XVIII: 2021 nr 2
Krakowskie Studia Międzynarodowe
KRAKOW INTERNATIONAL STUDIES
e-ISSN 2451-0610
ISSN 1733-2680
DOI: 10.48269/2451-0610-ksm-2021-2-004

Rett R. Ludwikowski
Professor Emeritus, Columbus School of Law, The Catholic University of America
https://orcid.org/0000-0001-7457-3096

Izabela Kraśnicka
dr hab., Uniwersytet w Białymstoku
https://orcid.org/0000-0001-9684-6681

COMPARATIVE ARGUMENTS IN THE LEGAL DEBATE OVER JUDICIARY REFORM IN POLAND

Introduction

Poland regained its full political independence over 30 years ago and ever since then it has served as an example of a country that cherished and respected the fundamental principles of democracy. The reform of the Polish judicial system that started in 2015 and continues until today, stands against both the respected principles and historical wins that the country has held. The civil protests against the reforms were widely covered by international media and the national legal changes could not pass unnoticed by the European institutions. In the result several cases against Poland were processed in the European Court of Justice.

As the main stages of the judicial reform are well known to the Polish readers, the article will not present a detailed story of how the process progressed.[1]

[1] For a more detailed information about the facts of the judicial changes in Poland see: L. Smith-Spark, A. Mortensen, P.P. Murphy, *Protests grow as Polish president considers judicial bill*, CNN, 23.07.2017, https://edition.cnn.com/2017/07/21/europe/poland-judicial-bill-pass-upper-house/index.html [accessed: 11.12.2021]; M. Santora, *Polish Crisis Deepens as Judges Condemn*

However, it is obvious that the transformation of the Polish legal system may have a significant impact on the global economy and for the NATO alliance. For this reason, the changes should be carefully watched by the European and American readers.[2]

The article will address some of the most controversial developments but its main aim is to verify the correctness of the arguments used by the politicians responsible for the preparation of the reforms and test the political arguments against the pre-existing legal structures. Our thesis states that such arguments were used to convince the public that the solutions included in the proposed Polish reforms were based on some foreign, already tested instruments. We will try to verify repeatedly used arguments of the Polish decision makers that the reforms introduced by the PIS government follow broadly patterns established by many states, such as Austria, France, Germany, the Netherlands, or the United States. They were supposed to bring an average Polish citizen to the conclusion that disregarding the similar judicial structures established in many countries, the European Union arbitrarily punishes democratically elected governments seriously damaging Poland's sovereignty.

The research done for the text used several scientific methods with the dogmatic and comparative methods serving as the main ones. The caselaw analysis together with historic method were used additionally.

A lot has been written on the Polish judiciary reform – both by Polish and foreign experts. The most relevant texts cited throughout the article include the works of Mirosław and Katarzyna Granat, Aleksandra Kustra-Rogatka, Fryderyk Zoll, Leah Wortham, Laurent Pech. The presented text adds the novel comparative perspective and tries to battle with the explanations provided by the supporters of the controversial judiciary reform. The examples used in the article are the ones referred to in public by the most prominent politicians arguing for the reform.

Their Own Court, The New Your Times, 5.07.2018, https://www.nytimes.com/2018/07/05/world/europe/poland-court-crisis-constitutional-tribunal.html [accessed: 11.12.2021]; L. Pech, R.D. Kelemen, *If you think the U.S. is having a constitutional crisis, you should see what is happening in Poland*, The Washington Post, 25.01.2020, https://www.washingtonpost.com/politics/2020/01/25/if-you-think-us-is-having-constitutional-crisis-you-should-see-what-is-happening-poland [accessed: 11.12.2021].

[2] F. Zoll, L. Wortham, *Judicial Independence and Accountability: Withstanding Political Stress in Poland*, 42 "Fordham International Law Journal" 2019, vol. 42, pp. 876–948; A. Kustra-Rogatka, *The Polish Constitutional Court and Political "Revolution" after 1989: Between the Continuity and Discontinuity of the Constitutional Narrative*, "Wroclaw Review of Law, Administration and Economics" 2016, vol. 6, pp. 62–91; A. Śledzińska-Simon, *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform reversing Democratic Transition*, "German Law Journal" 2018, vol. 16, pp. 1839–1870; A. Kustra, *Poland's Constitutional Crisis. From Court-Packing Agenda to Denial of Constitutional Court's Judgments*, "Studi Polacco-Italliani di Toruń" 2016, vol. XII, pp. 343–365.

Reform or transformation?

Summarizing only the factual developments, let's note that the first legal move of the ruling party back in 2015 was the amendment of the Law on Constitutional Tribunal (CT). Polish parliament voted on the amendments on 19 November 2015 and they were signed into law by the Polish President just a week later.[3] The new provisions allowed for the re-appointment of some of the Constitutional Tribunal's judges who had been appointed in the previous parliamentary term by the now-opposing party which was then in power. Despite strong public protests, the majority of the Law and Justice party passed resolutions appointing five judges (including three to replace the already appointed ones). Four of them arrived to the presidential palace at the same night to get the final nomination. Initial resistance of the President of the Constitutional Tribunal was overcome and the "stunt" judges were placed in the court. On 3 December 2015, the Constitutional Tribunal ruled that the appointment of two out of five judges by the previous parliament had violated the Constitution.[4] Six days later the Tribunal ruled that the amendments of the Law on Constitutional Tribunal are contrary to the Constitution.[5] The Polish Prime Minister Beata Szydło originally refused to publish the Tribunal's decisions what created an unprecedented situation since the establishment of the Tribunal back in 1986.

Another amendment law concerning the Constitutional Tribunal was passed couple days before Christmas 2015 and signed by the President at the end of the month.[6] The law stipulated that the Tribunal is to adjudicate in full court, which requires the participation of at least 13 judges (so far, the full court had 9 judges). The act deprived the General Assembly of the Tribunal of the right to terminate the mandate of a judge of the Tribunal. The right to initiate disciplinary proceedings against a judge of the Tribunal was held by the Polish President or the Minister of Justice. It further stipulated that trial dates must be set in the order in which they are received by the Tribunal. This law was immediately questioned as unconstitutional and relevant decision was taken by the Tribunal itself on March 9, 2016 which declared that the amendments passed on December 22 were fully unconstitutional.[7] Prime Minister Szydło again refused to publish the Tribunal's judgment. On 22 July 2016, the majority of the Law and Justice party passed a new Law on the Constitutional Tribunal.[8] It was immediately signed by

[3] Ustawa z dnia 19 listopada 2015 r. o zmianie ustawy o Trybunale Konstytucyjnym [Act of 19 November 2015 amending the Act on the Constitutional Tribunal], Dz. U. 1928.

[4] Trybunał Konstytucyjny [Constitutional Tribunal] Dec. 3, 2015, K 34/15.

[5] Trybunał Konstytucyjny [Constitutional Tribunal] Dec. 9, 2015, K 35/15.

[6] Ustawa z dnia 22 grudnia 2015 r. o zmianie ustawy o Trybunale Konstytucyjnym [Act of 22 December 2015 amending the Act on the Constitutional Tribunal], Dz. U. 2217.

[7] Trybunał Konstytucyjny [Constitutional Tribunal] Mar. 9, 2016, K 47/16.

[8] Ustawa z dnia 22 lipca 2016 r. o Trybunale Konstytucyjnym [Act of 22 July 2016 on the Constitutional Tribunal], Dz. U. 1157.

the President and published as binding despite several strongly argued opinions critical of the proposed law.

In the next move, the governing party turned to the Polish Supreme Court. It began with the new law on the Supreme Court that the Polish parliament passed in July 2017. The proposed act reformed the procedure of the judges' appointment (at the same time increasing the number of Supreme Court's judges to 120, so the 2/3rd of the new judges would be appointed in the amended procedure controlled by the ruling party). The retirement rules allowed for the forced retirement of the sitting judges who reached the age of 65 including the First President of the Court whose term would have been shortened in contrary to the Polish Constitution.[9] It also established three new chambers in the Supreme Court with the most controversial one – the Disciplinary Chamber that would take on disciplinary cases of the Supreme Court's judges as well as judges of the ordinary courts. Step by step, the changes were perceived more as transformations than reforms.

Is Poland heading toward Polexit? A summary of the dialog between Poland and the European Union

The proposed law was widely criticized by the judges of the Supreme Court, by the legal experts, by the European Union and most importantly the nationwide social protests against the reform spread through the country.[10] In the article of this size, we cannot analyze exhaustively the origins and models of all judicial institutions functioning recently in Poland and compare them to those working in other countries. We will, however, pick up several arguments most often used in defense of the Polish reforms.

The first important reaction on the structural transformation of the Polish judicial system came from the Helsinki Human Rights Foundation and the Helsinki Committee in Poland. These institutions published a joined statement underlying that the new law constitutes "embezzlement of the principle of

[9] Konstytucja Rzeczypospolitej Polskiej [The Constitution of the Republic of Poland] Apr. 2, 1997, Dz. U. 78.483, art. 183. Art 183 reads: "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".

[10] A. Koper, L. Kelly, *Protests in Poland condemn controversial judicial reforms*, Reuters, 16.07.2017, https://www.reuters.com/article/us-poland-politics-protests-idUSKBN1A10S3 [accessed: 11.12.2021]; *Protests sweep Poland over law to control judiciary*, FRANCE24, 23.07.2017, https://www.france24.com/en/20170723-protests-poland-law-control-judiciary-walesa-kaczynski [accessed: 11.12.2021]; *Candlelight protest against changes to Poland's judiciary*, EURACTIV, 24.07.2017, https://www.euractiv.com/section/freedom-of-thought/news/candlelight-protest-against-changes-to-polands-judiciary [accessed: 11.12.2021]; R. Lyman, *In Poland, an Assault on the Courts Provokes Outrage*, The New York Times, 19.07.2017, https://www.nytimes.com/2017/07/19/world/europe/poland-courts-law-and-justice-party.html [accessed: 11.12.2021].

triple power and opens the way to a dictatorship of the parliamentary majority, unrestrained by the constitution".[11]

However, the most significant evaluation of the judiciary reforms in Poland had to come from the highest decision-making levels of the European Union. The European Commission, whose primary function is to guard the European treaties and to supervise the application of the EU law in member states,[12] has taken several steps against Polish judiciary reforms. In December 2017 the European Commission initiated the procedure under Article 7[13] of the Treaty on European Union against Poland. This Article, often called the "nuclear option", serves as a specific EU's punishment clause, allowing it to discipline member states when there is a "clear risk of a serious breach" of the Union's core principles. It has never been used before. Triggering it against Poland, the European Commission aimed to encourage the Council to decide about additional actions.[14]

In addition to the procedure initiated under Article 7 of the Treaty on the European Union, the European Commission used the mechanisms of the infringement procedure as regulated by the Treaty on the Functioning of the European Union.[15] They allowed the Commission to take legal action against an EU country that fails to implement or wrongfully implements the EU law. The procedure

---

[11] *The Constitutional Role of the Judiciary in Poland Has Been Completely Undermined*, The Helsinki Foundation, https://www.hfhr.pl/en/the-constitutional-role-of-the-judiciary-in-poland-has-been-completely-undermined [accessed: 11.12.2021].

[12] Treaty on the European Union, art. 17, Feb. 7, 1992, 1992 O.J. (C191) 1 Article 17 reads: "The Commission shall promote the general interest of the Union and take appropriate initiatives to that end. It shall ensure the application of the Treaties, and of measures adopted by the institutions pursuant to them. It shall oversee the application of Union law under the control of the Court of Justice of the European Union".

[13] Article 7 of the TEU reads: "On a reasoned proposal by one third of the Member States, by the European Parliament or by the European Commission, the Council, acting by a majority of four fifths of its members after obtaining the consent of the European Parliament, may determine that there is a clear risk of a serious breach by a Member State of the values referred to in Article 2. Before making such a determination, the Council shall hear the Member State in question and may address recommendations to it, acting in accordance with the same procedure". Article 2 of the TEU reads: "The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights, including the rights of persons belonging to minorities. These values are common to the Member States in a society in which pluralism, non-discrimination, tolerance, justice, solidarity and equality between women and men prevail".

[14] *Proposal of the European Commission for a „Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law"*, 2017, COM/2017/0835 final – 2017/0360 (NLE).

[15] Consolidated Version of the Treaty on the Functioning of the European Union art. 258, Sept. 5, 2008, 2008 O.J. (C 115) 47 [hereinafter: TFEU]. Article 258 of the TFEU reads: "If the Commission considers that a Member State has failed to fulfil an obligation under the Treaties, it shall deliver a reasoned opinion on the matter after giving the State concerned the opportunity to submit its observations. If the State concerned does not comply with the opinion within the period laid down by the Commission, the latter may bring the matter before the Court of Justice of the European Union".

might result with referring the issue to the Court of Justice and in imposition of financial penalties.[16] We have to note, however, that these decisions, would have to be enforced by the courts of member state.

In fact, on April 2019, and in April 2020, the European Commission launched another infringement procedures against Poland and decided to refer Poland to the European Court of Justice (requesting an expedited action) and on July 14, 2021, the ECJ ordered Poland to suspend several elements of its law on Disciplinary Chamber of the Supreme Court[17]. In response the Polish authorities have offered three main arguments to neutralize criticism from abroad. First, Poland responded that the reforms were necessary to eliminate from the courts the remains of the Communist regime; second, that the demands of the EU institutions are simply "an aggression" against the sovereign state, third, that their introduction would violate the Polish Constitution. Although Jarosław Kaczyński, the leader of PIS, stated that Poland's future is in the European Union, the possibility of a "legal Polexit" became more and more realistic.[18]

The comparative perspective or a comparative decoration?

1. Politicization of the Polish and American high courts

Before addressing the merits of the comparisons used by the authors of the Polish reforms, let us note, that they have "*a tu quoque*" character. They create a logical fallacy which means that the pure fact that somebody else did the same thing as we did may exonerate our actions.[19] The best example of this type of argument is the statement of the Polish Minister of Justice who claimed that "the proposed

---

[16] For a detailed analysis see: P. Bogdanowicz, M. Schmidt, *The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU*, "Common Market Law Review" 2018, vol. 55, no. 4, pp. 1061–1100.

[17] K. Sobczak, *Polski system dyscyplinarny wobec sędziów sprzeczny z prawem UE* [Polish disciplinary system against judges contrary to EU law], Prawo.pl, 15.07. 2021, https://www.prawo.pl/prawnicy-sady/izba-dyscyplinarna-nie-jest-sadem-wyrok-tsue,509466.html (Pl) [accessed: 11.12.2021].

[18] *'There will be no Polexit': Kaczynski says Poland's future is in EU* . Euronews with AP, AFP, 15.09.2021, https://www.euronews.com/2021/09/15/there-will-be-no-polexit-kaczynski-says-poland-s-future-is-in-eu [accessed: 11.12.2021].

[19] The argument "*a tu quoque*" was widely used by the defense of the Nazi leaders during the Nuremberg Trial. The defenders raised that one of the judges sitting on the Tribunal was Soviet Major General I.T. Nikitchenko, who presided in several Stalin's "show trials" including those which sentenced Kamenev and Zinoviev. See. J. Lemnitzer, *Nuremberg war crimes trials 70 years on: a complex legacy*, The Conversation, 20.11.2015, http://theconversation.com/nuremberg-war-crimes-trials-70-years-on-a-complex-legacy-50503 [accessed: 11.12.2021]. The argument was also widely discussed during S. Milosevic's trial. See: D. Hamilton, *Milosevic's trial and Selective justice*, Global Policy, 9.04.2001, https://archive.globalpolicy.org/wldcourt/tribunal/2001/0409chom.htm [accessed: 11.12.2021].

solutions (in Poland) do not deviate from those in Western countries. […] Are these totalitarian states?" – asked the Minister.[20]

Critical arguments against the pre-existing Polish Constitutional Tribunal stressed that the judges of that body, like the judges of the Supreme Court of the United States, are not elected in the general election. Both American Court and Polish Tribunal are the institutions which have a political character. The representatives of PIS claimed that in this situation, without a major reform, the Polish courts cannot be regarded as a "third power".

On 18 July 2017, during the 46th session of the Polish Sejm, Minister Ziobro addressed the opposition in lower chamber of the parliament saying: "Well, in the United States, the democratic country where Montesquieu's principle (to which you refer so often) was so ideally recognized or one may say – photographed, who nominates the judges to the Supreme Court? President. Why? Because he is given a democratic legitimization. Montesquieu rolls in his grave when he hears that he was the one proposing judges to be self-nominated, evaluated, controlled and removed."[21]

Let's review the argument of the Polish Minister of Justice, that the politicization of the courts, even in the country such as the United States, does not mean totalitarian or authoritarian transformations of its political and judicial system.

This point has two main components worth of analyzes. First, we have to consider whether the American system of division of powers really tolerates political deviations of the courts. Second, whether the reforms politicizing the Polish judicial system duplicates in any way the judicial model introduced in the United States over two hundred years ago?

Addressing the first question, let's recall that the American constitutional system is not ideal and the question of the political nature of the decision-making process of the U.S. Supreme Court returns continuously, especially when the American system of separation of powers (checks and balances) loses its own balance.

Still, we have to note that the only court established under the American federal Constitution is the U.S. Supreme Court. The other courts were established by federal statute. Additionally, each of the 50 states has its own judicial structure. In the U.S., the judiciary, in addition to the classic role of a guardian of compliance with the law, has its own control functions over the executive and legislative powers. The U.S. Supreme Court plays a key role in interpreting the Constitution and thus has the greatest influence on the division and boundaries of competence, the proper understanding of tasks, and the correct interpretation of

[20] See: Ministry of Justice Twitter, 31.01.2017, https://twitter.com/MS_GOV_PL/status/826380467679195137 [accessed: 11.12.2021].

[21] Zbigniew Ziobro – wystąpienie z 18 lipca 2017 r. [Zbigniew Ziobro – speech of July 18, 2017], https://www.youtube.com/watch?v=9iS9x-A5Mnw (Pl) [accessed: 11.12.2021].

the federal law-state law relationship. The Constitution provided federal judges with independence by guaranteeing lifetime positions and removal only in impeachment proceedings.[22]

The possible temporary erosion of a balance between constitutionally separated powers in the state being, as the United States, the bastion of democratic arrangements, is distinctly different than intentional attempts of unconstitutional takeover of the Polish tribunals by the one-party controlled executive organs.[23] Minister Ziobro is right that the situations, such as those mentioned above, in which one of the powers in the United States attempted to intrude into the activities traditionally reserved for another power are not rare, but they do not transform the American political and legal system into a totalitarian or authoritarian one.

To conclude, as indicated above, in contrast with the incidental political intrusions of the courts of the U.S., the Polish executive branch has openly criticized the decisions of the Polish Supreme Court, the European Court of Justice and strongly questioned their validity which unprecedently and permanently interfered with the separation of powers' principle.

2. "Judicialization" of prosecutors and investigators. The French legacy?

Reviewing the components of the Polish reforms, we have to note, that the model of the prosecution services (called the centralized system) with the Procurator General serving as the Minister of Justice is not a new invention introduced recently in Poland. The question still remains whether this model fits the general system of the division of powers in Poland and whether, in the recent shape, it does not interfere with the principle of judicial independence?

Public prosecutors in Poland are civil law servants whose functioning is regulated by the Law on the Prosecutor's Office of 28 January 2016 (adopted within the first year of the PiS party governance).[24]. The organs of the Prosecution Service are: Prosecutor General, National Prosecutor, deputies of the Prosecutor General, as well as the prosecutors of the common units (the National Prosecution Office, provincial, regional and district prosecutions[25]). The Chief Officer

[22] Constitution of the United States of America, Art. III.

[23] R.D. Kelemen, *Poland's Constitutional Crisis. How the Law and Justice Party is Threatening Democracy*, Foreign Affairs, 25.08.2016, https://www.foreignaffairs.com/articles/poland/2016-08-25/polands-constitutional-crisis [accessed: 11.12.2021].

[24] Ustawa z dnia 28 stycznia 2016 r. Prawo o prokuraturze [Act of 28 January 2016 on the Law on Prosecutor's Office], Dz. U. 177.

[25] The hierarchical structure of prosecution is equivalent to the structure of the Polish courts. For the short overview of the court system see: *The Judicial System in Poland, District Court in Warsaw*, Biuletyn Informacji Publicznej Sądu Okręgowego w Warszawie, http://bip.warszawa.so.gov.pl/artykuly/436/the-judicial-system-in-poland [accessed: 11.12.2021].

is Prosecutor General. As the Prosecution is accountable to the government, the Procurator General serves as the Minister of Justice.[26]

The new law however extended the powers of the Prosecutor General allowing for his intervention in specific investigations, appointing and dismissing heads of the prosecution units based on discretionary decision.[27] It also sparked the new comparisons, this time with French legal system. The disputes on the constitutionality of this reform provoked the Deputy Minister of Justice, Sebastian Kaleta to the reflection that what is proceeded in Poland is a copy of the binding regulations in France. In December 2019 Kaleta twitted: "As far as I know France is the EU, also Germany is in the EU where judges are appointed directly by the politicians. Qualifying our EU partners as authoritarian states is a questionable interpretation". "Proposed regulations reflect the French regulations. You don't like France? You don't' like Europe? Vive La France, Vive l'Europe".[28]

Let's try first to verify the point that the Polish reform duplicated the French model of judiciary. The concept of "judicialization" of the prosecutors and investigators has been popular in France through several centuries and has its additional explanation in the assumption that the judge in civil law system should have more aggressive role in pre-trail investigation than in common law system.

The trend toward "judicialization" basically stemmed from two factors: historical – related to the French political experience, and more general features of the civil law system. Traditionally, the kings used to grant the French prosecutors some judicial authority. In the medieval ages, granting prosecutors judicial powers contributed to the expediency of the criminal procedure and additionally was less expensive. More recently, the trend toward judicialization of prosecutorial and investigative functions stemmed from the inquisitorial rather than adversarial features of the civil law system. The lack of discovery in the civil law procedures used to reduce the investigative role of the counsels. While in typical adversarial system judges play roles of arbitrators protecting the concept of a fair trial, in the inquisitorial system they assist in collecting the evidence, hearing

[26] Ustawa z dnia 28 stycznia 2016 r. Prawo o prokuraturze [Act of 28 January 2016 on the Law on Prosecutor's Office], Dz. U. 177, art. 1.

[27] More on the new law: K. Kułak, *Kwestia niezależności prokuratora w nowej ustawie – Prawo o prokuraturze* [The Issue of the Prosecutor's Autonomy in the New Act – Law on the Prosecutor's Office], "Studia Iuridica Lublinensia" 2016, vol. 25 (105), pp. 105–125; M. Eyre, J. Allosp, *Poland is Purging Its Prosecutors*, Foreign Policy, 11.10.2019, https://foreignpolicy.com/2019/10/11/poland-is-purging-its-prosecutors [accessed: 11.12.2021].

[28] The Twitts triggered a strong reaction from Laurent Pech, Professor at the University of Middlesex in London and expert on the French judiciary who pointed to the wrongfulness of such comparisons and explained the basics of the French system. See: https://twitter.com/ProfPech/status/1205776422809276416 [accessed: 11.12.2021]. Professor Pech's works include: L. Pech, K.L. Scheppele, *Illiberalism within: rule of law backsliding in the EU*, "Cambridge Yearbook of European Legal Studies" 2017, vol. 19, pp. 3–47; D. Kochenov, L. Pech, *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, "European Constitutional Law Review" 2015, vol. 11 (3), pp. 512–540.

witnesses and selecting experts. It resulted in more aggressive intervention of the judges in the pre-trial stages of criminal proceeding and in the tendency to share some judicial functions with prosecutors and investigators.[29]

In France, this process was evidenced even by the names of investigating officers. The examining magistrate is called *juge d'instruction* (investigative judge) and prosecutors in France are the *magistrature debout* – the standing judiciary, while the regular judges are the *magistrature assise*- the sitting judiciary.[30] The participation of *juge d'instruction* – a judge from the *Tribunal de Grande Instance*, appointed for renewable term of 3 years – in the investigating procedures is mandatory with regard to crimes but discretionary in the case of misdemeanors (*delits* and *contraventions*). In this way "judge" intervenes into pre-trial stage and has power to decide about arrest, searches, seizures etc. On the other hand, *juge d'instruction* is not authorized to start "instruction" on his own initiative; the public prosecutor, representing the executive, has discretion to bring or not to bring a prosecution.[31]

The speakers for the Polish Minister of Justice again played the game on words. Using the term "judicialization" to put some emphasis on comparisons of the procurators' services in France and Poland, they entirely and consciously confused the "politicization" of the Polish model with French tradition of giving investigating officers titles such as *juge d'instruction*, what emphasizes only "equal to judges" immunity and independence.

Let's conclude this section with the statement of Prof. Laurent Pech who responded to the Polish comparisons on Twitter: "[…] French law cannot justify (obvious) violations of the fundamental requirements of judicial independence established by the French Constitution/EU law (or in this case Polish law)", the professor wrote. He referred to a draft prepared by the French Constitutional Council, indicating that Article 64 of the Constitution of the French Republic contains a provision on the independence of judicial authority, which "covers both judges adjudicating and prosecutors".[32]

3. Modeling of Poland's Constitutional Tribunal. Does it mean "politicization" and does it follow "the Austrian model of judicial review"?

The evaluation of the transformation of the Polish judicial system brought "on the deck" of dispute, Austria as another state called in the debate as an example.

[29] For more detailed comments on judicialization of the investigative officers in France see: J. Hodgson, *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France*, Hart Publishing, Oxford 2005.

[30] C. Elliott, C. Vernon, E. Jeanpierre, *French Legal System*, Pearson–Longman, Prentice Hall 2006. Since the adoption of Act of August 24, 1993 instructions have to be written and placed on file.

[31] V. Dervieux, *The French System*, [in:] M. Delmas-Marty, J.R. Spencer (eds.), *European Criminal Procedures*, Cambridge University Press, Cambridge 2002, pp. 218–291.

[32] Laurent Pech Twitter: https://twitter.com/ProfPech/status/1205776422809276416 [accessed: 11.12.2021].

This time, it was a controversial, historical warning sent in 2016 from the President of the Polish Supreme Court to the justices of the Constitutional Tribunal. President Gersdorf recalled that the 1933 situation when the Austrian government ran by Dollfuss challenged the "invalid appointment" of three judges of the Constitutional Tribunal that then led to the resignation of four more. This caused a total paralysis of the Tribunal for over a decade and led to the destruction of the rule of law.[33] Even if the Austrian example may serve as a warning, not an actual comparison, the so-called Austrian model of judicial review and the process of the creation of the equivalent institutions in Eastern Europe is certainly worth a short presentation.

In Austria the model of judicial review was first tested in 1867 and adopted in the constitution of 1 October 1920, as amended in 1929. The power to review the constitutionality of laws was vested in the Constitutional Court, and to review the legality of administrative actions in the Administrative Court. [34]

Following the Austrian experience, judicial control of constitutionality was adopted by the Czechoslovakian constitution of 1920. Czechoslovakia also established the Administrative Tribunal in Bratislava. In 1921 the Supreme Administrative Tribunal was formed in Poland and, until the war, the Austrian model was adopted by most of the countries that had formally been under the influence of the Austro-Hungarian Empire. After the war, administrative tribunals were recognized as contrary to the basic principles of Leninism and as such ceased to operate in Bulgaria in 1944, in Romania in 1948, and in Hungary in 1949. Czechoslovakia's administrative tribunal did not "work" since the war, but was not officially closed until 1952.[35] In Poland, which had been "liberated" by the Soviet army, it was simply not re-established.[36]

In the late 1950s the attitude toward judicial control of administrative acts began to change in the socialist countries including Poland. In February 1982 the constitutional amendment introducing the Constitutional Tribunal and the

[33] The comparison was widely discussed in the Polish public debate and treated as a significant warning that the state of the constitutional review system is in fact a test of a real democratism of the state. See: *Sytuacja wokół TK analogiczna do austriackiej z 1933 r.? Co wtedy faktycznie się stało* [Situation around CT analogous to the Austrian one from 1933? What actually happened then], TVN24, 13.05.2016, https://tvn24.pl/polska/sytuacja-wokol-tk-analogiczna-do-austriackiej-z-1933-r-co-wtedy-faktycznie-sie-stalo-ra643300 [accessed: 11.12.2021]. On the history of the Austrian Constitutional Court's abolition in 1933 see: *History of the Constitutional Court: Overview*, https://www.vfgh.gv.at/verfassungsgerichtshof/geschichte/history_overview.en.html [accessed: 11.12.2021]; K. Lachmayer, *The Austrian Constitutional Court*, [in:] A. Jakab, A. Dyevre, G. Itzcovich (eds.), *Comparative Constitutional Reasoning*, Cambridge University Press, Cambridge 2017, pp. 75–114.

[34] Staatsgrundgesetz [The Federal Constitutional Law] of 1920 as amended in 1929, Law No. 153/2004, art. 130 and art. 137–138

[35] See: R. Ludwikowski, *Judicial Review in the Socialist Legal System: Current Developments*, "The International and Comparative Law Quarterly" 1988, vol. 37, no 1, p. 92.

[36] *Ibidem.*

Tribunal of State was submitted to the Polish Sejm. The appropriate constitutional amendment, Article 33a, was adopted on 26 March 1982, and after three years of work the final statute on the Constitutional Tribunal was published on 29 April 1985. The Tribunal began to review cases from 1 January 1986.[37]

If we are checking the features of these models, we have to admit that the Polish Statute on the Constitutional Tribunal adopted a centralized and mixed system of judicial review. The Polish Constitutional Tribunal was conceived as the single judicial organ vested with the power to review and to determine the constitutionality of normative acts. Constitutional proceedings could be initiated either through petition (an "abstract" review) or through inquiry by a regular court ("concrete" review). In 1997, the right of individual complaint has been introduced into the Polish system by the constitutional provisions.[38]

To sum up, the argument that the Polish system imitated in theory the Austrian model, cannot be rejected. The problem is not in discrepancies of these two models, if we compare their original versions. The basis for the criticism of the Polish reforms by the European Union institutions is not just the departure of the Polish reformers from the classic Austrian (or a Kelsenian)[39] model of review. The "departure" means the factual (not structural changes) which resulted in the politicization of this highest judicial institution in Poland. This "hidden" politicization – wrote former Justice Miroslaw Granat about the changes in functioning of the Constitutional Tribunal – "deeply affected the external position of the Tribunal as well as its effectiveness."[40]

4. "Centralized and Unified" German Model. Unclear Separation of Judiciary from Executive Agencies

The participation of the Polish Ministry of Justice in disciplinary actions against the Polish judges pretends to duplicate also the German so-called "centralized and unified" model. Although the authors of this article have to admit that the recent discussions of the excessive politicization of the German judiciary are more and more fervent recognition of this fact should rather discourage than encourage the Polish decision makers from making references to German legal traditions.[41]

---

[37] *Ibidem*, p. 100.

[38] Konstytucja Rzeczypospolitej Polskiej [The Constitution of the Republic of Poland] Apr. 2, 1997, Dz. U. 78.483, art. 79.

[39] For the comments on a Kelsenian model of review, adopted originally in Austria: M. Granat, K. Granat, *The Constitution of Poland. A Contextual Analysis*, Hart Publishing, Oxford 2019, pp. 131–157. The evaluation of the structures and reforms of the Constitutional Tribunal has been subject of their detailed analyzes in the quoted book. See also: M. de Visser, *Constitutional Review in Europe – A Comparative Analysis*, Hart Publishing, Oxford 2014, p. 142.

[40] M. Granat, K. Granat, *op. cit.*, s. 157.

[41] M. Koschyk, *How independent are German judges?*, Deutche Welle, 5.08.2017, https://www.dw.com/en/how-independent-are-german-judges/a-39980017 [accessed: 11.12.2021].

The German judiciary is selected by the Minister of Justice who acts in cooperation with Nominating Committees at both federal and land levels.[42] The Federal Committee consists of the competent Land Ministers[43] and equal number of members elected by the Bundestag. The judges are appointed permanently,[44] and they are dismissed, suspended or retired before the expiration of their term only by virtue of a judicial decision on the grounds provided by law. The legislation may set up a retirement age.[45] The federal judges serve during good behavior and may be impeached by the two-thirds majority of the Federal Constitutional Court upon the request of the Bundestag, for official or unofficial violations of the Basic Law or the constitutional order.[46]

The Basic Law is supposed to separate legislative, executive and judicial functions. It means that, in principle, executive agencies cannot exercise judicial functions or individuals working for the executive cannot serve as judges. Still, as German experts claim, the role of the Minister of Justice in the process of selection of judges creates opportunity for foreign commentators, such as the Polish lawyers, to compare this arrangement with the drafts of their own reforms. Maximiliane Koschyk noted that "The issue of Poland's judicial reforms has raised the question of judicial independence in Germany. Here it is a cornerstone of the rule of law. But where is the concept anchored and what are its limits?".[47]

Jens Gnisa, the chair of the German Association of Judges, admitted that the party-political control of judicial placement, although rarely criticized in Germany might, in Polish circumstances, "enable the ruling nationalist party to deeply influence Poland's judiciary and direct courts according to the own wishes.» Commenting on this statement, one of the German experts, V. Wagener observed: "Even in Germany, respected around the world for its adherence to the rule

[42] Grundgesetz für die Bundesrepublik Deutschland [Grundgesetz] [GG] [Basic Law], May 23, 1949, BGBl.I, art. 95.2.

[43] "The Länder ministries form part of the respective Land's government. Every Land government has an environmental department. The environment ministers represent their Land in the Conference of German Environment Ministers, the Umweltministerkonferenz (UMK)"; *Federal and Länder Authorities*, https://www.bmu.de/en/ministry/federal-and-laender-authorities [accessed: 11.12.2021].

[44] The exception is the tenure of 12 years of the judges of the Constitutional Tribunal in Germany based on Part I **§ 4** of Bundesverfassungsgerichts-Gesetz [Federal Constitutional Court Act], 12 March 1951, Federal Law Gazette I, p. 1473.

[45] *Ibidem*, art 97: "(1) Judges shall be independent and subject only to the law. (2) Judges appointed permanently to positions as their primary occupation may be involuntarily dismissed, permanently or temporarily suspended, transferred or retired before the expiry of their term of office only by virtue of judicial decision and only for the reasons and in the manner specified by the laws. The legislature may set age limits for the retirement of judges appointed for life. In the event of changes in the structure of courts or in their districts, judges may be transferred to another court or removed from office, provided they retain their full salary".

[46] *Ibidem*, art 98.2.

[47] M. Koschyk, *op. cit*.

of law, the judiciary›s independence has come under scrutiny in the last several years. Jurisprudence has been accused of being politics by other means."[48]

Let's note, however, that what for the critics of the German judiciary mean by "politics", for the defenders of this model mean "representation of the public interest."

For many commentators (including the authors of this article) this response is highly unsatisfactory. Without a consensus on what public interest means, the above observation becomes meaningless. It brings us to the conclusion that the comparison of the Polish reforms to the German system, would only confirm that a politization of the judiciary may be a common problem for both countries, but it, by no means, justifies the Poland's conscious violations of the concept of the "rule of law" in the European Union.

5. The National Council for the Judiciary in Poland and its role as a constitutional body obliged to stand up for the independence of the courts and judges – the comparative perspective

"For democracy and the rule of law to function and flourish, – wrote Fryderyk Zoll and Leah Wortham – important actors in the justice system need sufficient independence from politicians in power to act under rule of law rather than political pressure. The court system must offer a place where government action can be reviewed, challenged, and, when necessary, limited to protect constitutional and legal bounds, safeguard internationally-recognized human rights, and prevent departures from a fair and impartial system of law enforcement and dispute resolution. Courts also should offer a place where government officials can be held accountable."[49]

Although the list of the minimum standards necessary to establish a well-organized judicial system is long, nobody has any doubts that the effective model of judicial selections and appointments is the main precondition of this process. As the ENCJ (European Networks of Councils for the Judiciary) Executive Board reiterates:

> […] the mechanism for appointing judicial members of a Council must be a system which excludes any executive or legislative interference and the election of judges should be solely by their peers and be on the basis of a wide representation of the relevant sectors of the judiciary.[50]

---

[48] V. Wagener, *How does Germany choose its judges? Always the best pick?*, Deutche Welle, 27.09.2019, https://www.dw.com/en/how-does-germany-choose-its-judges-always-the-best-pick/a-39846970 [accessed: 11.12.2021].

[49] F. Zoll, L. Wortham, *op. cit.*, p. 876.

[50] European Network of Councils for the Judiciary (ENCJ) is the organization, originally established in Rome in 2004, set up to unite the national judicial institutions in the Member States of the European Union. For the evaluation of the Polish system see: *Opinion of the ENCJ Executive Board on the adoption of the amendments to the law on the Krajowa Rada Sądownictwa of Po-*

With regard to Poland, the commentators confirmed that originally the Polish National Council of Judiciary (Krajowa Rada Sądownictwa – KRS) has moved toward Northern European model (used by Sweden, Denmark and Ireland), which vests responsibility for judicial appointments, control of administration of the courts and accountability of judges in the Council which is an organ of a self-government of judiciary. In the Southern European model (as used in Italy, France, Bulgaria), the councils are basically advisory organs to the Ministers of Justice who have almost full appointing authority.[51]

Checking the provisions of the Polish Constitution, we may find out, that the judges are appointed by the President for an indefinite period[52] on the motion of the National Council of Judiciary, which as we pointed out above, is supposed to safeguard the independence of the courts and judiciary.[53] The judges are irremovable through the regular administrative decisions. They can be removed or suspended from office or moved to another branch or position only on the basis of the court decision. The way in which they can be retired was to be specified by law.[54]

The judges are guaranteed judicial immunity; they cannot "without prior consent granted by a court be held criminally responsible nor deprived of freedom". The Constitution requires that the judges will be politically neutral and will not belong to a political party or trade union or perform public activities incompatible with the principles of independence. The judges are guaranteed appropriate conditions of work and remuneration consistent with the dignity of their office and the scope of their duties.

The provisions of the Polish Constitution, summarized above, seemed to meet the basic standards of judicial independence. The scope of activity and procedures for work of the National Council of the Judiciary, and especially the system of choosing its members, were, however, to be specified by statute.

---

land, at 2, https://encj.eu/images/stories/pdf/Members/krs_pl_opinion_encj_eb_5_dec_2017.pdf [accessed: 11.12.2021].

[51] For more comments see: W. Voermans, *Councils for the Judiciary in Europe: Trends and Models*, [in:] F.F. Segado (ed.), *The Spanish Constitution in the European Constitutional Context*, Dickinson, Madrid 2003, pp. 2133–2144.

[52] For more comments see: S. Doran, J. Jackson, *The Judicial Role in Criminal Proceedings*, Hart Publishing, Oxford 2000, p. 125.

[53] The current system, the scope of action and the procedure of operation of the Council are defined by Konstytucja Rzeczypospolitej Polskiej [Constitution] Apr. 2, 1997, Dz. U. 78.483, art. 186(1) together with Ustawa z dnia 12 maja 2011 r. o Krajowej Radzie Sądownictwa [Act of 12 May 2011 on the National Council for the Judiciary], Dz. U. 126.714 and Uchwała 158/2019 Krajowej Rady Sądownictwa z dnia 24 stycznia 2019 r. w sprawie Regulaminu Krajowej Rady Sądownictwa [Resolution of the National Council for the Judiciary of 24 January 2019 concerning the Rules of Procedure of the National Council Judiciary], M.P. 192.

[54] Konstytucja Rzeczypospolitej Polskiej [Constitution] Apr. 2, 1997, Dz. U. 78.483, art. 178-181.

This provision paved the way for the adoption of the new Poland Act on the National Council of the Judiciary. The works on the new Act started after the electoral victory of PiS and soon the new government began drafting the Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland.[55] Summarizing the most controversial provisions of the Draft, the commentators stressed that the mandates of 15 judges of the National Council of Judiciary, should be terminated 30 days after the entry into force the Draft Act. In fact, the Draft Act was adopted by the Sejm on 12 July 2017 and by the Senate on 15 July 2017.

In accordance with the Act, the National Council of the Judiciary was to be composed of 25 members: a representative of the President of Poland, the Minister of Justice, six members of parliament elected by this organ to serve four-year terms, the First President of the Supreme Court of Poland, the First President of the Supreme Administrative Court of Poland, and 15 judges elected *en masse* by the "organ of judicial self-government" to four-year terms.

On December 20, 2017, the European Commission, after thorough analysis of the Draft Act concluded that the Polish government plans to "interfere significantly" with the judiciary and it moved to impose "unprecedented disciplinary measures against Poland".[56] After the statement of the Commission, which was commented in all over Europe, the President of Poland, backed off from his initial plan of referring the Draft Act back to the Sejm, and signed it without any further delay.

As we commented above, the Act introduced the mandatory retirement age for the Justices of the Supreme Court. It also provided for establishment of the new Disciplinary Chamber of the Court to deal with disciplinary cases against Supreme Court judges and other legal professionals. The selection of the new judges of the Supreme Court was to be almost entirely controlled by the executive. "Overall, the degree of executive interference in appointments to the Supreme Court, including to its highest positions of First President and Presidents of Chambers – concluded the OSCE (Organization for Security and Co-operation in Europe) in the Final Opinion – presents a threat to the

[55] OSCE/ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland (the 2011 Act on the National Council of the Judiciary (hereinafter "the 2011 Act"). (based on an unofficial English translation of the Draft Act commissioned by the OSCE Office for Democratic Institutions and Human Rights), JUD-POL/305/2017-Final [AlC/YM], 5.05.2017, https://www.osce.org/odihr/315946?download=true [accessed: 11.12.2021]; *Chronology: Poland clashes with EU over judicial reforms, rule of law*, Reuters, 4.07.2018, https://www.reuters.com/article/us-eu-poland-chronology-idUSKBN1JU25U [accessed: 11.12.2021].

[56] *European Commission triggers Article 7 against Poland*, Deutsche Welle, 20.12.2017, https://www.dw.com/en/european-commission-triggers-article-7-against-poland/a-41873962 [accessed: 11.12.2021]. See also: *Poland judiciary reforms: EU takes disciplinary measures*, BBC News, 20.12.2017, https://www.bbc.com/news/world-europe-42420150 [accessed: 11.12.2021].

independence of the judiciary in Poland, thereby undermining public confidence in the judiciary".[57]

The comments on the Amendments encouraged the ENCJ to visit Poland and recommend the suspension of National Council of Judiciary of Poland.[58] Following the growing criticism of the Act, the President of Poland's Supreme Court, Justice Małgorzata Gersdorf refused to retire accordingly to the new legislation. In the meantime, the term of the Constitutional Tribunal president Andrzej Rzeplinski expired, and President Duda appointed PiS-nominated judge Julia Przyłębska as the new chief.[59] Under the new presidency, the Constitutional Tribunal quickly confirmed the appointment of new justices who filled 5 existing vacancies.

The process of implementation of the reform of the National Council of Judiciary was equally fast. The PiS-dominated parliament approved the party's list of 15 candidates of the new Council.[60] The conflict over the appointment of the remaining members of the Council lasted longer. In accordance with Art 11 a. of Poland's Act on the National Council of Judiciary (of 12 May 2011 with amendments of 20 December 2019) Parliament was supposed to elect the additional members of the Council who collected supporting signatures of "the entities authorized to nominate candidates for a membership of the Council". The Act stated that "entities" are: "a group of at least: 1) 2 000 nationals of the Republic of Poland who are over 18 years of age, have full legal capacity and enjoy full public rights; 2) 25 judges, excluding retired judges."[61]

The reluctance of PiS to reveal the lists of "entities" supporting the new members of the National Council of Judiciary provoked a new round of Poland's clashes with the European Union. The conflicts between the European Union's institutions and Poland lasted already for several years, so the new exchange of mutual communications did not startle greatly the commentators. The problem with the enforcement of the rulings of the European Court of Justice remained,

---

[57] *Final Opinion (on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland*, JUD-POL/305/2017-Final [AlC/YM], sec 109, https://www.legislationline.org/download/id/7393/file/313_JUD_POL_30Aug2017_en.pdf [accessed: 11.12.2021].

[58] After the visit in Poland on 21 June 2018, the Board of ENCJ stated that "the KRS no longer fulfils the requirements for Membership of the ENCJ"; *ENCJ Board proposes to suspend the National Council of Judiciary (KRS) of Poland*, 2018, https://www.encj.eu/index.php/node/492 [accessed: 11.12.2021]. See also: *ENCJ Guide*, 2018, https://www.encj.eu/encj-guide [accessed: 11.12.2021].

[59] *Chronology: Poland clashes with EU over judicial reforms, rule of law*, Reuters, 4.07.2018, https://www.reuters.com/article/us-eu-poland-chronology-idUSKBN1JU25U [accessed: 11.12.2021].

[60] *Poland's PiS takes control of judicial watchdog*, Deutsche Welle, 6.03.2018, https://www.dw.com/en/polands-pis-takes-control-of-judicial-watchdog/a-42853145 [accessed: 11.12.2021].

[61] Ustawa z dnia 12 maja 2011 r. o Krajowej Radzie Sądownictwa [Act of 12 May 2011 on the National Council for the Judiciary], Dz. U. 126.714.

however, an inflamed legal problem. Ewa Siedlecka (investigating reporter writing to OKO press), in June 2019, concluding her observations on these new developments was asking the question of fundamental importance: "Who will execute the judgment of the Court of Justice of the European Union (CJEU)? Judges. Otherwise, they will not be European judges".[62]

Conclusions

The analysis provided in the presented article confirmed the opening thesis. The comparative arguments used to explain and support the judiciary reform introduced in Poland aimed to strengthen the ruling party's position and tried to impose the narration that all changes have been successfully used in other countries. The conducted verification of those arguments, based on the scientific explanation, shows that legal instruments and solutions implemented in other countries must be analyzed in the proper perspective, with deeper and broader understanding of the foreign legal orders' specifics.

The European Union's reaction to the Polish government's judicial reform reforms results from the specificity of the EU legal order. The fact, that the fundamental legal framework of this system is comprised of the treaties signed by the member states and the set of legal rules adopted by the EC/EU institutions themselves gives this entity (which formally is not a federation or a confederation) features of blended dualistic and monistic systems. This entity adopted a special multi-vector model of division of power in which some components limit and some increase the power of the entity as a whole. As an example, we can note a coexistence in the European system principle of subsidiarity and flexibility clause.[63] Most of the other rules related to the relationships between the EU and

[62] E. Siedlecka, *Kto wykona wyrok TSUE? Sędziowie. Inaczej nie będą sędziami europejskimi* [Who will execute the judgment of the CJEU? Judges. Otherwise they will not be European judges], OKO press, 10.06.2020, https://oko.press/siedlecka-kto-wykona-wyrok-tsue-sedziowie-inaczej-nie-beda-sedziami-europejskimi [accessed: 11.12.2021]. Much more extended analyses of the enforcement mechanisms in European Union (especially comments on Early Warning System (EWS) which allows national parliaments to review draft legislative acts of the European Union for their compatibility with the subsidiarity principle) the readers will find in: K. Granat, *The Principle of Subsidiarity and its Enforcement in the EU Legal Order. The Role of National Parliaments in the Early Warning System*, Hart Publishing, Oxford 2018.

[63] For more comments on „subsidiarity" (as a complementary act) see: R. Ludwikowski, *Subsydiarność i federalizm z perspektywy prezydentury Donalda Trumpa* [Subsidiarity and federalism from the perspective of Donald Trump's presidency], [w:] M. Skrodzka (ed.), *Subsudiarność – uwarunkowania, regulacje i praktyka* [Subsidiarity – conditions, regulations and practice], Warszawa 2020, p. 83-87. "Flexibility clause" (Art. 352 of the TFEU) states: "If action by the Union should prove necessary, within the framework of the policies defined in the Treaties, to attain one of the objectives set out in the Treaties, and the Treaties have not provided the necessary powers, the Council, acting unanimously on a proposal from the Commission and after obtaining the consent of the European Parliament, shall adopt the appropriate measures".

member states, we can find in the case law of the CJEU which explains the principles of supremacy of EU law, direct effect and direct applicability of this law.[64] In some of these rulings the CJEU, confirmed that "the (national) courts (must) give the rules of Community law […] precedence over the provisions of national law".[65] The statement such as this provoked some expectations that the CJEU will be more active, particularly in checking the human rights policy of the member states and rules concerning the independence of judiciary. In fact, however, the courts of some member states, did not recognize this statement for granted. For example, the Poland's Constitutional Court ruled on October 7th 2021 that some parts of EU treaties are incompatible with the Polish constitution which is the highest law in the country.

As we noted in the article, the European Commission triggered Article 7 of the Treaty against Poland. This Article could lead to sanctions and a suspension of the state's EU voting rights.[66] However, at the moment when we are submitting these conclusions, the circle is still locked. The hundreds of pro-EU demonstrations in Polish cities on October 10, 2021 may encourage the Polish judges of the regular courts to take the risk of disciplinary sanctions and rebel against the government. Still the final questions whether it will resolve the Polish "Gordian Knot" and whether the Polexit is the most realistic solution[67] remain unanswered.

References

Laws

Konstytucja Rzeczypospolitej Polskiej [The Constitution of the Republic of Poland] Apr. 2, 1997, Dz. U. 78.483.

Constitution of the United States of America.

Staatsgrundgesetz [The Federal Constitutional Law] of 1920 as amended in 1929, Law No. 153/2004.

Treaty on the European Union, Feb. 7, 1992, 1992 O.J. (C191) 1.

[64] For the review of the CJEU's Landmark Rulings Regarding the Supremacy of EU Law, see: S. Dorani, *The Supremacy of EU Law over National Law: The ECJ's Perspectives*, The Political Reflection Magazine, 19.01.2020, https://politicalreflectionmagazine.com/2020/01/19/the-supremacy-of-eu-law-over-national-law-the-ecjs-perspectives [accessed: 11.12.2021].

[65] Case C – 36/75 Roland Rutili v Ministre de I'interieur, 1975 ECLI:EU:C:1975:137. For more comments on Rutili see: A. Tizzano, *The Role of the ECJ in the Protection of Fundamental Rights*, [in:] A. Arnull et al. (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs*, Oxford University Press, Oxford 2008, pp. 125–138.

[66] S. Fleming, J. Shotter, *Brussels warns Poland to comply with EU ruling s or face fines*, Financial Times, 20.07.2021, https://www.ft.com/content/9591a832-681b-41a0-aa54-572bbe5b60dd [accessed: 11.12.2021]. See also note 48 supra.

[67] See J. Henley, J. Rankin, *Polish court rules EU laws incompatible with its constitution.,* The Guardian, 07.11. 2021, https://www.theguardian.com/world/2021/oct/07/polish-court-rules-that-eu-laws-incompatible-with-its-constitution [accessed: 11.12.2021].

Treaty on the Functioning of the European Union, Sept. 5, 2008, 2008 O.J. (C 115) 47.
Bundesverfassungsgerichts-Gesetz [Federal Constitutional Court Act], 12 March 1951, Federal Law Gazette I, p. 1473.
Ustawa z dnia 19 listopada 2015 r. o zmianie ustawy o Trybunale Konstytucyjnym [Act of 19 November 2015 amending the Act on the Constitutional Tribunal], Dz. U. 1928.
Ustawa z dnia 22 grudnia 2015 r. o zmianie ustawy o Trybunale Konstytucyjnym [Act of 22 December 2015 amending the Act on the Constitutional Tribunal] Dz. U. 2217.
Ustawa z dnia 28 stycznia 2016 r. Prawo o prokuraturze [Act of 28 January 2016 on the Law on Prosecutor's Office], Dz. U. 177.
Ustawa z dnia 22 lipca 2016 r. o Trybunale Konstytucyjnym [Act of 22 July 2016 on the Constitutional Tribunal] Dz. U. 1157.
Ustawa z dnia 12 maja 2011 r. o Krajowej Radzie Sądownictwa [Act of 12 May 2011 on the National Council for the Judiciary], Dz. U. 126.714.
Uchwała 158/2019 Krajowej Rady Sądownictwa z dnia 24 stycznia 2019 r. w sprawie Regulaminu Krajowej Rady Sądownictwa [Resolution of the National Council for the Judiciary of 24 January 2019 concerning the Rules of Procedure of the National Council Judiciary], M.P. 192.

Judgments

Trybunał Konstytucyjny [Constitutional Tribunal] Dec. 3, 2015, K 34/15.
Trybunał Konstytucyjny [Constitutional Tribunal] Dec. 9, 2015 K 35/15.
Trybunał Konstytucyjny [Constitutional Tribunal] Mar. 9, 2016, K 47/16.
Case C – 36/75 Roland Rutili v Ministre de I'interieur, 1975 ECLI:EU:C:1975:137.

EU documents

Proposal of the European Commission for a „Council Decision on the determination of a clear risk of a serious breach by the Republic of Poland of the rule of law", 2017, COM/2017/0835 final – 2017/0360 (NLE).
Opinion of the ENCJ Executive Board on the adoption of the amendments to the law on the Krajowa Rada Sądownictwa of Poland, at 2, https://encj.eu/images/stories/pdf/Members/krs_pl_opinion_encj_eb_5_dec_2017.pdf [accessed: 11.12.2021].

Books and articles

Arnull A. et al. (eds.), *Continuity and Change in EU Law: Essays in Honour of Sir Francis Jacobs*, Oxford University Press, Oxford 2008.
Bogdanowicz P., Schmidt M., *The infringement procedure in the rule of law crisis: How to make effective use of Article 258 TFEU*, 55, "Common Market Law Review" 2018, vol. 55, no. 4.
Delmas-Marty M., Spencer J.R. (eds.), *European Criminal Procedures*, Cambridge University Press, Cambridge 2002.
Doran S., Jackson J., *The Judicial Role in Criminal Proceedings*, Hart Publishing, Oxford 2000.
Elliott C., Vernon C., Jeanpierre E., *French Legal System*, Pearson–Longman, Prentice Hall 2006.
Granat K., *The Principle of Subsidiarity and its Enforcement in the EU Legal Order. The Role of National Parliaments in the Early Warning System*, Oxford, Hart Publishing 2018.

Granat M., Granat K., *The Constitution of Poland. A Contextual Analysis*, Hart Publishing, Oxford 2019.

Hodgson J., *French Criminal Justice: A Comparative Account of the Investigation and Prosecution of Crime in France*, Hart Publishing, Oxford 2005.

Jakab A., Dyevre A., Itzcovich G. (eds.), *Comparative Constitutional Reasoning*, Cambridge University Press, Cambridge 2017.

Kochenov D., Pech L., *Monitoring and Enforcement of the Rule of Law in the EU: Rhetoric and Reality*, "European Constitutional Law Review" 2015, vol. 11 (3).

Kułak K., *Kwestia niezależności prokuratora w nowej ustawie – Prawo o prokuraturze* [The Issue of the Prosecutor's Autonomy in the New Act – Law on the Prosecutor's Office], "Studia Iuridica Lublinensia" 2016, vol. 25 (105).

Kustra A., *Poland's Constitutional Crisis. From Court-Packing Agenda to Denial of Constitutional Court's Judgments*, "Studi Polacco-Italliani di Toruń" 2016, vol. XII.

Kustra-Rogatka A., *The Polish Constitutional Court and Political "Revolution" after 1989: Between the Continuity and Discontinuity of the Constitutional Narrative*, "Wroclaw Review of Law, Administration and Economics" 2016, vol. 6.

Ludwikowski R., *Judicial Review in the Socialist Legal System: Current Developments*, "The International and Comparative Law Quarterly" 1988, vol. 37, no 1.

Pech L., Scheppele K.L., *Illiberalism within: rule of law backsliding in the EU*, "Cambridge Yearbook of European Legal Studies" 2017, vol. 19.

Segado F.F. (ed.), *The Spanish Constitution in the European Constitutional Context*, Dickinson, Madrid 2003.

Skrodzka M. (ed.), *Subsydiarność – uwarunkowania, regulacje i praktyka* [Subsidiarity – conditions, regulations and practice], C.H. Beck, Warszawa 2020.

Śledzińska-Simon A., *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform reversing Democratic Transition*, "German Law Journal" 2018, vol. 16.

Visser M. de, *Constitutional Review in Europe – A Comparative Analysis*, Hart Publishing, Oxford 2014.

Zoll F., Wortham L., *Judicial Independence and Accountability: Withstanding Political Stress in Poland*, "Fordham International Law Journal" 2019, vol. 42.

Internet sources

Candlelight protest against changes to Poland's judiciary, EURACTIV, 24.07.2017, https://www.euractiv.com/section/freedom-of-thought/news/candlelight-protest-against-changes-to-polands-judiciary [accessed: 11.12.2021].

Chronology: Poland clashes with EU over judicial reforms, rule of law, Reuters, 4.07.2018, https://www.reuters.com/article/us-eu-poland-chronology-idUSKBN1JU25U [accessed: 11.12.2021].

The Constitutional Role of the Judiciary in Poland Has Been Completely Undermined, The Helsinki Foundation, https://www.hfhr.pl/en/the-constitutional-role-of-the-judiciary-in-poland-has-been-completely-undermined [accessed: 11.12.2021].

Dorani S., *The Supremacy of EU Law over National Law: The ECJ's Perspectives*, The Political Reflection Magazine, 19.01.2020, https://politicalreflectionmagazine.com/2020/01/19/the-supremacy-of-eu-law-over-national-law-the-ecjs-perspectives [accessed: 11.12.2021].

ENCJ Board proposes to suspend the National Council of Judiciary (KRS) of Poland, 2018, https://www.encj.eu/index.php/node/492 [accessed: 11.12.2021].

ENCJ Guide, 2018, https://www.encj.eu/encj-guide [accessed: 11.12.2021].

European Commission triggers Article 7 against Poland, Deutsche Welle, 20.12.2017, https://www.dw.com/en/european-commission-triggers-article-7-against-poland/a-41873962 [accessed: 11.12.2021].

Eyre M., Allosp J., *Poland is Purging Its Prosecutors*, Foreign Policy, 11.10.2019, https://foreignpolicy.com/2019/10/11/poland-is-purging-its-prosecutors [accessed: 11.12.2021].

Federal and Länder Authorities, Federal Ministry for the Environment, Nature Conservation, Nuclear Safety and Consumer Protection, 2021, https://www.bmu.de/en/ministry/federal-and-laender-authorities [accessed: 11.12.2021].

Final Opinion (on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland, JUD-POL/305/2017-Final [AlC/YM], sec 109, https://www.legislationline.org/download/id/7393/file/313_JUD_POL_30Aug2017_en.pdf [accessed: 11.12.2021].

Fleming S., Shotter J., *Brussels warns Poland to comply with EU ruling s or face fines*, Financial Times, 20.07.2021, https://www.ft.com/content/9591a832-681b-41a0-aa54-572bbe5b60dd [accessed: 11.12.2021].

Hamilton D., *Milosevic's trial and Selective justice*, Global Policy, 9.04.2001, https://archive.globalpolicy.org/wldcourt/tribunal/2001/0409chom.htm [accessed: 11.12.2021].

Henley J., Rankin J., *Polish court rules EU laws incompatible with its constitution*, The Guardian, 7.11.2021, https://www.theguardian.com/world/2021/oct/07/polish-court-rules-that-eu-laws-incompatible-with-its-constitution [accessed: 11.12.2021].

History of the Constitutional Court: Overview, https://www.vfgh.gv.at/verfassungsgerichtshof/geschichte/history_overview.en.html [accessed: 11.12.2021].

The Judicial System in Poland, District Court in Warsaw, Biuletyn Informacji Publicznej Sądu Okręgowego w Warszawie, http://bip.warszawa.so.gov.pl/artykuly/436/the-judicial-system-in-poland [accessed: 11.12.2021].

Kelemen R.D., *Poland's Constitutional Crisis. How the Law and Justice Party is Threatening Democracy*, Foreign Affairs, 25.08.2016, https://www.foreignaffairs.com/articles/poland/2016-08-25/polands-constitutional-crisis [accessed: 11.12.2021].

Koper A., Kelly L., *Protests in Poland condemn controversial judicial reforms*, Reuters, 16.07.2017, https://www.reuters.com/article/us-poland-politics-protests-idUSKBN1A10S3 [accessed: 11.12.2021].

Koschyk M., *How independent are German judges?*, Deutche Welle, 5.08.2017, https://www.dw.com/en/how-independent-are-german-judges/a-39980017 [accessed: 11.12.2021].

Laurent Pech Twitter, https://twitter.com/ProfPech/status/1205776422809276416 [accessed: 11.12.2021].

Lemnitzer J., *Nuremberg war crimes trials 70 years on: a complex legacy*, The Conversation, 20.11.2015, http://theconversation.com/nuremberg-war-crimes-trials-70-years-on-a-complex-legacy-50503 [accessed: 11.12.2021].

Lyman R., *In Poland, an Assault on the Courts Provokes Outrage*, The New York Times, 19.07.2017, https://www.nytimes.com/2017/07/19/world/europe/poland-courts-law-and-justice-party.html [accessed: 11.12.2021].

Ministry of Justice Twitter, 31.01.2017, https://twitter.com/MS_GOV_PL/status/826380467679195137 [accessed: 11.12.2021].

Murphy P.P., *Protests grow as Polish president considers judicial bill*, CNN, 23.07.2017, https://edition.cnn.com/2017/07/21/europe/poland-judicial-bill-pass-upper-house/index.html [accessed: 11.12.2021].

OSCE/ODIHR Final Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland (the 2011 Act on the National Council of the Judiciary (hereinafter "the 2011 Act"). (based on an unofficial English translation of the Draft Act commissioned by the OSCE Office for Democratic Institutions and Human Rights), JUD-POL/305/2017-Final [AlC/YM], 5.05.2017, https://www.osce.org/odihr/315946?download=true [accessed: 11.12.2021].

Pech L., Kelemen R.D., *If you think the U.S. is having a constitutional crisis, you should see what is happening in Poland*, The Washington Post, 25.01.2020, https://www.washingtonpost.com/politics/2020/01/25/if-you-think-us-is-having-constitutional-crisis-you-should-see-what-is-happening-poland [accessed: 11.12.2021].

Poland judiciary reforms: EU takes disciplinary measures, BBC News, 20.12.2017, https://www.bbc.com/news/world-europe-42420150 [accessed: 11.12.2021].

Poland's PiS takes control of judicial watchdog, Deutsche Welle, 6.03.2018, https://www.dw.com/en/polands-pis-takes-control-of-judicial-watchdog/a-42853145 [accessed: 11.12.2021].

Protests sweep Poland over law to control judiciary, FRANCE24, 23.07.2017, https://www.france24.com/en/20170723-protests-poland-law-control-judiciary-walesa-kaczynski [accessed: 11.12.2021].

Santora M., *Polish Crisis Deepens as Judges Condemn Their Own Court*, The New Your Times, 5.07.2018, https://www.nytimes.com/2018/07/05/world/europe/poland-court-crisis-constitutional-tribunal.html [accessed: 11.12.2021].

Siedlecka E., *Kto wykona wyrok TSUE? Sędziowie. Inaczej nie będą sędziami europejskimi* [Who will execute the judgment of the CJEU? Judges. Otherwise they will not be European judges], OKO press, 10.06.2020, https://oko.press/siedlecka-kto-wykona-wyrok-tsue-sedziowie-inaczej-nie-beda-sedziami-europejskimi [accessed: 11.12.2021].

Sobczak K., *Polski system dyscyplinarny wobec sędziów sprzeczny z prawem UE* [Polish disciplinary system against judges contrary to EU law], Prawo.pl, 15.07.2021, https://www.prawo.pl/prawnicy-sady/izba-dyscyplinarna-nie-jest-sadem-wyrok-tsue,509466.html (Pl) [accessed: 11.12.2021].

Sytuacja wokół TK analogiczna do austriackiej z 1933 r.? Co wtedy faktycznie się stało [Situation around CT analogous to the Austrian one from 1933? What actually happened then], TVN24, 13.05.2016, https://tvn24.pl/polska/sytuacja-wokol-tk-analogiczna-do-austriackiej-z-1933-r-co-wtedy-faktycznie-sie-stalo-ra643300 [accessed: 11.12.2021].

'There will be no Polexit': Kaczynski says Poland's future is in EU, Euronews with AP, AFP, 15.09.2021, https://www.euronews.com/2021/09/15/there-will-be-no-polexit-kaczynski-says-poland-s-future-is-in-eu [accessed: 11.12.2021].

Wagener V., *How does Germany choose its judges? Always the best pick?*, Deutche Welle, 27.09.2019, https://www.dw.com/en/how-does-germany-choose-its-judges-always-the-best-pick/a-39846970 [accessed: 11.12.2021].

Zbigniew Ziobro – wystąpienie z 18 lipca 2017 r. [Zbigniew Ziobro – speech of July 18, 2017], https://www.youtube.com/watch?v=9iS9x-A5Mnw (Pl) [accessed: 11.12.2021].

Comparative Arguments in the Legal Debate Over Judiciary Reform in Poland

The judiciary reform in Poland started in 2015 with the replacement of judges in the Polish Constitutional Tribunal, the court responsible for the judicial review. It continued with amendments of laws addressed to judges and functioning of the Polish Supreme Court. Controversies over the reform reached the international level and triggered reactions from the European institutions and resulted in judgments of the Court of Justice. The article deals with comparative arguments (examples from the United States, Austria, France or Germany) concerning the extensive judiciary reform that have been presented by its authors throughout the debates and as response to criticism.
Key words: judiciary reform, Constitutional Tribunal, Supreme Court, Poland, comparative arguments

Argumenty porównawcze w prawniczej debacie nad reformą sądownictwa w Polsce

Reforma sądownictwa w Polsce rozpoczęła się w 2015 roku od wymiany sędziów w polskim Trybunale Konstytucyjnym, sądzie odpowiedzialnym za kontrolę konstytucyjności prawa. Reforma była kontynuowana poprzez zmiany ustaw dotyczących sędziów i sposobu funkcjonowania polskiego Sądu Najwyższego. Kontrowersje wokół reformy osiągnęły poziom międzynarodowy i wywołały reakcje instytucji europejskich oraz zaowocowały wyrokami Trybunału Sprawiedliwości. W artykule omówiono argumenty porównawcze (przykłady ze Stanów Zjednoczonych, Austrii, Francji czy Niemiec) dotyczące szeroko zakrojonej reformy sądownictwa, które były przedstawiane przez jej autorów w toku debat i jako odpowiedź na krytykę.
Słowa kluczowe: reforma sądownictwa, Trybunał Konstytucyjny, Sąd Najwyższy, Polska, argumenty porównawcze