different obstacles and hurdles. They should not be ignored by policymakers and leaders of the current opposition. Quite to the contrary, they have to be taken into account as a scenario in which political and legal actions are achievable, and which of them are merely theoretical and illusory. They are like traps installed in the system that may prevent a natural return to the rule of law system.

First, judicial reforms may face strong opposition from constitutional organs that may sympathize or be loyal to the previous government. The Constitutional Court has been packed throughout 2015 – 2023 with loyal judges.[6] The Constitutional Court has the power to declare any legislative act unconstitutional. Moreover, in case of a motion by the President, submitted before signing the law, the Constitutional Court may 'freeze' the entry into force of the legislative act for a certain period of time. Therefore, the new government would have to take this factor into account in its political scenarios. Moreover, the possible reform of the Constitutional Court is an issue in itself (see below).

Second, judicial reforms implemented between 2017 and 2023 required a number of individual appointments to positions in the judiciary. Therefore, one of the most important obstacles could be the implementation of any vetting procedure for judges. The President of Poland Andrzej Duda declared on different occasions that any judicial nominations made by him cannot be challenged, as they were made within his constitutional prerogative. This is a controversial view. Nevertheless, it signals that any

6 Venice Commission: Opinion CDL-AD(2016)001 of 11 March 2016, Opinion CDL-AD(2016)026 of 14 October 2016.

vetting procedures for judges could be subject to fierce opposition from the President of Poland.

Third, in some constitutional organs, its presidents or members are appointed for specific terms, which are constitutionally regulated. For example, the First President of the Supreme Court has a 6-year term, and the National Council of Judiciary members are appointed for 4-year terms. Without a constitutional majority, it might be difficult to shorten those terms, notwithstanding the fact that the original appointments were constitutionally dubious.

Fourth, there might be a strong opposition towards changes due to different personal stakes involved. Over the last 8 years, 'Law and Justice' created a clientelist system, with a number of beneficiaries and financial incentives (including support to special state funds, media, and private organizations). People and institutions defending the *ancien regime* might be an important hurdle in the implementation of different changes.

Fifth, despite the current economic crisis, it seems that as compared to the Communist government in 1989, the government of 'Law and Justice' would not face an overwhelming stigma. This government has provided for important social transfers and secured a low level of unemployment. Even if 'Law and Justice' fails at the elections due to a lack of further trust and current economic problems, it would not face strong moral condemnation. It is not a situation that could be compared to 1989 when Polish citizens observed the financial, political, and moral catastrophe of 45 years of communism. Such a social environment will have an impact on the success of different rule of law reforms and transitional measures.[7]

Those factors will influence the process of Transition 2.0. They may limit the ability of the new government and parliamentary majority to quickly repair the system of the judiciary and reestablish rule of law guarantees. Certainly, there will be pressure to exact revenge, review judicial nominations, and repair the justice system. The question is, however, whether the society at large expects this ('let's finish the war in the judiciary', 'judiciary should be for citizens, not judges', 'judges should not be politicians'); whether legislative changes would get a clearance from the President and

7 1989 was a turning year also for judges, including different transitional schemes – see Adam Strzembosz and Maria Stanowska, *Sędziowie warszawscy w czasie próby 1981 – 1988* [Warsaw judges upon pressure 1981 – 1989] (Warsaw: Instytut Pamięci Narodowej 2005).

the Constitutional Court; and whether any radical action will fuel the chances of 'Law and Justice' regaining power.

III. Necessary Judicial Reforms

1. Constitutional Court

The situation in the Constitutional Court is commonly regarded as a major obstacle to the potential transitional reforms. The Constitutional Court has been packed by 'Law and Justice', with the majority of judges being appointed by it. Moreover, it includes three 'double judges', i.e. judges nominated for positions that were already filled by the Parliament in 2015.[8] The Constitutional Court is also suffering due to internal crises and conflicts between judges. In the public debate in Poland, two proposals have been submitted on how to resolve the situation in the Constitutional Court. According to Wojciech Sadurski, so-called 'option zero' should be adopted. Politicians should aim toward creation of a new composition of the Constitutional Court, and existing judges should resign.[9] However, it is not clear how to achieve such an outcome without changing the Constitution. According to the Batory Foundation draft law,[10] the change in the composition of the Constitutional Court should be made over time, as a result of the following actions: 1) resignations of some existing members (that could be induced by retirement benefits); 2) appointment of new judges, upon expiry of the actual terms of current judges (some judges end their terms in 2024–2025); and 3) dismissal of 'double judges'. The draft law also provides for a change in disciplinary proceedings against the Constitutional Court judges. Such cases would be heard by panels composed of existing and former Constitutional Court judges. It would provide an opportunity to review the actions of some judges who openly involvement themselves in politiking, despite their judicial function. These actions are certainly long-term options, but they might create the conditions for an evolutionary

8 ECtHR, *Xero Flor w Polsce sp. z o.o. v. Poland* (n. 2).

9 Wojciech Sadurski, 'Trybunał do wyzerowania [Constitutional Court is to have option zero]', Gazeta Wyborcza daily, 8 July 2022, https://wyborcza.pl/magazyn/7,124059,28665135,trybunal-do-wyzerowania.html.

10 Draft law on the Polish Constitutional Court prepared by the Batory Foundation has been presented on 18 July 2022, https://www.batory.org.pl/informacje_prasowe/obywatelski-i-apolityczny-projekt-ustawy-o-trybunale-konstytucyjnym.

recovery of the Constitutional Court, without the necessity of changing the Constitution.

2. National Council of Judiciary

The major constitutional problem with the National Council of Judiciary ('NCJ') is that 15 of its judicial members (out of a total of 25 members) are appointed by the lower chamber of the Parliament. Before 2018, this appointment was made by other judges (peers). Such a method of appointment was in accordance with the Polish constitutional design, as it guaranteed proper separation of powers. The new composition of the NCJ led to numerous consequences. The NCJ has been expelled from the European Network of Councils of Judiciary.[11] According to the jurisprudence of the EU Court of Justice ('CJEU'), any court should have a right to verify whether appointments made by the NCJ are in accordance with the principle of effective legal protection and judicial independence.[12] The ECtHR declared that judicial panels composed of judges appointed by the NCJ in its new composition ('neo-NCJ') may not fulfill criteria of 'court' under Article 6 ECHR.[13] The neo-NCJ is regarded as a fundamental problem in the current legal system. Deficiencies in judicial nominations have an impact on the daily operation of courts and allow for the undermining of court verdicts. Therefore, it is a fundamental task to resolve the problem of the NCJ.

The only solution is the appointment of judges to the NCJ in accordance with constitutional and legislative practices that existed before 2018. 15 judicial members should be appointed by other judges, in order to guarantee judicial independence standards. For this purpose, a relevant legislative act should be implemented. The question is whether the existing terms of current members could be shortened. One should note here that original nominations for the period 2018–2022 (first term) and 2022–2026 (second period) were made in grave violation of the Constitution. Their nominations have been challenged in the public discourse and in the ju-

11 European Network of Councils of Judiciary: Statement of 28 October 2021 on expulsion of the Polish National Council of Judiciary, https://www.encj.eu/node/605.

12 CJEU, *A. K. and Others,* Joined Cases C-585/18, C-624/18 AND C-625/18, judgment of 19 November 2019, ECLI:EU:C:2019:982.

13 ECtHR, *Advance Pharma sp. z o.o v. Poland*, judgment of 3 February 2022, no. 1469/20.

risprudence of the CJEU and the ECtHR. These developments potentially provide an argument that the existing terms of some members could be shortened. Nevertheless, such a decision would result in a vivid discussion and protests by persons (including judges) defending the *ancien regime*. There is also a risk that any legislative act introducing such change could be challenged by the President of Poland, acting in cooperation with the Constitutional Court.[14]

3. System of disciplinary actions towards judges

Judicial reforms introduced by 'Law and Justice' included the new system of disciplinary proceedings, composed of two major elements: 1) disciplinary judges appointed directly by the Minister of Justice, and 2) a new Disciplinary Chamber in the Supreme Court.[15] Thanks to this system it was possible for the executive power – using the hands of loyal judges acting as disciplinary judges – to target those who resisted judicial reforms or were critical towards the transformation of the Polish judiciary into the authoritarian direction. Moreover, proceedings aimed at lifting judicial immunity, instigated by prosecutors, were also used to achieve a 'chilling effect'. As a result of both disciplinary and immunity proceedings, several judges were subject to harsh disciplinary proceedings, and a few of them were suspended as judges (with most notable examples of Igor Tuleya[16] and Paweł Juszczyszyn[17]).

Certainly, any judicial reform should involve the elimination of the special position of disciplinary judges, which are acting together with the executive power. Any person holding such a position should be selected by organs affiliated with the judicial branch of government. Therefore, it is a

14 See the paper by Miroslaw Wyrzykowski on 'constitutional trap' in this book.

15 Katarzyna Gajda-Roszczynialska and Krystian Markiewicz, 'Disciplinary Proceedings as an Instrument for Breaking the Rule of Law in Poland', Hague Journal of the Rule of Law 12 (2020), 451–483.

16 *Tuleya v. Poland*, applications nos. 21181/19 and 51751/20, judgment of 6 July 2023. See also: 'The Case of Judge Igor Tuleya: Continued Threats to Judicial Independence in Poland', American Bar Association, 20 November 2020, https://www.americanbar.org/groups/human_rights/reports/the-case-of-judge-igor-tuleya--continued-threats-to-judicial-ind/.

17 Paweł Juszczyszyn case is of special character. For the first time in the history of Polish cases, the ECtHR declared violation of Article 18 ECHR, ECtHR, *Juszczyszyn v. Poland*, judgment of 6 October 2022, no. 35599/20.

fundamental step towards eliminating the current method of appointment – appointment must made directly by the Minister of Justice in the future.

When it comes to the Disciplinary Chamber in the Supreme Court, as a result of the CJEU judgment of 15 July 2021,[18] and the pressure from the European Commission (suspension of the EU Recovery Plan)[19], the first steps have been made. The Disciplinary Chamber has been replaced with the Chamber of Professional Responsibility in the Supreme Court.[20] Later on, due to ongoing pressure from the European Commission, the new law provided for further changes. The parliamentary majority decided to adopt new laws that implemented two guidelines: independence of the disciplinary mechanism against judges and the possibility for judges to verify the status of other judges (so-called 'judicial independence test').[21] Most notably, the new law included a controversial change – the transfer of all disciplinary cases against judges to the Supreme Administrative Court. The President of Poland decided to submit this law to the Constitutional Court for judicial review before signing it. The case has not been yet decided.[22] Irrespective of the final decision of the Constitutional Court, neither the Chamber of Professional Responsibility nor the Supreme Administrative Court meet the criteria of judicial independence, albeit due to different reasons. Therefore, the reform should provide for transferring such powers to the existing chamber of the Supreme Court, composed of judges who are fully independent. Those criteria are met by the Criminal Chamber of the Supreme Court.

18 CJEU, C-791/19, *Commission v Poland*, judgment of 15 July 2021, ECLI:EU:C:2021:596.

19 'EU withholding billions in cohesion funds from Poland over rule-of-law concerns', Notes from Poland, 17 October 2022, https://notesfrompoland.com/2022/10/17/eu-withholding-billions-in-cohesion-funds-from-poland-over-rule-of-law-concerns.

20 Paweł Marcisz, 'A Chamber of Certain Liability', Verfassungsblog, 31 October 2022, https://verfassungsblog.de/a-chamber-of-certain-liability.

21 Ustawa z dnia 13 stycznia 2023 r. o zmianie ustawy o Sądzie Najwyższym oraz niektórych innych ustaw [Act of 13 January 2023 on amending the Supreme Court Act and other legal acts].

22 The case is registered with the number Kp 1/23. Due to the dispute and political tensions between the judges of the Constitutional Court, the case is not yet resolved. Specifically, there is a dispute among judges whether Julia Przyłębska is still the President of the Constitutional Term. See on this: Daniel Tilles, 'Polish constitutional court judges rebel against chief justice, demanding she step down', Notes from Poland, 5 January 2023, https://notesfrompoland.com/2023/01/05/polish-constitutional-court-judges-rebel-against-chief-justice-demanding-she-step-down.

4. Status of neo-judges

Since 2018, the President of Poland acting upon the recommendation of the neo-NCJ has made numerous judicial nominations. He has appointed judges to the new chambers of the Supreme Court (Disciplinary Chamber and the Chamber of Extraordinary Appeals and Public Affairs), existing chambers of the Supreme Court, the Supreme Administrative Court, and to common courts and administrative courts. However, due to the extensive case-law of the CJEU and the ECtHR, judicial nominations made by the neo-NCJ may be subject to legal challenge. In *Advance Pharma v. Poland* and other subsequent cases concerning the situation in the Polish judiciary, the ECtHR confirmed that there is an 'inherently deficient procedure for judicial appointments of new judges' made by the neo-NCJ.[23] In consequence, any court adjudicating cases with the participation of such judges cannot be regarded as a 'tribunal established by law' in accordance with Article 6 ECHR. Despite the ECtHR jurisprudence, neo-judges continue to serve in the judiciary. It happens that their status is challenged by certain 'old' judges who refuse to adjudicate in panels with them or quash judgments issued by them, referring to existing case law of the CJEU and ECtHR. This tension grows with every passing day and will have to be resolved in the case of Transition 2.0.

Therefore, any judicial reform should involve the procedure of vetting such neo-judges. Otherwise, their mandate to adjudicate could be continuously put in question, by both 'old' judges, the ECtHR, and the parties to different proceedings. Any judge should have a clear and undisputed legitimacy to perform his/her duties, and therefore there is a need for a vetting procedure. Such vetting should be made by the NCJ, composed of judges nominated in accordance with the constitutionally compliant procedure.

Among neo-judges, one may distinguish the following categories of judges: 1) 'rookie' judges – graduates of the National School of Judiciary and Prosecution Service; 2) judges promoted to higher instances (e.g. from district courts to regional courts); 3) new judges appointed to the Supreme Court or lowers courts out of academia members, or representatives of other legal professions (prosecutors, attorneys, legal advisors, notaries). One should note that graduates of the National School of Judiciary and Prosecution Service did not have any other option other than to get a judicial nomination via applying to the neo-NCJ and asking for its recommendation.

23 ECtHR, *Advance Pharma sp. z o.o v. Poland* (n. 13), para. 349.

This factor should have an impact on any possible vetting procedures in the future. Maybe in this case vetting should be relatively automatic – their status as judges should be confirmed by the NCJ acting in constitutionally compliant procedure and composition. Judges in the remaining groups (2 and 3, above) had a personal choice whether to apply for judicial nomination by the neo-NCJ. Therefore, the vetting procedure with respect to them should be more comprehensive. As regards judges appointed to higher instance courts (e.g. district court judges appointed to regional or appeal courts), one should consider their 'return' to their original courts. This way, one may avoid criticism that such judges are deprived of their judicial status. The full process of vetting should concern new judges appointed after 2018 (3. category). They have made a conscious decision to participate in the system which was constitutionally questionable at the outset. They should have been aware when accepting the nomination by the neo-NCJ that they were acting against the Constitution of Poland, in order to benefit personally and professionally.

One should note that due to the scale of judicial nominations made since 2018 (more than 2.000 judges) and the diversified status of judges appointed by neo-NCJ, such vetting procedures may require a longer time to be effectively performed. Moreover, vetting procedures should not lead to the paralysis of the judicial system. Therefore, one could imagine simplified procedures for vetting. The legislation could provide that if no objections are made to the status of a particular judge by a given date, that person's status is confirmed by the new NCJ. For example, the NCJ could confirm the judicial nomination of certain judges as long as, within a certain deadline, nobody presents arguments against such nomination, with the expectation that such arguments would indicate serious facts which bring into question such person's independence or integrity. Only in the case of neo-judges whose status was questionable, the comprehensive vetting procedure would be performed. Such an approach could contribute to a greater sense of stability in the system.

In the case of the vetting process of judges, significant protests can be expected from political circles associated with the current government, from the President of Poland, but also from current neo-judges. Nevertheless, such vetting is necessary to bring the functioning of the judiciary in line with constitutional requirements. Therefore, this political cost must be borne. The vetting process will affect a large group of people and therefore has to be undertaken over a longer period of time. At the same time, it should not jeopardize the efficiency of the proceedings. It is not possible to

remove from office judges who constitute 1/5 of all judges in Poland. This factor should be taken into consideration when planning relevant vetting mechanisms.

5. Re-opening of judicial proceedings

Neo-judges have been actively involved in the administration of justice since their appointment. Their participation varied, depending on their procedural role: they could adjudicate cases individually, they could be part of court formations (or formations were composed entirely of neo-judges), and they could also perform certain managerial tasks in courts, such as court presidents or chamber presidents. There are dozens of cases pending before the European Court of Human Rights that deal with inadequate staffing of courts and the consequences for citizens. Therefore, reforms have to contemplate the possibility of re-opening proceedings in cases completed or pending with neo-judges.

Here too it is questionable how to carry out these changes so as not to paralyze the judiciary. After all, neo-judges issue hundreds of judgments and orders every day nationwide, and as of 2018, there have been at least several hundred thousand of these rulings. It is inconceivable that all these proceedings should be re-opened years later. One should carefully think about how to reconcile two interests. On the one hand, citizens should have a broad possibility to reopen any proceedings that involved the participation of neo-judges. On the other hand, reopening should not be too frequent, as it may lead to a serious burden on the judiciary. In the case of wider access, the mere allegation of the improper composition should trigger the relevant procedure. It can be assumed that only a proportion of litigants will want to use this procedure and return to cases that have already been concluded. In the case of narrower access, a party would have to make a *prima facie* case that the involvement of a neo-judge in the proceedings had a real impact on the proceedings or on the outcome. Such an additional condition would limit the number of potential re-opening proceedings.

6. Administration of judiciary

Transition 2.0 also requires implementation of changes concerning organization and management of judiciary. In 2017 the Minister of Justice gained

powers to directly influence the staffing of management positions in the courts (presidents of courts, heads of departments, spokespersons, etc.). In this respect, it would be proper to restore this power to judges and their representative bodies at the level of courts themselves (e.g. colleges of courts). In addition, the problem is the large number of judges who do not perform judicial work but are seconded to the structures of the Ministry of Justice. The long-standing demands of NGOs[24] should be answered and the institution of secondment of judges should be abolished. This will put an end to the unclear relationship between the judiciary and the executive. In addition, the Ministry of Justice will be able to gradually create a civil service corps responsible for the administrative oversight of the judiciary. Significant changes should also be made to institutions that support the Ministry of Justice in carrying out various tasks, such as the National School of the Judiciary and Public Prosecution (*Krajowa Szkoła Sądownictwa i Prokuratury*), the Justice Institute (*Instytut Wymiaru Sprawiedliwości*) and the Justice Fund (*Fundusz Sprawiedliwości*). The management of these institutions should respect the highest standards of public interest, cooperation with civil society and transparency. These institutions should become an example of public trust and thus should be a forerunner in building an ethos of trust in the relationship between the judiciary and the executive. In a further stage, once the necessary institutional changes concerning the courts have been made and the situation in the judiciary has healed, the creation of an independent administrative oversight body for the courts, separate from the Ministry of Justice, should be pursued.

7. Prosecution Service

In 2016, the office of the Minister of Justice and the Prosecutor General was merged. This marked a return to the legal situation that existed before 2010. However, the above institutional change was more taxing on the standards of the rule of law. The Prosecutor General was given a number of additional powers to directly influence the course of proceedings conducted by prosecutors across the country.[25] In addition, the reform led to a kind

24 Dawid Sześciło, *Delegowanie sędziów do Ministerstwa Sprawiedliwości. Problemy ustrojowe i praktyczne* [Delegation of judges to the Ministry of Justice. Institutional and practical problems] (Warsaw: Helsinki Foundation for Human Rights 2012).

25 Venice Commission: Opinion of 11 December 2017 on the Act on the Public Prosecutor's Office, as amended, CDL-AD(2017)028.

of 'purge' in the prosecution service. Many deserving prosecutors have been demoted to the lowest organizational units. Direct control over the activities of the prosecutor's office provided an absolute sense of impunity for representatives of 'Law and Justice' and its allies.

One of the consequences of the changes in the prosecutor's office was the establishment of the prosecutors' association Lex Super Omnia, which conducts advanced monitoring and research on the functioning of the prosecutor's office.[26] Changes concerning the prosecutor's office became the subject of a 2017 opinion by the Venice Commission.[27] However, this opinion was ignored by the Polish authorities. It does, however, provide evidence that the institutional design of the Office of the Prosecutor General has been questioned for many years.

Therefore, changes in the broader justice system should also include the prosecution service. It is necessary to restore the ethos in the profession of the prosecutor and to depoliticize it completely. The key to achieving these outcomes must be the separation of the office of the Minister of Justice and the Prosecutor General, and limiting the possibility of day-to-day political influence on the activities of prosecutors. Poland should also join the European Public Prosecution Office, as this will enable independent prosecutions (i) with a cross-border dimension or (ii) relating to the use of EU funds.[28]

One of the most important challenges for transitional justice may be the activities of the prosecution in the context of abuses committed by politicians and others associated with the *ancien regime*. The first challenge is whether it is possible to truly decouple the activities of the prosecution service from the new set-up of power in such a way that prosecutions focus only on the merits and not on political aspects, so that a sense of seeking the truth and establishing accountability prevails, and not a desire for political retaliation. The second challenge focuses on whether prosecutors have the ethos and integrity to conduct such investigations in a fair manner, or have too many of them succumbed over the past years to the temptation

26 See e.g. Michał Mistygacz, Grzegorz Kuca and Piotr Mikuli (eds), *Minister Sprawiedliwości a Prokuratura. W poszukiwaniu optymalnego modelu relacji* [Minister of Justice and the Prosecution Service. In search of optimum model of relations] (Kraków: Wydawnictwo Księgarnia Akademicka 2021).

27 Venice Commission, Opinion of 11 December 2017 (n. 25).

28 Adam Bodnar and Maciej Taborowski, 'Uczciwi nie muszą się bać' [Honest people should not be afraid], Rzeczpospolita daily, 10 April 2021, https://www.rp.pl/opinie-prawne/art186701-adam-bodnar-maciej-taborowski-uczciwi-nie-musza-sie-bac.

to serve the government and fulfill political expectations? If so, they may not be motivated enough to follow up on abuses, or they may create specific obstacles to the fair conduct of investigations.

8. Other changes

The destruction of the rule of law in Poland concerned not only the Constitutional Court, judiciary, and prosecution service. It had a tremendous impact on other sectors of government, including civil service, the educational sector, the operation of state-owned companies, and misuse of public funds, public media, and secret services. It is beyond the scope of this paper to make a detailed analysis of the required reforms with respect to those sectors. Nevertheless, judicial reform should be holistic and go hand in hand with changes concerning those areas of governance that are important for the return of the rule of law. For example, there is a need for comprehensive reform of secret services and creation of the democratic oversight. The work of the special committee in the Senate[29] and the investigative committee in the European Parliament[30] concerning abuse of Pegasus spyware should end up with recommendations concerning the role of the judiciary vis-à-vis secret services, accountability and use of covert techniques.[31] Another example is civic education. Any changes concerning the judiciary should be accompanied by intensive educational programs concerning the role of courts and the importance of the rule of law. Such change is not possible without cooperation with the Minister of Education. An important role could be also played by public media. They were used as an instrument of propaganda and attack against judges, but their role could

29 'Komisja Nadzwyczajna do spraw wyjaśnienia przypadków nielegalnej inwigilacji, ich wpływu na proces wyborczy w Rzeczypospolitej Polskiej oraz reformy służb specjalnych' [Senate Extraordinary Committee to explain cases of illegal surveillance, its impact on electoral process in Poland and on reform of secret services], https://www.senat.gov.pl/prace/komisje-senackie/komisja,215,komisja-nadzwyczajna-do-spraw-wyjasnienia-przypadkow-nielegalnej-inwigilacji-ich-wplywu-na-proces-wyborczy-w-rzeczypospolitej-polskiej-oraz-reformy-sluzb-specjalnych.html.

30 European Parliament's Committee of Inquiry to investigate the use of Pegasus and equivalent surveillance spyware, https://www.europarl.europa.eu/committees/en/pega/home/highlights.

31 See also communicated cases, ECtHR, *Pietrzak v. Poland and Bychawska-Siniarska and Others v. Poland*, applications nos. 72038/17 and 25237/18, concerning the Polish law on surveillance and standards not complying with the ECtHR jurisprudence. Hearing before the ECtHR in those cases took place on 27 September 2022.

be different. They may contribute to raising awareness of the rule of law and the importance of courts for citizens.

IV. Role of the EU and International Organizations in Securing Judicial Reforms

A review of the Polish public debate, especially among opposition parties, judicial and prosecutorial associations and civil society may indicate a high level of preparedness for necessary judicial reforms and other institutional changes required in Poland. There are certain draft laws being prepared. Two of them are adopted as official draft laws of the Polish Senate.[32] Please note, however, that those drafts are presently only of symbolic value, as the lower chamber (Sejm) is blocking any further work on them. But they may be used by the new government after the elections. There are also intensive discussions among lawyers, especially judicial and prosecutorial associations, including on the work necessary for drafting future legislation.

Polish resistance against the decay of the rule of law had a constructive effect in engaging different stakeholders in a discussion. Nevertheless, one should not underestimate the importance of international cooperation, when the window of opportunity for Transition 2.0 opens up. Specifically, this role may be played by the European Union, but also by other international organizations and some states in their bilateral projects (e.g. Norway).

The role of the European Union is crucial due to the need to enforce CJEU judgments concerning judicial independence. As of the end of April 2023, Poland has not implemented the 'milestones' agreed upon in order to benefit from the EU Recovery Plan. Moreover, the CJEU has imposed financial penalties on Poland due to its failure to enforce judgments on rule of law.[33] The European Commission has instigated new proceedings

32 Those draft laws prepared by the Senate and submitted to Sejm include: *Senacki projekt ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw* [Senate draft law on changing the Act on the National Councill of Judiciary, the Supreme Court Act and some other acts], No. EW-020–72/20, submitted on 10 June 2022; *Senacki projekt ustawy o uchyleniu ustawy o Radzie Mediów Narodowych* [Senate draft law on cancelling the Law on the National Media Council], No. EW-020–198/20, submitted on 3 December 2020.

33 On 21 April 2023, the ECJ reduced the penalties for non-compliance with judgments on judiciary from 1 mln EUR per day to 500.000 EUR per day.

concerning the operation of the Polish Constitutional Court.[34] Therefore, it is up to the new government to close this negative chapter and return to rule of law–compliant countries.

Another aspect is the implementation of numerous judgments issued by the ECtHR concerning judicial independence. The wording of some of them may resemble so-called 'quasi-pilot judgments'. The ECtHR indicated a systemic failure in judicial nominations made by the neo-NCJ and consequently found a violation of Article 6 ECHR in respect of any case adjudicated with the participation of neo-judges. As of now, Poland is refusing to comply with those judgments (but also interim measures concerning disciplinary actions towards judges[35]). The Polish Constitutional Court in two judgments openly undermined the compliance of the ECHR with the Polish Constitution.[36] Nevertheless, enforcement of the ECtHR judgments, as regards their general measures, will be subject of the supervision of the Committee of Ministers. The new government will have to respond to this challenge. One of the ideas to close this chapter could be the issuance by the ECtHR of the pilot judgment, which would include a scheme for how to deal with repetitive cases concerning the violation of Article 6 ECHR.[37] However, such a pilot judgment could only be made possible in case of legislative changes concerning the status of the NCJ, vetting of judges, and creation of a possibility of re-opening of proceedings.

The Venice Commission might be crucial in giving additional legitimacy to reforms planned by the government. Any draft law should be subject to review by the Venice Commission. Such action could increase the legitimacy of actions. It could also allow for the elimination of possible unjust criticism that reforms aim towards revenge, are non-democratic, violates individual rights of judges being subject to vetting, etc. The Venice Commission due to its mandate, experience, but also a representation of

34 Decision to start infringement case against Poland concerning the operation of the Constitutional Court was made on 15 March 2023, https://ec.europa.eu/commission/presscorner/detail/en/ip_23_842.

35 See press release of ECtHR: *Non-compliance with interim measure in Polish judiciary cases*, 16 February 2023, ECHR 053 (2023).

36 See judgments of the Polish Constitutional Court: 24 October 2021, No. K 6/2, 10 March 2022, No. K 7/21.

37 On pilot judgments' concept development and practice of negotiations with the Council of Europe member states see *Pilot Judgement Procedure in the European Court of Human Rights. 3rd Informal Seminar for Government Agents and other Institutions* (Warsaw: Ministry of Foreign Affairs 2009).

non-European states (especially the United States) might be a credible supporter of governmental reforms. Moreover, positive opinions of the Venice Commission on draft laws may decrease the risk of the President of Poland using his power to veto laws. Another factor is the international pressure that Poland faces to resolve its rule of law problems. Please note that in this regard an important role could be played by the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe ('OSCE ODIHR'). Warsaw office of OSCE ODIHR has strong expertise in standards of judicial independence.[38] Between 2015 and 2023 it was heavily involved in a debate on rule of law in Poland. It commented on draft legislative acts or organized round table discussions. One should expect a continuation of the OSCE ODIHR engagement in this topic.

The rule of law crisis has a direct consequence on the economy of Poland and the stability of investments. Over years Poland dropped significantly in the World Justice Project Rule of Law Index.[39] Therefore, the new government should underline that judicial reforms are aimed at regaining the trust of investors and financial markets. For this purpose, cooperation with such organizations as the World Bank, OECD, and the International Monetary Fund may be needed. Those organizations, using their experience, may support the Polish government in changes concerning the efficiency of the justice system (see below for an overview of the necessary reforms). This support may be combined with long-term financing of some reforms. Such an approach would have additional advantages. It could secure that certain ideas are not subject to daily political turmoil, unstable visions, and constant discussions, but could be based on a 5–10 year road map, to be followed by subsequent governments. The crisis of the justice system is deep enough to justify that kind of international support.

Without any doubt, cooperation with the EU or the ECtHR is necessary, due to the need for compliance with the EU law and international human rights treaties. But one should look beyond the pure legal logic of such

38 See e.g. OSCE ODIHR Kiev Recommendations on Judicial Independence in Eastern Europe, South Caucasus and Central Asia, 2 November 2010, https://www.osce.org/odihr/KyivRec. See also Adam Bodnar and Eva Katinka-Schmidt, 'Rule of Law and Judicial Independence in Eastern Europe, the South Caucasus, and Central Asia', OSCE Yearbook 17(2011), 289–302.

39 According to the recent Rule of Law Index, Poland is at 34. position in the world, one of the lowest in the European Union, with major drop in the category 'constraints on governmental powers', https://worldjusticeproject.org/rule-of-law-index.

cooperation. International organizations and bodies should be regarded as external agents pushing for changes, giving them more legitimacy and thus diminishing the level of criticism and protests coming from domestic stakeholders (including followers of the *ancien regime*). The compliance-pull of international bodies, whether this view is popular or not, may be similar to the same process as it existed before Poland's accession to the EU. In 2023 Poland is not fulfilling the criteria established in Article 49 TEU, as interpreted in the light of Article 2 TEU. Therefore, the future change in the legal system must be fundamental. The EU as well as other international organizations have an interest in bringing Poland back to the level allowing for fulfilling EU membership criteria.

V. Transitional Justice Schemes

The judicial reforms have caused serious institutional problems, but they have also led to personal involvement in the destruction of basic tenets of the constitutional state. The question is, whether individuals who contributed to unconstitutional reforms should be accountable for their actions, and what role could transitional justice schemes play in settling accounts with the past.

Under the Polish Constitution, violation of the Constitution by major constitutional organs should be adjudicated upon by the Tribunal of State (*Trybunał Stanu*). In practice, this method of accountability may be difficult to achieve due to the complicated procedure and insufficient practice of the operation of the Tribunal of State (there were a few cases in the history of Poland). Moreover, this mechanism may be only applied to the highest state officials. Nevertheless, the initiation of proceedings before the Sejm Committee on Constitutional Responsibility (*Komitet Odpowiedzialności Konstytucyjnej*) should be considered. Proceedings before this body must proceed any motion to the Tribunal of State. Investigatory powers of this Committee (especially the power to hear witnesses) may help in the clarification of different abuses of power.

When it comes to judges involved in building the new system of authoritarian power, one should consider proceedings under Article 231 of the Polish Criminal Code. This provision allows for responsibility for the abuse of the state power. Such proceedings would require lifting judicial immunity. Certainly, this type of transitional justice measure should not concern

all the judges, but only those who actively participated in the destruction of the legal system. There were several examples of such actions: participation of judges in smear campaigns against other judges[40]; use of disciplinary proceedings in order to 'chill' judicial dissent; participation in the adjudication of cases that resulted in the politically motivated suspension of judges (e.g. in the Disciplinary Chamber of the Supreme Court); refusal to comply with judgments of courts ordering the return of judges to adjudication; or disregard of interim measures issued by the European Court of Human Rights[41]. Please note that some of those actions by judges have been already adjudicated upon by the ECtHR. For example, in *Juszczyszyn v. Poland*, ECtHR identified a number of measures taken by Polish authorities to attack Judge Juszczyszyn for his decision to verify the status of judicial nominations made by the NCJ.[42] Thus, the ECtHR concluded that the suspension of *Juszczyszyn* by the Disciplinary Chamber of the Supreme Court was made to achieve an effect outside of legal aims (violation of Article 18 ECHR).

Certainly, there is a thin line between the ordinary adjudication of different cases, when judges act in accordance with legislative provisions, and the abuse of power. Therefore, in order to initiate proceedings in such cases, the abuse of power should be clear and unequivocal. On the basis of facts, as confirmed by documents, speeches, judicial pronouncements, and other sources, it must be beyond any doubt that certain judges acted on the basis of their personal (or political) motivation, and not on account of legal reasons.[43]

With respect to cases not involving abuse of power, one should consider the use of disciplinary proceedings with respect to judges. It should be not-

40 M. Gałczyńska, 'Śledztwo Onetu. Farma trolli w Ministerstwie Sprawiedliwości, czyli '"za czynienie dobra nie wsadzamy"' [Trolls' farm in the Ministry of Justice, it means 'for making good we do not put in prison'], press article for Onet.pl, 19 August 2019, https://tiny.pl/7lwbd.

41 European Stability Initiative, *Under Siege – Why Polish courts matter for Europe,* report of 22 March 2019, https://esiweb.org/publications/under-siege-why-polish-courts-matter-europe.

42 ECtHR, *Juszczyszyn v. Poland* (n. 17).

43 There were interesting cases when Polish judges (including Igor Tuleya and Paweł Juszczyszyn) fought for their re-instatement to judicial positions using litigation before civil courts. Civil courts, referring to the CJEU case-law ordered that they should be re-instated. However, those judgments were not respected by respective court presidents, being politically dependent on the Minister of Justice. Open refusal to comply with judgments on reinstatement could be considered as an abuse of power and possibly start criminal proceedings under Article 231 of the Criminal Code.

ed that the draft law on the Constitutional Court, prepared by the Batory Foundation, provides for the extension of judicial panels able to conduct disciplinary cases against the Constitutional Court judges, also including former judges of this Court. Through this solution, it would be possible to have a more objective approach.

In addition to criminal and disciplinary cases, as well as vetting procedures (see comments in Section 3 of this Chapter), one should consider the implementation of transitional justice measures based on the search for truth and aimed towards reconciliation. It may appear that some judges may want to explain their role in the destruction of the legal system. They would be able to face moral condemnation, but still would like to retain their professional role. A procedure should be created allowing for such testimonies. One could think about the body created within the structure of the Ministry of Justice, with the participation of retired judges, members of academia, respected representatives of bar associations, judicial associations and civil society, that would provide room for such actions. Such a body may work as a truth commission – in case of providing testimony by the judge, there should be a public agreement that no disciplinary case is instigated. However, participation in the work of such a body should not relieve a judge of any criminal responsibility for the abuse of power. Only cases concerning violation of judicial ethics could possibly be dropped.

In addition to this, there is a need for the investigation of specific cases concerning individual judges or actions orchestrated by the Ministry of Justice. There are some individual cases that need a deep evaluation from the point of view of the involvement of different state agencies and bodies (disciplinary judges, presidents of courts, prosecution service, the Central Anti-Corruption Office) in targeting individual judges or the state not providing them sufficient protection against the massive hate. The case of Waldemar Żurek is a good example of long-term orchestrated action by the state.[44] He has been the subject of more than 20 disciplinary cases for his statement. His financial declarations were intrusively reviewed by the Central Anti-Corruption Office. A hate campaign against him was orchestrated by government-related officials. Finally, the Minister of Justice used his personal power to submit an extraordinary appeal against judgments concerning the division of property with Żurek's former wife. To conclude, he is regarded as one of the most repressed judges in Poland. Therefore, the establishment of a commission of inquiry investigating this case (but

44 ECtHR, *Waldemar Żurek v. Poland*, judgment of 16 June 2022, no. 39650/18.

possibly other fundamental individual cases) could be regarded as a proper enforcement of the ECtHR judgment as regards individual measures. The outcome of such inquiry would be the presentation of the anatomy of the destruction of the judicial systems: methods and instruments used, involvement of state propaganda, cooperation of different state services, lack of accountability for abuses, silent acknowledgment of verbal abuses, and hate of fellow citizens.

To sum up, there should be no single mechanism of transitional justice. Rather it should be a mix of different instruments, being inspired by comparative examples (especially concerning truth commissions), but also taking what is best from the existing legal instruments. Any such measures should be strongly rooted in rule of law standards. Even the highest need for transitional justice should not trump the necessity to comply with procedural standards and guarantees of a fair trial.

VI. Legitimacy of the Judiciary – Search for Effectiveness

Institutional reforms concerning the judiciary are not enough to secure a successful transition. It is equally important to look much broader into origins of the crisis of the rule of law and judiciary. Jan Winczorek, in an interview with Oko.Press, formulated a view as to why Poles—despite appearances to the contrary—have not participated long-term and consistently in protests to defend the judiciary. He stated that in Poland we have a huge gap in access to the law: 'If our law and legal institutions are non-functional, if a legal problem cannot be solved in a certain time or at a certain cost, then why get excited about the law in the first place?'.[45] This statement should be an important memento for anyone who is going to deal with judicial reforms after the parliamentary elections in Poland.

Basically, it means that any reform of the judiciary should take into account the perspective of regular citizens. They may not be so much interested in sophisticated and difficult-to-understand changes concerning judicial independence. They would look at whether, as a result of changes, proceedings are more efficient and courts more reliable. Therefore, further

45 Dominika Sitnicka, 'Dlaczego nie umieramy za praworządność? A kto by chciał umierać za państwo z kartonu?' [Why don't we die for rule of law? But why anyone would like to die for the state made out of cardboard?] – interview with Jan Winczorek, Oko.Press, 19 June 2022, https://oko.press/dostep-do-prawa-jan-winczorek/.

legislative changes are needed to improve the performance of the court and its public perception. For example, despite numerous postulates by experts, a law on expert witnesses has not been enacted in Poland for years.[46] The lack of expert witnesses (and sometimes their unreliability) is one of the biggest barriers to speeding up court proceedings. Class actions need to be reformed so that those injured by corporations can effectively and quickly claim their rights, even if the amounts are small. In family cases, consideration needs to be given to how to simplify certain proceedings and how to strengthen those most affected, namely children. Consideration needs to be given to court costs as well as to the availability and quality of legal aid (especially in civil cases and criminal cases at the pre-court stage). Finally, it is worth reviewing all the major codes that have been corrected (or rather spoiled and patched up) over the years by the Ministry of Justice staff, rather than the best lawyers in the country.

But even the best legislative changes are not enough. The foundation must be the strengthening of the judiciary's staff. There is a shortage of hundreds of judges in the courts. The vetting process of neo-judges may create additional problems. Moreover, some courts are more overburdened with cases than others. It concerns especially those dealing with abusive CHF or EUR-denominated loans, and those reviewing cuts in retirement benefits for persons who collaborated with secret services before 1989. Courts are flooded with cases, and there is a desperate need to employ additional judges to deal with such cases.

It is also important to strengthen the administrative and support apparatus for judges. Every judge should be fully supported by a professional staff consisting of court clerks, assistants, protocol officers, and registrars, so that he or she can focus on adjudicatory activities. There are currently approx. 4 000 assistants and there should be at least twice as many. Moreover, they are in constant rotation, as in order to improve their financial situation, they either leave the judiciary or apply for judicial positions.

A responsible approach to lay-person judges is also necessary. Judging in court should be the greatest honor. Meanwhile, in Poland, there is an

46 Barbara Grabowska, Artur Pietryka and Marcin Wolny, *Biegli sądowi w Polsce* [Expert witnesses in Polish courts] (Warsaw: Helsinki Foundation for Human Rights 2014), https://prawo.uni.wroc.pl/sites/default/files/students-resources/Biegli%20s%C4%85dowi%20w%20Polsce%20-%20raport%20HFPC.pdf.

idea to introduce 'justices of the peace' (*sędziowie pokoju*),[47] rather than to reform the institution of 'lay persons' (*ławnicy*).[48] The fact that the function of a layperson can be associated with civic dignity is evidenced by the action of the Committee for the Defense of Democracy (*Komitet Obrony Demokracji*, KOD).[49] The Senate of the Republic of Poland elected 30 lay persons to the Supreme Court, most of whom were candidates put forward by the KOD. In order to bring the judiciary closer to citizens, strengthening 'lay persons' may be crucial.

It is also important to 'take care' of those serving in the broader justice system, especially those who are undervalued: probation officers, prison staff (including prison psychologists), staff in correctional institutions, youth prison centers, and juvenile shelters. Courts will not function properly if they are left without reliable, professional, trust-based support from other institutions responsible for the execution of punishment or the educational and probation system.

There is no simple answer as to how all these changes can be implemented quickly and effectively. Moreover, the veil of information of the current Ministry of Justice may hide even more secrets, systemic problems, and proverbial 'skeletons in the closet'. But surely any changes must take place in a spirit of continuous dialogue, drawing on the knowledge of experts and scholars and the cooperation of all legal communities. That is why support from international organizations may be needed in order to bring the best standards to the Polish judiciary, reform the administration of courts, provide for further IT development, and support the staff.

47 Draft law on justices of peace submitted by President of Poland to Parliament on 4 November 2021, https://www.prezydent.pl/prawo/wniesione-do-sejmu/prezydencki-projekt-skierowal-do-sejmu-projekt-ustawy-o-sadach-pokoju-,41632.

48 Adriana Sylwia Bartnik, *Sędzia czy kibic – rola ławnika w wymiarze sprawiedliwości III RP* [Judge or fan – role of lay judge in the justice system of Polish Third Republic] (Warsaw: Wydawnictwo Trio, 2009).

49 Marcin Jabłoński, Wiktoria Nicałek and Mateusz Mikowski, 'Senat wybrał 30 ławników do Sądu Najwyższego. Kandydatury większości z nich zgłosił KOD' [Senate has selected 30 lay persons to adjudicate in the Supreme Court. Most of the candidates were put forward by the Committee to Protect Democracy], Gazeta Prawna daily, 6 October 2022, https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8563365,lawnicy-sad-najwyzszy-wybor-senat-kod.html.

VII. Conclusions

If the parliamentary opposition wins the 2023 elections, fundamental changes to the judiciary and restoring the rule of law are required. It is unlikely that an amendment to the Constitution will be possible. Therefore, most of the changes will have to be carried out through legislative amendments. At the same time, they may face a number of problems, including resistance from the President or a politically subservient Constitutional Court. However, it is important that the locomotive of the rule of law gets back on track and moves towards increasing the accountability of the authorities to the law, correcting systemic problems, and cooperating loyally with the European Union. The changes must concern the key organs of the judiciary, especially the National Council of the Judiciary and the system of common courts. They must also include the vetting process of judges. This is necessary due to the requirements of EU law and the case law of the European Court of Human Rights. But transitional justice mechanisms will also be important. Without them, confidence in the judiciary will not be restored and acts committed against the constitutional system will not be held to account. In the context of judicial reforms, improving the efficiency of the judiciary should not be forgotten. Without this, it will be difficult to gain the long-term support of citizens and their legitimacy for the changes being made. The support of international organizations for the transformation process should be taken into account to ensure the long-term effectiveness of the reforms.