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Rule of law in Poland 2020:

HOW TO CONTAIN THE CRISIS AND REFORM THE JUSTICE SYSTEM?

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LIST OF ABBREVIATIONS:

CEPEJ – European Commission for the Efficiency of Justice
CJEU – Court of Justice of the European Union
CT – Constitutional Tribunal
ECHR – European Convention on Human Rights
NCJ – National Council of the Judiciary
SC – Supreme Court

EXECUTIVE SUMMARY

- The crisis in the rule of law that Poland has witnessed since 2015 must be contained as soon as possible. Any proposal to restore the rule of law must follow certain principles such as legality, proportionality and respect for fundamental rights. It is also important to gather public support around such a plan, and make sure that it does not simply assume a return to *status quo ante*.
- It is essential to correctly identify the breaches of the rule of law in order for any successful plan to contain the crisis. In order to focus on genuine violations, we propose our own definition, and catalogue the breaches.
- Some civil society organisations and elements of the opposition have already presented their plans to restore the rule of law. It is important that such documents are created and debated as it will allow us to build better, definitive plans when the window of opportunity opens. However, despite having correctly identified the key breaches, their plans sometimes lack clarity, and need to be updated in order to respond to the recent developments; or they require improvements to respect the right to court of those affected by these plans, including the individuals appointed to judicial posts following questionable nominating procedures.
- As the Constitutional Tribunal has the power to issue universally binding decisions which usually follow the ruling majority's views, it is important that any plans to contain the crisis deal with this issue first.
- All these breaches, because of the Constitutional Tribunal, should be referred to international courts, such as the Court of Justice or the European Court of Human Rights. In some fields, cases which relate to the violations of the rule of law are already pending. The judgements of international courts may thus facilitate the whole process of restoring the rule of law in Poland.
- While the ruling party's policies have led to many violations of the rule of law, they have also failed to respond to various challenges that existed in the justice system before 2015.
- Apart from restoring the rule of law, the justice system has to be reformed. National and international measures show that performance of judiciary has been deteriorating since the 'reforms' by Law and Justice started. For example, the average length of judicial proceedings is even greater, and the substantial public resources that have been devoted to the justice system are still being spent in an inefficient way.

1. INTRODUCTION

The detrimental changes that have been implemented in Poland's justice system since late 2015, collectively referred to as 'the rule of law crisis', are well identified and documented both domestically and internationally[1]. The set of deliberate actions which the ruling Law and Justice party has taken resulted in the gradual takeover of judicial institutions, including the Constitutional Tribunal (2016), the National Council of the Judiciary (2018), and more recently, a large part of the Supreme Court (2019–2020). Taken together, these legal changes and practices undermine judicial independence, an essential component of the rule of law intended to safeguard other core principles, such as separation of powers, equality before the law, fair trial, legal certainty, and preventing the arbitrariness of the executive[2].

Such violations of the rule of law cannot be tolerated in a democratic society. On the one hand, they create a major risk to human rights and democracy, resulting in a gradual erosion of the rights and freedoms of individuals and their ability to legally prevent the establishment of a *de facto* one-party state. On the other, respect for the rule of law is a precondition for any of the genuine institutional reform, particularly in the judiciary, that is so expected by Polish society. For this reason, it is essential to contain the crisis immediately as soon as favourable conditions arise.

However, it will not be an easy task to restore the rule of law, either legally or practically. Merely repealing all the legal changes introduced deliberately to undermine the rule of law will not be sufficient, as it may unintentionally create further risks to that principle. Moreover, the institutions already captured by the ruling majority may react to attempts to undermine their status, for example, by declaring new laws unconstitutional or creating more and more undesirable case law. It would be also problematic to rewrite the constitution and establish new institutions from scratch, since that requires a qualified majority of two-thirds of the votes in the lower house of the parliament (*Sejm*) and the approval of the upper chamber (the Senate); in some cases, a referendum must also be held to approve any constitutional amendments. Furthermore, it would also seem contrary to the rule of law not to guarantee sufficient judicial protection and an opportunity to challenge new rules for the individuals who benefited from the crisis, such as appointees nominated to courts by the current NCJ.

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1 See W. Sadurski, *Poland's Constitutional Breakdown,* Oxford 2019; European Commission, 'Proposal 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', COM(2017) 835 final, 20 December 2017; 'Parliamentary Assembly of the Council of Europe', 6 January 2020, Report 15025 (2020), The functioning of democratic institutions in Poland; European Parliament, 'European Parliament resolution of 17 September 2020 on the proposal 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' (COM(2017)0835 – 2017/0360R(NLE)), P9_TA(2020)0225.

2 For a more detailed catalogue of principles of the rule of law, see 'European Commission for Democracy Through Law (Venice Commission)', *Rule of Law Checklist,* Study No 711/2013, 18 March 2016, CDL-AD(2016)007.

Apart from procedural issues, time also plays a crucial role when it comes to restoring the rule of law. This is because the longer the captured institutions operate and contaminate the legal system from within, the more convenient it will be to leave these changes *as they are* for the sake of legal certainty. Trying to invalidate hundreds of irregular judicial nominations (and their rulings) years after they took place could be detrimental to individuals looking for the legal protection of their interests, while unaware of the fact that their cases had been dealt with by dubiously constituted courts.

It is therefore essential that the restoration of the rule of law follows certain principles in order to avoid any reasonable doubts as to the real purpose of this process. Among other things, these include:

— legality: any measure intended to overcome the crisis must be in line with the constitution and Poland's international commitments, including obligations stemming from EU law and the ECHR;

— respect for fundamental rights: it is not permitted to treat the restoration of the rule of law as a means to retaliate against the ruling majority and those who benefited from the crisis; they must be given the opportunity to challenge the measures that affect them before independent courts;

— proportionality: each step taken to overcome the crisis must be limited to what is necessary to achieve the objectives of the whole process; as a result, the content and form of the action must be in keeping with the aim pursued;

— no return to the *status quo ante*: restoring the rule of law does not mean merely returning to previous laws and practices; institutions require constant improvement, especially as the deficiencies in the organisation and functioning of the justice system were clearly identified well before the crisis;

— social approval: unless the citizens understand the seriousness of the crisis and its impact on their rights and freedoms and democracy, it will be difficult to obtain their approval for the plan; it is therefore essential to consult plans not only with key stakeholders, but also with other groups involved, and to tweak them as needed.

Polish civil society organisations and the opposition have prepared several plans to contain the crisis. They concern the NCJ in its current composition and its nominating activity, and the situation in the SC and CT, among other matters. However, due to constant changes in the state of play, it is not easy to keep up with them and recommend correctly tailored actions. Moreover, some of them do not entirely fulfil the principles mentioned above, and must be amended so they can be treated as useful proposals to restore the rule of law.

The main aim of this report is to assess those plans from the point of view of how to successfully restore the rule of law. To do this, we firstly set out criteria to identify the breaches and apply them to the laws and practices that have been implemented since late 2015. Then, we present the plans and check whether they meet the said principles and provide

a solid basis to resolve the crisis. Restoring the rule of law will be a complex process, which will have to be associated with the reform of the justice system. In the second part of this report, we discuss some of the national and international measures which demonstrate that the performance of the judiciary has been deteriorating since the 'reforms' made by the Law and Justice party. We also indicate key areas where reforms are needed in the future.

This report concludes the series about the rule of law crisis in Poland published by the Civil Development Forum (FOR) in 2020. In the first part we presented the detrimental changes in the justice system pursued by the ruling majority since late 2015 from a domestic and comparative perspective[3]. Part 2 was devoted to international and European responses to the on-going crisis[4]. In Part 3 we described how the COVID-19 pandemic negatively affected the situation and posed new risks to the rule of law[5].

This and other reports, as well as the Rule of Law in Poland project[6], are based on our belief that the rule of law in Poland and other EU member states is important not only for the citizens of these countries, but also for the future of the European project as a club of countries with high-quality democratic institutions safeguarding human rights.

3 M. Tatała, E. Rutynowska, P. Wachowiec, *Rule of Law in Poland 2020: A Diagnosis of the Deterioration of the Rule of Law From a Comparative Perspective,* Warsaw 2020, https://for.org.pl/en/publications/for-reports/rule-of-law-in-poland-2020-a-diagnosis-of-the-deterioration-of-the-rule-of-law-from-a-comparative-perspective.

4 P. Wachowiec, E. Rutynowska, M. Tatała, *Rule of Law in Poland 2020: International and European responses to the crisis,* Warsaw 2020, https://for.org.pl/en/publications/for-reports/rule-of-law-in-poland-2020-international-and-european-responses-to-the-crisis.

5 E. Rutynowska, M. Tatała, P. Wachowiec, *Rule of law in Poland 2020: The rule of law crisis in the time of the COVID-19 pandemic,* Warsaw 2020, https://for.org.pl/en/publications/for-reports/rule-of-law-in-poland-2020-the-rule-of-law-crisis-in-the-time-of-the-covid-19-pandemic.

6 The Rule of Law in Poland project: https://ruleoflaw.pl/.

2. IDENTIFYING THE BREACHES OF THE RULE OF LAW

Despite years of research on the expectations and attitudes of Polish society towards courts and law in general, little has been published about the violations of the rule of law themselves. Scholars tend to focus on the description and assessment of specific cases, but they tacitly assume that the violations merely took place, setting aside more in-depth analysis of the substance of those breaches. In other words, they take it for granted that, for instance, changes to the CT violate the rule of law in general, while not explaining to the public what this infringement actually consists of, or how it affects the principles of the rule of law.

This approach is, on the one hand, understandable as it is not a question of any particular measure adopted by the ruling majority that amounts to a threat to the rule of law. It is more about a specific pattern and a set of deliberate, sometimes even minor actions that have changed the state of play. However, on the other hand, in order to successfully contain the crisis, it must be at least possible to indicate particular actions which taken together could be treated as a breach of the rule of law. The lack of clear definition allows the ruling party to trivialise the problem ('Look at France or Catalonia, where police attacks peaceful protests') or muddy the waters ('Where are all those political prisoners you expected to see?'), and as a result to negatively affect the plan to restore the rule of law. Therefore, correctly identifying the breaches (using accurate terminology) can facilitate the whole process, and make it more helpful and understandable to the citizens.

In order to fill this gap, to grasp the nature of the activities that lead to the crisis, and to precisely indicate issues subject to the restoration, it is important to present a clear definition of a breach of the rule of law. Each violation has certain motivations behind it, and results in a certain change in the state's institutional framework. Pursuant to this assumption, for this report we have adopted the following definition: a breach of the rule of law is a deliberate and unlawful act by a public agent aimed at establishing or deepening an enduring institutional dysfunction which threatens human rights and democracy, and will be extremely difficult to reverse using contemporary domestic legal measures.

Each part of this description requires further clarification. Firstly, a violation must be unlawful in the sense that it threatens or infringes a legal interest, regardless of its source (domestic or international law), and whether it is codified or unwritten. Such interests include independence of the judiciary and the sound administration of justice. In this respect, one must consider that some actions that seem to breach the rule of law are within the margin of discretion of the legislature or other state authorities. It is therefore important to distinguish permitted actions from forbidden ones.

Secondly, a breach of the rule of law can only be made by the public authorities. In contrast, private actors can ultimately face legal responsibility, so they cannot as such commit a violation.

Thirdly, by unlawful 'act', we mean both actions and omissions, regardless of whether they are single or continuous.

Fourthly, as a result of the public agent's act 'an enduring institutional dysfunction' must emerge or deepen. To avoid tautology, we have adopted a more detailed approach. Each component of the rule of law, such as equality before the law or access to justice, is, in general, a feature of a state's institutional framework. A threat to any of them creates instability between the state authorities and results in weaker constraints that were not intended by the constitution's makers. In other words, as a consequence of the mentioned action or omission, a constitutional system of government comes to operate – for a relatively long time – in an atypical way, not in line with the constitutional arrangements and objectively not as it was originally projected. For example, because President Duda refused to take the oath from three judges of the CT elected by the *Sejm* who were legally allowed to do so, there are permanent doubts as the CT's composition and the binding force of its rulings. This goes against how the constitution was supposed to operate regarding the CT.

Fifthly, an institutional dysfunction must threaten human rights and democracy. In this respect it is not necessary for specific abuses to actually happen; an abstract threat to these values alone may give rise to reasonable doubts in the minds of the citizens as to how well their rights and freedoms, and democracy in general, are being defended.

Sixthly, in order to describe a particular behaviour as a breach of the rule of law, it must be extremely difficult to reverse using contemporary domestic legal measures. This is because the more serious the violation, the more complicated the legal measures it requires to restore the previous state will be. Public authorities that commit breaches of the rule of law, within our meaning, usually search for some 'anchor points' in the constitution to justify their actions[7]. For example, they try to convince the public that their actions or omissions have created irreversible legal effects because of the presumption of legality, such as the early termination of the previous NCJ's term of office, which was not challenged before domestic courts or the CT. Now it would be much difficult to legally reinstate the former members of the NCJ without solid legal grounds.

Our reservation concerning 'contemporary domestic legal measures' in the context of difficulties with restoring the rule of law stems from the assumption that the public authorities must act in a way that builds trust among society. It is important that the citizens believe that state bodies act in a reasonable and just manner, and do not intend to violate or circumvent the law. In other words, an action or omission is a breach

7 J. Zajadło, a law professor from the University of Gdańsk, describes this kind of justification as a *constitution-hostile interpretation*; see J. Zajadło, *Wykładnia wroga wobec Konstytucji,* Przegląd Konstytucyjny, nr 1 (2018), http://www.przeglad.konstytucyjny.law.uj.edu.pl/article/view/100.

of the rule of law where one needs to employ a piece of 'legal acrobatics' to reverse it.

Our definition, apart from its complexity and more theoretical approach, allows us to focus on genuine breaches of the rule of law. As a consequence, it may facilitate plans to restore the rule of law and stimulate the debate about the very issues that must be subject to restoration.

Under this definition, the election of five CT judges by the current opposition in 2015, including two judges pursuant to unconstitutional legal basis, was not a violation of the rule of law as the lawfully constituted CT decided in its judgement of 3 December 2015. This breach was not permanent and was easy to reverse. Moreover, according to the definition used in this report, issues such as an excessive backlog of cases, which negatively affects the length of judicial proceedings, and changes in the Public Prosecutor's Office should not be treated as breaches of the rule of law either. Despite their detrimental effect on the right to court, they can be managed by a set of tailored statutory amendments. Reform to these areas will of course require a complex plan, but the main obstacle, in this respect, is merely a lack of political will to change the status quo. It is relatively easy to get rid of them from the point of view of the legislative procedure. Obviously, actions aimed at restoring the rule of law themselves will not become breaches as long as they are conducted in the proper way.

Having presented examples of actions that do not constitute breaches of the rule of law, and taking our narrower concept into account, we have identified the following priorities among the violations of the rule of law in Poland:

1) the Constitutional Tribunal:

- the refusal of the President of the Republic to take the oath from the three CT judges elected by the 7th *Sejm*,
- the election of three individuals by the 8th *Sejm* to judicial posts already occupied by the CT judges elected by the previous *Sejm*,
- the President of the Republic taking the oath from three individuals elected by the 8th *Sejm* the night before the CT's decision on the legal basis of the election of three CT judges by the 7th *Sejm*,
- the creation of the post of interim President of the CT, pursuant to a law adopted with no *vacatio legis* provided; and the appointment to that post of a CT judge in order to bypass the active Vice-President of the CT,
- the appointment of the President and Vice-President of the CT from among individuals elected to judicial posts already occupied, following a procedure involving those individuals,
- the arbitrary assignment of cases by the President of the CT, including individuals elected to judicial posts already occupied, and with an intention to deliver rulings in line with the governing party's views,

- multiple secret meetings between the President and Vice-President of the CT and members of the ruling majority,
- changes in laws regulating the CT with the intention of producing immediate legal effects and avoiding constitutional review;

2) the National Council of the Judiciary:

- early termination of mandates of judicial members of the previous NCJ and the election of their successors by the *Sejm* and not by their peers,
- judicial nominations by the NCJ composed of judges appointed by the *Sejm*;

3) the Supreme Court:

- establishing the Disciplinary Chamber as a summary court within the meaning of the constitution,
- the appointment of the First President of the Supreme Court by the President of the Republic from among individuals nominated by the NCJ,
- lowering the retirement age of active judges of the SC with the intention to remove a significant number of them.

The breaches of the rule of law presented here, which threaten the right to court, have removed effective constitutional review and the judicial protection of individuals. Moreover, as a consequence, they have led to thousands of questionable rulings in Poland's legal system issued by courts which may not fulfil guarantees of independence and establishment in accordance with law. These actions also relate to the judicial mandate, as they make them dependent on political authorities or bodies strongly connected with politicians.

What is more, they are not reparable using contemporary legal measures, as they can be challenged any time before the CT, or they concern judicial guarantees such as irremovability and the principle of legal certainty.

3. CURRENT PLANS TO CONTAIN THE CRISIS

As mentioned above, more than five years after the election of individuals for the CT to already-occupied judicial posts, several plans to restore the rule of law have been proposed. Apart from the difficulties concerning the wording of the legislative proposals to contain the crisis, a more serious obstacle is the responsiveness of the ruling majority and the frequent changes in the state of play which require constant amendments to these plans. That is why only a limited number of proposals have so far been made public.

Two plans require more comprehensive assessment. The first one comes from the Batory Foundation and its group of legal experts, who in 2019 presented a book entitled *How to restore the rule of law?* and its proposals concerning the CT, the NCJ and the SC[8]. The second plan has been developed by the upper chamber of the parliament. When the opposition took control over the Senate in 2019, it presented a legislative initiative concerning the NCJ and the Disciplinary Chamber following the Court of Justice's judgement in the case *A.K. and Others*[9] of November 2019 on the status of these bodies[10]. This proposal was extensively consulted with the stakeholders before the COVID-19 pandemic, but it is still at the early stages of the legislative procedure.

3a. The Constitutional Tribunal

In our opinion it is essential to deal with the situation in the CT first, since the operation of this body allows the ruling majority to reach their political goals through universally-binding CT case-law. The Batory Foundation's plan consists of three parts concerning the composition of the CT, the status of rulings issued by individuals appointed to already-occupied judicial posts, and disciplinary proceedings against CT members.

The plan suggested by Marcin Matczak and Tomasz Zalasiński is based on Article 190(4) of the Constitution, pursuant to which 'A judgement of the CT on the non-conformity to the Constitution, an international agreement or statute, of a normative act on the basis of which a legally effective judgement of a court, a final administrative decision or settlement of other matters was issued, shall be a basis for reopening proceedings, or for quashing the decision or other settlement in a manner and on principles specified in provisions applicable to the given pro-

8 See *How to restore the rule of law?*, T. Zalasiński (ed.), Warsaw 2019, https://www.batory.org.pl/wp-content/uploads/2020/02/Jak-przywrocic-panstwo-prawa_Interaktywna.pdf.

9 Judgement of the CJEU of 19 November 2019, *A.K. and Others (Independence of the Disciplinary Chamber of the Supreme Court),* joined cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982.

10 'Projekt ustawy o zmianie ustawy o Krajowej Radze sądownictwa oraz niektórych innych ustaw', *Senat* Paper no. 50, https://www.senat.gov.pl/prace/proces-legislacyjny-w-senacie/inicjatywy-ustawodawcze/inicjatywa,101.html.

ceedings.' In their opinion, since the CT confirmed in its judgement of 3 December 2015 that the previous *Sejm* had legally elected the three CT judges, the resolutions of the following term of the *Sejm* in which it elected three individuals to already-occupied judicial posts can be regarded as 'settlements of other matters' and quashed by the parliament, as a result of which the legally-elected judges would be allowed to join the CT and adjudicate.

As far as the validity of rulings issued by the CT is concerned, the Batory Foundation recommends reopening the proceedings pursuant to the Code of Civil Procedure (applied *mutatis mutandis* to proceedings before the CT) while limiting these actions, for the sake of legal certainty, only to those verdicts issued by the CT composed of individuals lacking judicial prerogatives.

Regarding a disciplinary regime for CT judges, the Batory Foundation suggests amending these proceedings to include retired CT judges. According to Matczak and Zasasiński, this would allow the functioning of the President and Vice-President of the CT and their questionable appointments to be assessed objectively.

3b. The National Council of the Judiciary

The breaches of the rule of law concerning the NCJ consist of two major issues: the appointment of 15 judicial members by the *Sejm* and the early termination of the previous members' mandates, and its involvement in the nominating procedures and the status of the individuals appointed to courts following those nominations.

As far as the NCJ's composition is concerned, both the plans mentioned refer to the previous manner of appointing judicial members of the NCJ exclusively by their peers. Both plans also recommend that the tenure of 15 judicial members of the council be terminated prematurely, as they were elected in a manner not permitted by the constitution. In a discussion within the Batory Foundation, it was also suggested that in order to ensure the 'continuity' of the former NCJ's operation, their previous members (whose mandates had been prematurely terminated by the ruling majority) should be reinstated and serve out their remaining terms of office (for periods ranging from a couple of days to two years).

Regarding the judicial nominations made by the current NCJ, the question is more problematic. The Senate proposes that the pending judicial nominations should be halted and re-assessed by a correctly constituted NCJ. As far as the already occupied judicial posts are concerned, the Senate assumes that those individuals have been appointed under a gross violation of the constitution and EU law, which renders their status dubious. In this respect, the Senate suggests that acting as a judge nominated by the NCJ in its current composition amounts to a disciplinary offence and should result in disciplinary proceedings, under which a court would be obliged to issue only one decision, i.e. removal from office, unless the individual resigns within a month of this proposal coming into legal force.

As for the rulings issued by the individuals nominated by the NCJ, the Senate recommends that their legal significance be recognised. However, it proposes that parties to the proceedings would be able to challenge them within one year merely because they were rendered by a body that did not fulfil the guarantees for effective judicial protection.

3c. The Supreme Court

Plans concerning the SC have been partially covered by the recommendations mentioned, insofar as they relate to the status of individuals nominated by the NCJ in its current composition or the judgements issued by courts composed of such individuals.

Moreover, when it comes to the early retirement of SC judges, including its former First President, the ruling majority complied with an interim order issued by the Court of Justice in late 2018[11] (confirmed in a judgement of June 2019[12]) and reinstated them a few weeks later. As a result, this breach of the rule of law has already been contained.

Nevertheless, we have identified two other violations, namely the establishment of the Disciplinary Chamber and the appointment of the new First President of the SC from among individuals appointed by the NCJ. The plans mentioned above address only the first matter.

As far as the Disciplinary Chamber is concerned, one may recall that its operation was provisionally suspended by the CJEU in April 2020[13]. However, the interim measure related only to disciplinary proceedings against judges; this chamber and the public prosecutors interpreted this to mean that it is allowed to lift judicial immunities for any criminal prosecution which results in the suspension of a judge performing his or her official duties. Although the order of the CJEU provisionally halted disciplinary proceedings, it must be emphasised that a final judgement of the Luxembourg court would be purely declaratory, and it would be up to the legislature to amend the law and get rid of the Disciplinary Chamber. Should the ruling majority not comply with the judgement of the CJEU, the Disciplinary Chamber would still be able to operate fully, including holding disciplinary proceedings against non-compliant judges.

In this respect both plans entail the complete removal of the Disciplinary Chamber, granting jurisdiction in disciplinary matters (as previously) to the Criminal Chamber of the SC and assigning cases concerning judicial status to the Labour and Social Security Chamber of that court. Both the Batory Foundation and the Senate assume that regardless of the nominating procedures, the very establishment of the Disciplinary

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11 See the order of the Vice-President of the CJEU of 19 October 2018, *Commission v Poland (Independence of the Supreme Court),* C-619/18 R, EU:C:2018:852 and order of the CJEU of 17 December 2018, *Commission v Poland (Independence of the Supreme Court),* C-619/18 R, EU:C:2018:1021.

12 Judgement of the CJEU of 24 June 2019, *Commission v Poland (Independence of the Supreme Court),* C-619/18, EU:C:2019:531.

13 Order of the CJEU of 8 April 2020, *Commission v Poland (Disciplinary regime for judges),* C-791/19 R, EU:C:2020:277.

Chamber as a special 'court within the court' is in violation of the constitution, which only allows such bodies to be created during martial law. It is expected that the Court of Justice will share this reasoning and rule that this body does not constitute a 'court' within the meaning of EU law.

However, future recommendations will have to be updated, for example due to the recent developments concerning the appointment of the First President of the SC in May 2020.

3d. Restoring the rule of law: assessment and recommendations

Restoring the rule of law is not an easy task. The breaches mentioned relate to various top judicial bodies, and overlap each other in several areas. One cannot repair the Supreme Court without addressing the issue of the flawed judicial nominations to the current NCJ. In order to change how the NCJ operates, it is essential to prevent the CT from rubber-stamping the ruling majority's political will.

The two major plans we have discussed, while useful and inspiring initiatives, have to be updated and improved in the future. Not only should they follow the recent developments in the justice system, such as the appointment of the new First President of the SC, but it is also important that they take a more general approach and deal with key issues such as the status of the individuals nominated by the NCJ and the rulings handed down by these nominees.

Because each new law adopted by the ruling majority benefits from the presumption of constitutionality, and the CT has been fully under political control since late 2016, it is vital to implement a plan dealing with the situation in the CT first. Since this body can issue universally binding rulings, as Poland's most powerful court, we suggest referring this issue to international tribunals such as the CJEU or the European Court of Human Rights. Both EU law and the ECHR, like the Polish constitution, require courts to be independent and always established by law. Obtaining a ruling that the CT lacks independence or has been constituted in violation with domestic and international law would provide more arguments against it. At this moment there is one such case pending before the Strasburg court, namely *Xero Flor w Polsce sp. z o.o. v. Poland* (application no. 4907/18). However, due to the nature of the European Court of Human Rights' rulings, we would recommend referring the issue also to the CJEU. As we suggested in one of our previous reports[14], the European Commission should consider infringement proceedings against the Polish government concerning the CT. This issue could also be raised by any court under the preliminary reference procedure. All in all, the CT is a body that applies EU law, and it must therefore fulfil the criteria for independence and establishment by law stemming from the treaties.

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14 P. Wachowiec, E. Rutynowska, M. Tatała, *supra* note 4.

On the other hand, international courts should be employed to deal with other crucial matters, i.e. the status of the individuals nominated by the current NCJ and their rulings. In this respect there are many cases both before the Luxembourg and Strasbourg courts which could shed more light on these issues. As long as the CT is still fully operative, we suggest sticking to international measures, which can be very helpful in containing the crisis.

Unfortunately, the plans mentioned do not entirely accord with the principles of successful rule-of-law decontamination set out in the first chapter. The Batory Foundation's proposal regarding the CT is based on rather unclear constitutional provisions, and for that reason some scholars have criticised it. At the same time, the Senate's plan to remove the individuals nominated by the current NCJ, while being proportional and legitimate, may disrespect the right to court and the principle of irremovability by obliging a disciplinary court to remove those recommended by the NCJ unless they decide to resign. In our opinion, any plan to restore the rule of law must provide for effective judicial remedies for each individual it concerns regarding whether they benefited from unlawful actions. Apart from the international measures we have suggested, we recommend a case-by-case approach rather than one of collective responsibility.

The recommendations can be summarised as follows:

— It is important to refer to international tribunals, such as the Court of Justice or the European Court of Human Rights, to obtain judgements regarding the Constitutional Tribunal, the status of individuals nominated by the National Council of the Judiciary in its current composition, and the rulings issued by courts composed of such individuals.

— The question of the Constitutional Tribunal must be addressed first, in order to prevent the legal system from contamination by a powerful body which is able to issue universally binding decisions. Apart from the Strasbourg court, infringement procedures or preliminary reference questions concerning its status should be referred to the Court of Justice.

— Each plan intended to contain the crisis must precisely identify the breaches of the rule of law, and focus on genuine violations that generate threats to human rights and democracy.

— In the process of restoring the rule of law, domestic institutions should use the know-how and recommendations of international institutions specialising in this topic, such as the Venice Commission and its legal opinions.

— Proposals to restore the rule of law should be in line with domestic and international law and proportional in nature, and should also respect the fundamental rights of those affected by such plans. Moreover, it is vital that these proposals do not simply return the *status quo ante*, but provide further measures to improve each institution. It is of paramount importance that each plan gathers public support and is understandable to the various social groups involved.

4. REFORMING THE JUSTICE SYSTEM INSTEAD OF RETURNING TO THE *STATUS QUO ANTE*

As indicated earlier in this report, apart from restoring the rule of law the justice system should be reformed. This means not only implementing changes to the key judicial institutions like the CT, NCJ and SC, but also a general improvement of the performance of judiciary. The performance of the justice system does not only depend on the independence of courts, which is essential for existence of the rule of law. What matters for performance is also the efficiency of the courts and the quality of their judgements. More and more international comparisons of quality and efficiency are available, and some of these measures are presented in part 4b.

One of the outcomes that can be assessed is the length of trial. In an analytical framework presented by OECD in 2013, the authors report on "factors acting on the market for justice"[15]. In this model, the trial's length depends on procedural rules and legal traditions, as well as the supply of justice and the demand for justice.

The supply of justice means the number of cases resolved; this depends, for example, on financial and human resources, specialisation, caseflow management techniques, incentives and the governance of the courts. The demand for justice means the number of incoming cases; this is affected by external factors like socio-economic conditions and the business cycle, and by internal factors like the rules for case allocation, alternative mechanisms for dispute resolution, and the degree of the law's certainty.

This type of model is useful when considering the various interdependencies among the factors affecting judicial performance, and might also be applied to Poland, where the justice system should be reformed together with the restoration of the rule of law.

4a. The main areas where judicial reforms are needed

Law and Justice has labelled its policies as 'reforms to the justice system', but in fact no significant reform has taken place since they took power in 2015. Therefore, it will not be enough to restore the rule of law and reverse the violations committed by the ruling party as real judicial reforms are needed. It should be a priority for future decision-makers to prepare, together with experts, an in-depth diagnosis of the justice system's weaknesses and respond to these problems with a complex reform

15 G. Palumbo, G. Giupponi, L. Nunziata, J. S. Mora-Sanguinetti, 'Judicial Performance and its Determinants: A Cross-Country Perspective', *OECD Economic Policy Papers 2013*, No. 5, p. 12, http://www.oecd.org/economy/growth/FINAL%20Civil%20Justice%20Policy%20Paper.pdf.

package that should be associated with the process of reversing many of Law and Justice's policies affecting the courts. In this section we will indicate some of the key areas where reforms are needed.

In the first report of this series we explained that Law and Justice has used the justice system's deficiencies as an excuse for their 'reforms', which contributed to many violations of the rule of law and the capture of key judicial institutions, including the Constitutional Tribunal, the National Council of Judiciary and the Supreme Court[16]. Public trust in the courts has been relatively low for many years, and the excessive length of dispute resolution has often been identified as a key problem. The public's expectations regarding reform of the system have always been high, so it was easy for the ruling politicians to take advantage of this situation to promote their agenda of weakening judicial independence and politicising the courts[17].

Length of dispute resolution by courts

Although the problem of the excessive length of procedures and backlogs in courts has been emphasised for years, the ruling majority was unable to resolve this issue, and in fact proved to have other priorities. Moreover, the transparency of the system has deteriorated. Of course the extraordinary situation of COVID-19 affected the operations of courts in 2020, but there is no justified reason why the Ministry of Justice has not yet revealed data about court proceedings for the full year of 2019[18].

The year-to-year comparisons of the first quarter of 2019 and the first quarter of 2018 show that the situation has worsened in all types of courts[19]. The indicator of length of dispute resolution in all courts rose from 95.4 to 106.6 days; the largest growth was observed in the regional courts, from 144.8 to 172.9 days[20]. The deterioration was observed in the majority of types of cases in courts, including civil law cases (in district and regional courts; a slight improvement in appellate courts) and commercial disputes.

When analysed in a longer time perspective, we can see that in general the average court proceedings took longer in 2018, after the first 'reforms' by Law and Justice, than in 2015. While there was a small improvement in length of court cases in regional courts, the situation worsened at the level of district courts, as well as when all courts are considered. These negative trends in the justice system are confirmed by international comparisons (see part 4b).

16 M. Tatała, E. Rutynowska, P. Wachowiec, *supra* note 3.

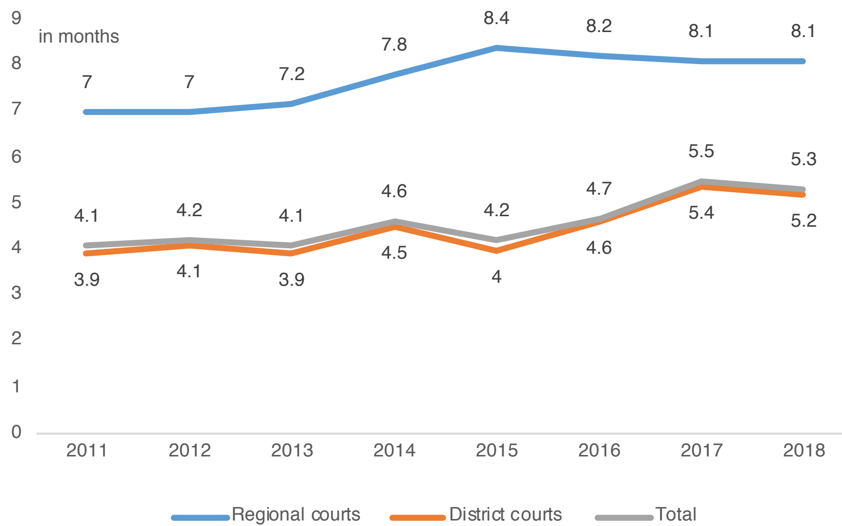
17 See Chapter 3 in M. Tatała, E. Rutynowska, P. Wachowiec, *supra* note 3.

18 The Ministry of Justice's database only shows data for Q1 2019, while full statistics for previous years from are available [visited on 17 December 2020].

19 All data come from the fact-checking website *Konkret24*, and are based on the Ministry of Justice's statistical database. See J. Kunert, 'Średni czas postępowań w sądach w pierwszej połowie 2019 roku wydłużył się', *Konkret24*, https://konkret24.tvn24.pl/polska,108/sredni-czas-postepowan-w-sadach-w-pierwszej-polowie-2019-roku-wydluzyl-sie,1031815.html.

20 Based on methodology by the European Commission for the Efficiency of Justice (CEPEJ).

FIG. 1: AVERAGE LENGTH OF COURT PROCEEDINGS IN MONTHS, SOURCE: KONKRET24, BASED ON THE MINISTRY OF JUSTICE'S DATABASE

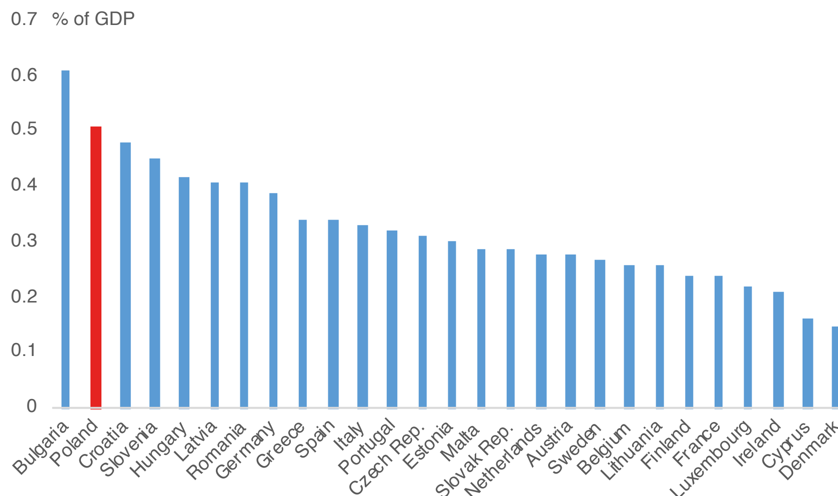


Poland has long been experiencing problems with court backlogs, and so far no solution has been offered by Law and Justice in their 'reform' packages. The excessive length of proceedings is often related to other problems identified by lawyers and experts from other fields.

Resources and their use

The delivery of justice requires various resources, both human (judges and the rest of the staff working in courts) and financial. With reference to the latter, it seems that Poland is already providing enough taxpayers' money to the system. Among EU states in 2018, only in Bulgaria were expenditures on law courts as a percentage of GDP higher than in Poland.

FIG. 2: GENERAL GOVERNMENT TOTAL EXPENDITURE ON LAW COURTS IN 2018 IN THE EU (AS A PERCENTAGE OF GDP), SOURCE: EUROSTAT



Therefore, the problem seems to be not how much is spent, but how efficiently the financial resources are used: in other words, using OECD methodology, how well the supply of justice is associated with the demand for justice. This problem should also be analysed from the perspective of local requirements, as there are significant differences between workload and efficiency among district and regional courts in various parts of Poland (see also the World Bank's research on the time needed to resolve commercial disputes in selected Polish cities, presented in part 4b). The biggest challenge is how to move resources, including judges, on a permanent or temporary basis, to adjust the local supply of justice to the local demand, without violating the independence of judges due to the arbitrary and politicised displacement of judges between courts.

A vast amount of expenditures on law courts is spent on human resources, i.e. judges and other staff essential for the operation of the courts, such as court administrators or assistants to the judges. International comparisons suggest that in general there is no problem with an inadequate number of judges. With 25.5 judges per 100,000 people Poland ranks 11th in the EU. This number is lower than in Slovenia (41.7) and Hungary (30.2), very similar to Germany (24.5) and much higher than Denmark (6.5) or Spain (11.5)[21]. Moreover, with already relatively high expenditures on courts and other existing needs, it would be impossible to devote even more resources to judges and their salaries.

By 'other needs', we mean for example judges' assistants who are important in the day-to-day delivery of justice. The number of these personnel seems inadequate, and falls far below one assistant per judge. Their relatively low salaries and their unclear career path discourages people from applying to become judges' assistants. Moreover, the Polish courts have growing problems with attracting staff to fill the other positions important for the operations of the justice system, especially in larger cities where salaries, work conditions and career perspectives are poor in comparison to the alternatives[22]. The distribution of financial resources requires an in-depth review; if some resources are demonstrated to be spent in an inefficient or useless way, then one of the priorities should be devoting more resources to staff supporting judges. Apart from financial motivations, working conditions, improvement in court management and clear career perspectives, this could serve as additional incentives to improve the human capital in courts.

Nevertheless, this situation should not lead to politicised decisions regarding the nominations and promotions of judges, as this would have a negative aspect on how human resources are used in courts. Since President Andrzej Duda and Law and Justice took power, vacant positions in the judiciary have become 'frozen'[23]. It seems clear that the rea-

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21 European Commission, *The 2020 EU Justice Scoreboard: Quantitative Data,* p.15, https://ec.europa.eu/info/sites/info/files/2020_eu_justice_scoreboard_quantitative_data_factsheet.pdf.

22 P. Szymaniak, *Brakuje chętnych do pracy w sądach. Mimo podwyżek* [No candidates for work in courts. Despite pay rises], Gazeta Prawna, https://prawo.gazetaprawna.pl/artykuly/1454587,praca-w-sadzie-zarobki-podwyzki-wakat.html.

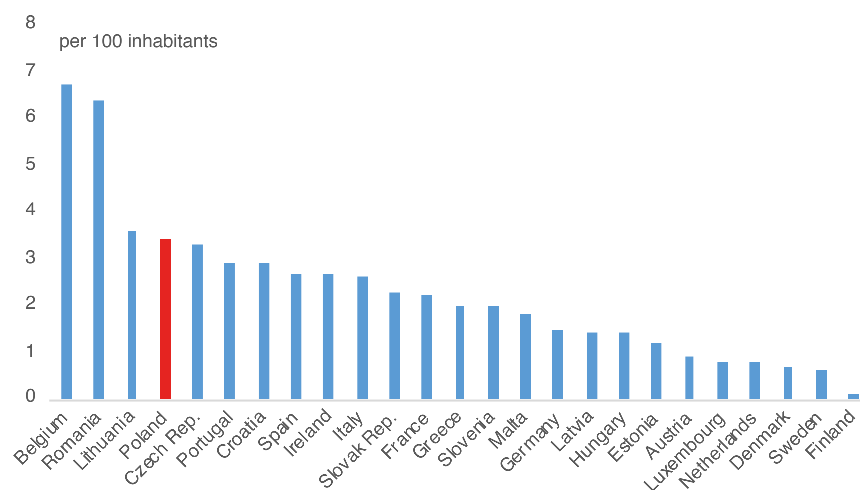
23 Commissioner for Human Rights, *MS „zamroziło" etaty sędziowskie – procesy przedłużają się* [The Ministry of Justice has „frozen" the vacant positions in courts – the court proceedings

son for the artificial stoppage of new nominations was the changes that were taking place in the judiciary, including the NCJ. Law and Justice wanted to ensure that their nominees had a majority on the NCJ before it resumed the nominations and promotions of judges. These vacancies have been presented by judges as one of the reasons why the length of proceedings in many types of cases has been rising since 2015.

The number of incoming cases

The burden on the courts related to the number of cases may also influence a trial's length. European comparisons show that the number of incoming cases per 100 inhabitants in Poland is relatively high. Poland is fourth in the EU, both in terms of civil, commercial and administrative cases in the first instance and in terms of litigious civil and commercial cases (Fig. 3).

FIG. 3: NUMBER OF INCOMING CIVIL AND COMMERCIAL LITIGIOUS CASES (IN THE FIRST INSTANCE, PER 100 INHABITANTS), SOURCE: EUROPEAN COMMISSION[24]



The national statistics show that in 2018 there were around 15 million incoming cases in all courts in total. While this number may look very high in comparison to less than 10,000 judges[25], we should remember that it includes all cases – from business and property registers run by the courts and many simple, non-litigious cases, to some very complex trials that take years to reach a verdict. This set in-cludes cases that re-

are longer], https://www.rpo.gov.pl/pl/content/ms-%E2%80%9Ezamrozilo%E2%80%9D-etaty-s%C4%99dziowskie-procesy-przed%C5%82uzaja-sie-kolejne-wyst%C4%85pienie-rpo-do-zbigniewa-ziobry.

24 No data for Bulgaria and Cyprus. Note on methodology from the EU Justice Scoreboard 2020: "Under the CEPEJ methodology, litigious civil/commercial cases concern disputes between parties, e.g. disputes about contracts. Non-litigious civil/commercial cases concern uncontested proceedings, e.g. uncontested payment orders. (...) Data for the Netherlands include non-litigious cases."

25 Demagog, *Ile spraw rocznie rozpoznają polscy sędziowie?* [How many cases are adjudicated in the courts?], https://demagog.org.pl/wypowiedzi/ile-spraw-rocznie-rozpoznaja-polscy-sedziowie/.

quire even more time and resources (to accelerate the final judgement), as well as incoming cases that might not end up in the courts.

The problem that has been indicated for years is the scope of a given court's jurisdiction in Poland. It might be possible to shift some cases from the justice system to public administration or other institutions, including public notaries, or (if constitutional conditions allow) to some quasi-judicial institutions such as 'justices of the peace'. Alternative methods for dispute resolutions, including arbitration (in private quasi-judicial bodies, e.g. for some commercial cases) and mediation, require further development and promotion. Finally, the rate of litigation is affected by local culture and socio-economic conditions. These might be difficult or impossible to change by legislation; however, what can be changed are incentives to go to courts. Therefore, a review of such incentives should be made, for example, when a ruling or court case is necessary due to some tax issues, or when an appeal, in cases where the values of the disputed claim are very low, is too simple.

Procedures and legislation

The rate of litigation and the number of incoming court cases also reflect the complexity and quality of the legal system. Even before COVID-19, judges, companies and individuals all had to deal with a growing number of legislative changes. In 2016 the highest number of pages of legal acts was passed in the parliament, and the rate of law production has been high for years[26]. The quality of the legislative procedures has been deteriorating under the Law and Justice government, and the speed of producing new status has accelerated[27]. One future priority should be the improvement of the legislative process; this will have a positive impact on the justice system as all parties using the courts and judges will be able to operate under a legal system which is simple and easier to comprehend. Moreover, simpler legal rules may minimise the conflicts that have to be dealt in the courts. Finally, one should also consider the penalisation of certain activities, e.g. situations in which there is no personal harm, such as the possession of some substances for personal use, or blasphemy laws. If some situations are decriminalised, then the courts will not be burdened by them.

Apart from a general improvement of law-making in Poland, the performance of the courts could also be enhanced by improving internal procedures in the justice system. This requires a simplification of the rules and a lower level of formalism. The ability to prolong trials due to 'procedural tricks' should be reviewed and eliminated. Digitalisation must be continued, so that all documents related to court cases can be submitted and accessed online. Moreover, online communication between the courts and parties, especially professional lawyers, should become the standard way of communication.

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26 Grant Thornton, *Barometr stabilności otoczenia prawnego w Polsce* [Barometer of stability of the legal system in Poland], https://barometrprawa.pl/

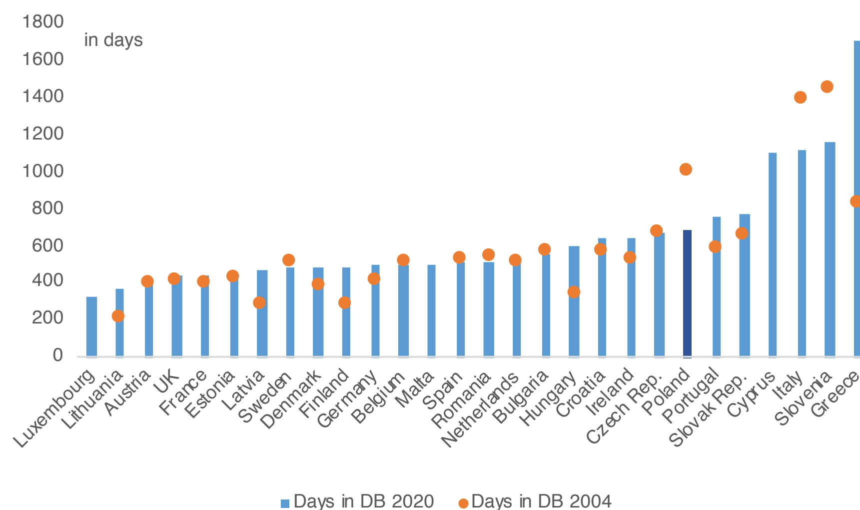
27 See Fig. 1 in E. Rutynowska, P. Wachowiec and M. Tatała, *supra* note 5.

These are just some of the areas where the justice system can be improved. If the restoration of the rule of law is accompanied by real reforms that improve the performance of the system, it will be easier to gain public support for changes and improve the level of public trust in the courts, which has been low for years and weakened still further during the 'reforms' of Law and Justice.

4b. International comparisons and the weaknesses of Polish justice system

The real challenges facing the judicial system in Poland are also visible from a comparative perspective[28]. One of the measures that is often shown in international comparisons is 'Enforcing Contracts', an indicator from the World Bank's *Doing Business* reports. Among many other things, this measures the time needed to resolve a commercial dispute in a specific court in a country (usually its capital city)[29]. This indicator does not cover courts alone, as it includes the average duration of the following stages of dispute resolution: (1) filing and service; (2) trial and judgement; and (3) enforcement. Nevertheless, it is often used as a proxy to assess the efficiency of courts in the field of business-related cases. As indicated in Fig. 4, the number of days needed to resolve a commercial dispute in Poland is still one the highest in the EU. While the improvement between the 2004 and 2013 editions of *Doing Business* reports was substantial, this measure has remained stable since 2013, and no improvement has been noticed due to Law and Justice's 'reforms' of the justice system.

FIG. 4: NUMBER OF DAYS NEEDED TO RESOLVE A COMMERCIAL DISPUTE (ENFORCING CONTRACTS INDICATOR); SOURCE: WORLD BANK

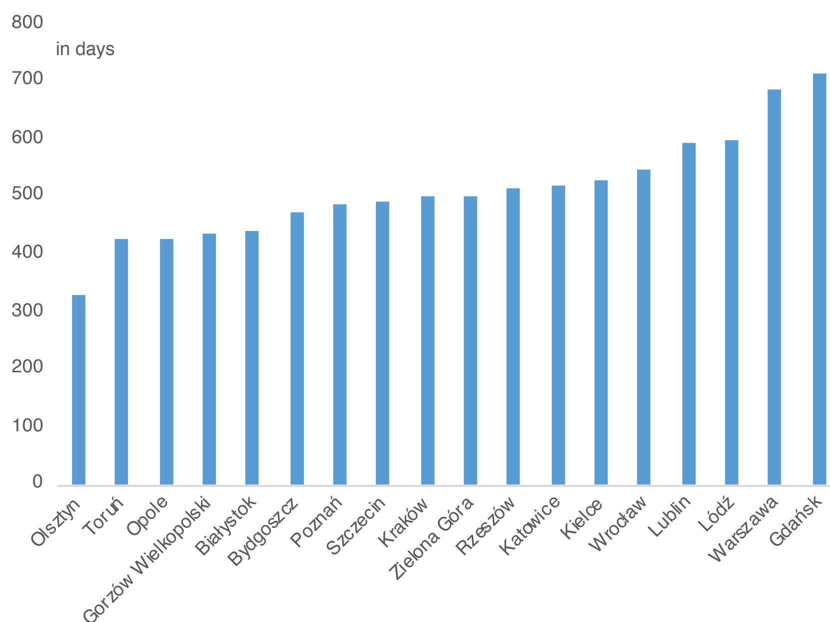


28 Some figures show data from the European Union countries and the UK; sometimes we will refer to this group as 'the European Union' for simplicity's sake.

29 World Bank, *Doing Business*, https://www.doingbusiness.org/en/data/exploretopics/enforcing-contracts.

While usually the *Doing Business* reports' data shows the regulatory burden for the capital cities (so Warsaw, in the case of Poland), in 2015 a subnational study on the ease of doing business in Poland was published. These results show huge discrepancies between 18 Polish cities. While Warsaw is at the top, together with some other larger cities such as Gdańsk and Łódź, there are places in Poland where the time needed to resolve a commercial dispute is similar to the top performing capital cities in the EU. On the one hand, this differentiation is linked to the level of business activity and the number of commercial entities registered in larger cities. On the other hand, it may signal problems with the allocation of resources, as suggested in part 4a; the Work Bank has emphasised the need to "ensure effective financial and human resource allocation within the courts"[30]. This problem has also not been covered by the 'reforms' implemented by the ruling majority in Poland.

FIG. 5: NUMBER OF DAYS NEEDED TO RESOLVE A COMMERCIAL DISPUTE (ENFORCING CONTRACTS INDICATOR) IN 18 CITIES OF POLAND; SOURCE: WORLD BANK



Another set of comparable data on the independence, quality, and efficiency of national justice systems is available in the EU *Justice Scoreboards* published by the European Commission[31]. In the first report in this series on the rule of law in Poland we presented selected indicators from the Scoreboards connected with judicial in-dependence[32]. In this chapter we will focus on the measures of efficiency shown by the EC, based mostly on what has been collected in the

30 World Bank, *Doing Business in Poland 2015: Comparing Business Regulations for Domestic Firms in 18 Cities with 188 Other Economies,* https://www.doingbusiness.org/content/dam/doingBusiness/media/Subnational-Reports/DB15-Poland.pdf.

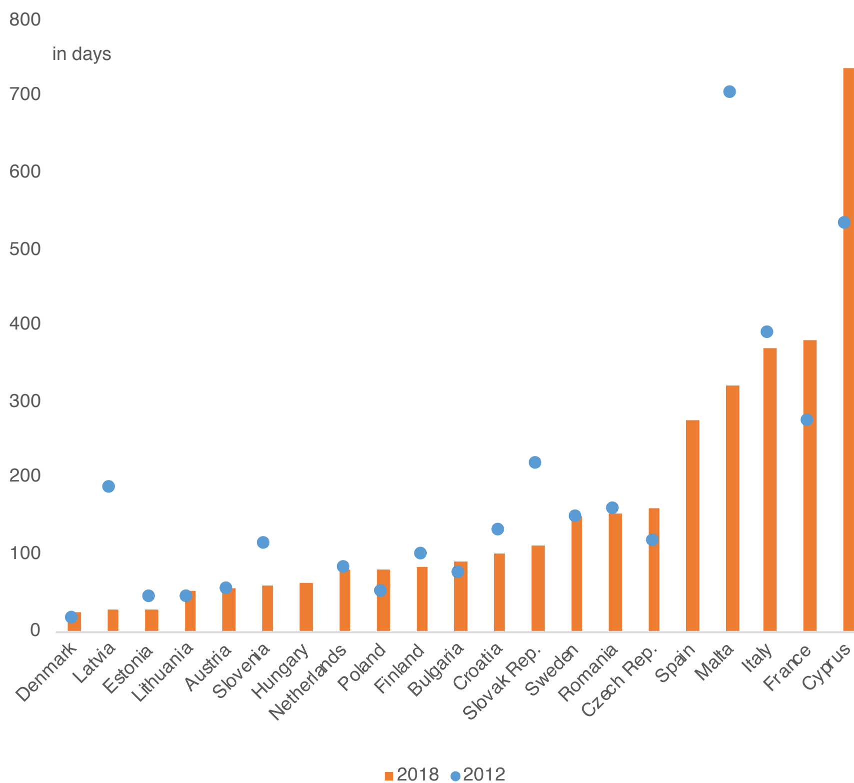
31 *EU Justice Scoreboard,* https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en.

32 M. Tatała, E. Rutynowska, P. Wachowiec, *supra* note 3.

reports of the European Commission for the Efficiency of Justice (CEPEJ)[33].

When we look at the estimated time needed to resolve almost all cases in first-instance courts (including non-litigious cases or business registry cases) the situation in Poland does not look too bad from a comparative perspective. The length of 82 days is much below the EU average of 163 days. Nevertheless, this measure has significantly worsened since 2012.

FIG. 6: ESTIMATED TIME NEEDED TO RESOLVE CIVIL, COMMERCIAL, ADMINISTRATIVE AND OTHER CASES IN 2012 AND 2018 (1ST INSTANCE/IN DAYS); SOURCE: EUROPEAN COMMISSION[34]

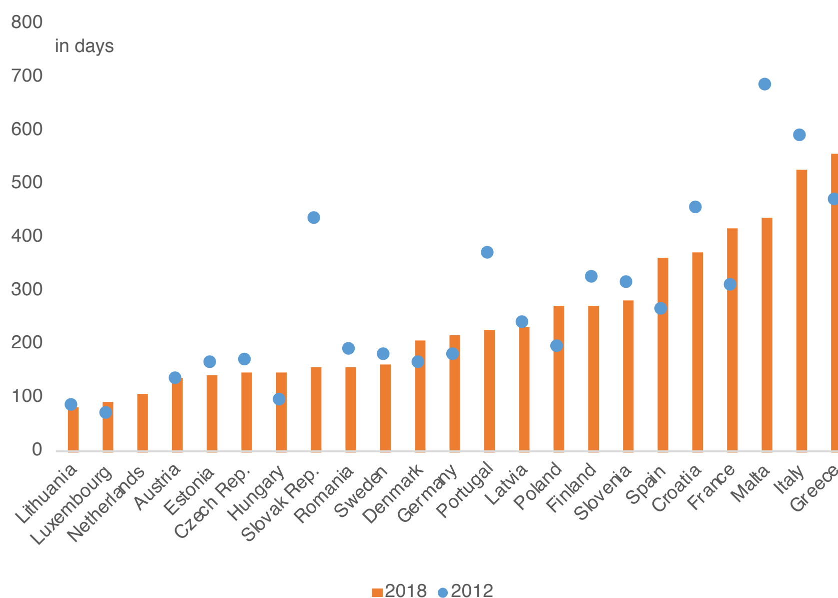


When we look at the estimated time needed to resolve litigious civil and commercial cases (i.e. cases concerning disputes between parties) in first-instance courts, the situation in Poland seems worse; at 273 days, the result is below the EU average of 250 days. As with all of these cases, this number was much higher in Poland in 2018 than in 2012.

33 Council of Europe European Commission for the Efficiency of Justice (CEPEJ), https://www.coe.int/en/web/cepej.

34 Note on methodology from the EU Justice Scoreboard 2020: "Methodology changes in Slovakia. Pending cases include all instances in Czech Republic and, until 2016, in Slovakia. In Latvia the sharp decrease is due to court system reform, as well as error checks and data clean-ups in the Court information system."

FIG. 7: ESTIMATED TIME NEEDED TO RESOLVE LITIGIOUS CIVIL AND COMMERCIAL CASES IN 2012 AND 2018 (FIRST INSTANCE/IN DAYS); SOURCE: EUROPEAN COMMISSION[35]

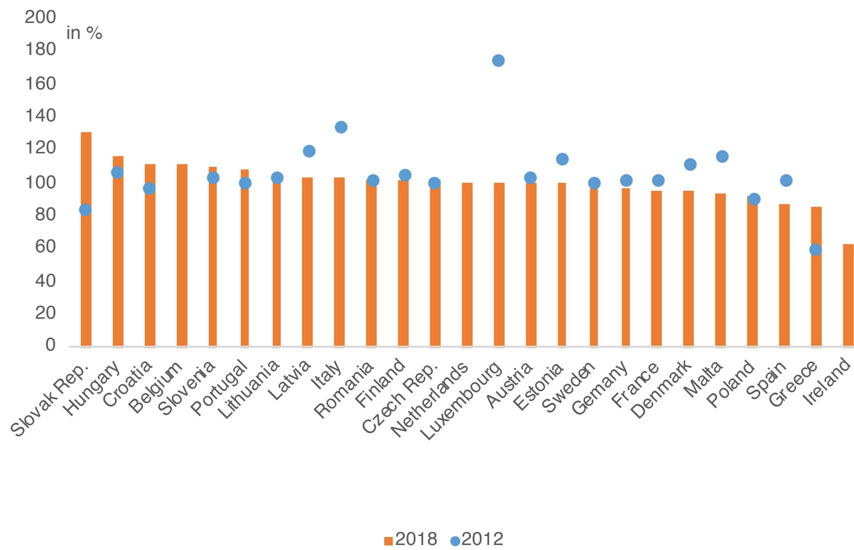


Another measure which indicates serious problems with the timely delivery of justice in Poland is the clearance rate for resolving cases. This is the ratio of the number of resolved cases over the number of incoming cases in a given period of time. It enables us to measure whether a court is keeping up with its incoming caseload. A rate of around 100% or higher means the judicial system is able to resolve at least as many cases as come in. When the clearance rate is below 100%, it signals that the courts are resolving fewer cases than the number of incoming cases.

For all cases analysed, the clearance rate in Poland was 99% in 2018; this figure was lower than in seven other EU countries. When we focus on civil and commercial litigious cases alone (which are usually the most time-consuming) in first-instance courts we can see that the rate in 2018 was much worse, and at 92% Poland was among the four worst performing EU member states. While between 2012 and 2016 substantial improvement in the clearance rate was noted in Poland, the period of Law and Justice's 'reforms' of judiciary was characterised by the gradual deterioration of this measure. Once again this indicates that what the ruling party labelled 'reforms' did not improve the efficiency of the system, but in fact worsened the independence of judges and the level of rule of law.

35 Note on methodology from the EU Justice Scoreboard 2020: "Under the CEPEJ methodology, litigious civil/commercial cases concern disputes between parties, e.g disputes about contracts. Non-litigious civil/commercial cases concern uncontested proceedings, e.g. uncontested payment orders. Methodology changes in Spain and Slovakia [in various years]. Pending cases include all instances in the Czech Republic and, until 2016, in Slovakia. Data for the Netherlands include non-litigious cases."

FIG. 8: RATE OF RESOLVING LITIGIOUS CIVIL AND COMMERCIAL CASES IN 2012 AND 2018 (FIRST INSTANCE IN %); SOURCE: EUROPEAN COMMISSION[36]



European[37] and international[38] comparisons confirm not only the deterioration of the independence of the judiciary, but also the lack of any policy responses towards the inefficiencies in the justice system in Poland. Moreover, in some areas Poland has experienced a worsening of the overall performance of the ordinary course when it comes to the length of proceedings. While Law and Justice has been promising to reform the justice system, it has actually made the system worse; this is why, apart from reversing many of its policies, a future agenda for the rule of law must also be associated with necessary reforms to improve the efficiency and quality of the system.

36 Note on methodology from the EU Justice Scoreboard 2020: "Methodology changes in Spain and Slovakia [in various years]. In Ireland the number of cases resolved is expected to be underreported due to the methodology. In Italy a different classification of civil cases was introduced in 2013. Data for the Netherlands include non-litigious cases."

37 *Rule of Law Dashboard,* https://ruleoflaw.lisboncouncil.net/.

38 M. Tatała, E. Rutynowska, P. Wachowiec, *supra* note 3.

5. CONCLUSION

One of the top priorities when the window of opportunity opens is restoring the rule of law in Poland. Any proposal to restore the rule of law must follow certain principles, such as legality, proportionality and a respect for fundamental rights. It is also important to gather public support around any such plan and ensure that it does not assume a return to the *status quo ante*. Moreover, containing the crisis of the rule of law should be accompanied by a package of reforms to the justice system which will improve its performance, including shorter trial lengths and a higher quality of adjudication. This will help to rebuild trust in the justice system among the people of Poland.

Correctly identifying breaches of the rule of law is essential for any successful plan to contain the crisis. In this report we have discussed the plans of civil society organisations and the opposition which have already been presented. The discussion about the future agenda for the rule of law in Poland must be continued, to ensure that the policy recommendations are adjusted to the changing legal situation, and that the plans are ready when political circumstances change. It is important that the plans to contain the crisis deal first with the issue of the Constitutional Tribunal, as it has the power to issue universally binding decisions which nowadays usually follow the ruling majority's views, as it is dominated by Law and Justice's nominees.

International law, including EU law, might help to contain the rule-of-law crisis. This is why all breaches should be referred to international courts, such as the Court of Justice or the European Court of Human Rights. In some fields, there are cases already pending which relate to the violations of the rule of law; it is important that the EU's institutions and other international bodies react promptly to any pending and upcoming breaches of the rule of law in Poland.

While the ruling party's policies have led to many violations of the rule of law, Law and Justice has failed to respond to the various challenges that existed in the justice system before 2015. Failure is not an option for future policy makers, as there is great demand for real judicial reform. The length of trials should be shortened and measures to lower the number of incoming cases should be implemented. What requires a more detailed review is the use of the resources inside the system to identify any possible inefficiencies and devote some resources to areas where changes are needed, such as digitalisation and employing more and better staff to support judges in their day-to-day activities. Legislation at the national level and procedures at the level of courts should also be improved, as the quality of laws matters for the performance of the whole system.

This is the last of the reports by the Civil Development Forum (FOR) of the series entitled 'Rule of Law in Poland 2020'[39]. The ruling Law and Justice party has announced that their 'reforms' of the justice system

39 You can find all reports at www.ruleoflaw.pl and https://for.org.pl/en/publications/for-reports.

will continue, so new violations may take place in the upcoming months and years. FOR will monitor and report on these changes.

FOR will also be involved in ongoing discussions about the restoration of the rule of law and reforms of the justice system, as we believe that these should be priorities for policy makers and opposition parties alike. As stated at the beginning of the project, the rule of law in Poland and other member states is important not only for the citizens of these countries, but also for the future of the European Union as a club of high-quality democracies where the rule of law and human rights are safeguarded. Moreover, an independent and well-performing justice system matters for individual rights and freedoms and for economic growth[40]. While the number of violations of the rule of law and problems inside the judiciary has been rising for years, the mobilisation of civil society, the EU and other international institutions, the Polish opposition and all other people and organisations willing to see the rule of law and a better justice system in Poland is essential to build a better future.

40 A. Łaszek, M. Tatała, J. Toczyński, *Without independent courts, the economy is developing slower and civil liberties are at risk,* https://for.org.pl/en/a/5469,analysis-12/2017-without-independent-courts-the-economy-is-developing-slower-and-civil-liberties-are-at-risk.

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Civil Development Forum (FOR Foundation) is a non-governmental think tank based in Poland promoting and defending economic freedom, the rule of law, individual liberties, private property, entrepreneurial activities, and ideas of limited government. Our activities are based on our vision of a society with favourable conditions for growth and productive activities, combining labour, entrepreneurship, innovation, saving, investment and obtaining knowledge. FOR aims to achieve its goals through fact-based reports and analysis, efficient communication and civil society mobilization.

Civil Development Forum was founded in 2007 by Professor Leszek Balcerowicz, former Deputy Prime Minister and Minister of Finance in the first non-communist government of Poland after the Second World War. FOR Foundation is a member of various networks of pro-liberty think tanks and NGOs – 4Liberty Network, Epicenter Network and Atlas Network. Our experts frequently appear in Polish and international media.

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