

**Vaclav Havel Joint Master Program**  
**European Politics and Society**



**Master Thesis:**

**Analysis of Polish Judicial Reform in the Line of Recent ECJ Judgment**

*- Commission vs. Poland (24 June 2019)*

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## **Abstract**

The judicial system of Poland is at the forefront of public, constitutional, political and legal debates of the European Union. Different aspects of rule of law in Poland, such as independence of judges, their right to irremovability, the alleged intention of the government to occupy and impact Polish judicial sector are discussed among academics.

The aim of this research conducted throughout the thesis is to add complete and all-inclusive analysis of the recent judgment of European Court of Justice (*hereinafter*: “ECJ”) regarding lowering retirement age of judges to the ongoing academic literature. Furthermore, before reaching that conclusion, providing the reader with the review of Polish political debate, the responses of European Union institutions and analysis of the necessity of the reform for Polish judicial system.

**Keywords:** Rule of Law, Judicial Reforms, Law and Politics, EU Institutions, ECJ, Poland.

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## 1. Introduction

The current situation in Poland raises very important issues of political and legal interest. After the victory of the coalition of Zjednoczona Prawica with the biggest right-wing Law and Justice Party (*hereinafter*: “PiS”) in the parliamentary elections of October 2015, the judicial system experienced a series of judicial changes.<sup>1</sup> These changes included an amendment to the laws on common courts, the National Council of the Judiciary and the Supreme Court.<sup>2</sup> Due to the fact that Poland is a member of the European Union (*hereinafter*: “EU” or “the Union”) and it has an obligation to respect the common values of the EU member states such as a democracy and the rule of law, these judicial changes have been assessed by EU institutions – European Commission (*hereinafter*: “EC” or “the Commission”) and ECJ. The situation concerning judiciary in Poland has reached a very culminating point when ECJ delivered its landmark ruling on 24 June 2019 – *Commission vs. Poland*<sup>3</sup> and noted that Polish national legislation concerning lowering the retirement age of judges to 65 violated EU law and principle of independence of the judiciary.

## 2. Research Questions

The objective of the thesis is to answer the questions to what extent the judicial reform was necessary for Polish judiciary and whether the measures employed by the Republic of Poland in the recent ECJ judgment to conduct the reform was proportionate to the aim Poland wanted to achieve. The importance of these questions is undoubted taking into consideration recent ongoing political and judicial turmoil in Poland. When talking about Poland it should be taken into account the circumstance that the country defended and promoted EU values in the past extensively.<sup>4</sup> Therefore it becomes more interesting to analyze how political power has changed the climate in the country with

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<sup>1</sup> European Stability Initiative, Under Siege, Why Polish Courts Matter for Europe, and: the case for infringement proceedings, preview – Brussels version, 20 March 2019, p.12.

<sup>2</sup> Davies C., Freedom House, and Nations in Transit, Hostile Takeover: How Law and Justice Captured Poland’s Courts, May 2018, p.1.

<sup>3</sup> Judgment of 24 June 2019, *European Commission vs. Republic of Poland*, C-619/18, EU:C:2019:531.

<sup>4</sup> Real Instituto Elcano, Kaczyński P. M. Poland in Europe: disappointment or merely hiccup? Working Paper 3/2019, 31 January 2019, p.3.

such an exemplary history of democracy. The essence of exploring the first question is directly connected to the second one. In order to understand the reasonability of measures of Polish government expressed in the recent ECJ Judgment, it is also necessary to examine the state of the judiciary that existed before the ruling.

The thesis will be divided into nine parts. Following this introduction, research question, methodology, and literature review, the fifth part will describe the political situation and constitutional order in Poland to show the reader ongoing political debate and its role in the judiciary system. The sixth part of the thesis refers to the chronological order of key facts in Polish judicial reform, main reactions from EU institutions that later lead to adopting the ruling of ECJ. This part reviews the steps taken by European Institutions in response to the judicial situation/changes in Poland. The seventh part of the thesis will address the situation concerning judicial independence in Poland from 2015- until now to see the necessity of adopting the reforms. The eighth part will refer to the recent judgment of ECJ and analyze the arguments of the parties. The last ninth part of conclusions will summarize all the main results that are analyzed and found throughout the different parts of the thesis and answer the research questions.

### **3. Methodology**

The research of the thesis is conducted in a qualitative manner with descriptive and explanatory research design. The descriptive method helps the reader to understand ongoing political debate concerning judiciary in Poland and since due to the nature of the topic it needs to be dealt with thorough analysis together with political and legal explanations, it justifies the choice of the method. Furthermore, the method of process tracing is used to assess the situation regarding the judicial independence and the principle of irremovability of judges from 2015 (after the victory of PiS) until now by tracing official EU Justice Scoreboards based on Euro barometer and in case of uncertainties of information presented in these documents filling gaps with the evaluations of leading international organizations. Apart from the data of international organizations, I use Polish national document – the White Paper on Polish Judiciary despite the fact that it can be biased, in order to understand the arguments of Polish side. Through reviewing and comparing these Scoreboards and materials of international

organizations, I aim to answer the first question about the necessity of judicial reform in Poland. Furthermore, by the comprehensive analysis of the arguments of parties of the judgment I intend to assess the reasonability of measures for conducting reform taken by Poland. Analysis of the arguments in the Judgment employs explanatory and comparative research design.

#### 4. Literature Review

Literature concerning the recent Polish judicial reform can be divided into the following groups: The first group refers to academic articles that specifically focus on the crisis in Poland and discuss applicability and use of “Article 7 procedure”.<sup>5</sup> The second group refers to the official reports of EU institutions and responses of Polish governmental and non-governmental authorities; reports of independent think-tank organizations that assess the situation in Polish judiciary.<sup>6</sup> The third group are the blogs and website articles<sup>7</sup> that provide information about the recent judicial change in Poland, presenting opinions of political leaders and possible predictions about the upcoming judgment of the ECJ. For example, the blog of Verfassungsblog on matters constitutional<sup>8</sup> and European Law Blog<sup>9</sup> offers brief discussions of academia on the alleged breach of rule of law in Poland; its legal and political aspects and about its possible repercussions on the rule of law of Poland. Even though these documents are

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<sup>5</sup> Kochenov D., *Bustling the Myths Nuclear: A Commentary on Article 7 TEU*, EU Working Paper Law 2017/10, pp. 2-13 (Kochenov 2017); Coli M., *Article 7 TEU: From a Dormant Provision to an Active Enforcement Tool? Perspectives on Federalism*, Vol. 10, issue 3, 2018, pp. 274-302 (Coli 2018); Pech L., and Grogan J., *Democratic Decay and Renewal, Bringing Democracy Defenders Together, Article 7 EU*; Pech L., and Scheppele L., *Illiberalism Within: Rule of Law Backsliding in the EU*, Cambridge Yearbook of European Legal Studies, 23 August 2017 (Pech L. and Scheppele K. L. 2017).

<sup>6</sup> Amnesty International, *Poland: Free Courts, Free People, Judges standing for their independence*, 2019; Freedom House, *Freedom in the World 2018: Democracy in Crisis, Poland*; Human Rights Watch, *Eroding Checks and Balances, Rule of Law and Human Rights under Attack in Poland, 2017* (Human Rights Watch Report 2017); Iustitia Reports, *Judges under pressure – report on the methods of harassment of independent judges by the authorities*, 8 July 2019; Komitet Obrony Sprawiedliwości (KOS), *A country that punishes, pressure and repression of Polish judges and prosecutors*, Warsaw, February 2019.

<sup>7</sup> The Guardian, *EU Court rules Poland’s lowering of judges’ retirement age is unlawful*, European court of justice decision is blow to nationalist Law and Justice government, 24 June 2019; Politico, *Ciensi J., Polish Supreme Court turns to ECJ for help, Justices suspend a controversial law forcing judges into early retirement*, 8 February 2018; EUobserver, *Rettman A., Polish judicial reforms broke EU law, court says*, Brussels, 24 June 2019.

<sup>8</sup> Verfassungsblog on Matters Constitutional, *Debate, Judges saving Judges*, available at: <https://verfassungsblog.de/category/debates/judges-saving-judges/#top>.

<sup>9</sup> European Law Blog, *News and Comments on EU law*, Simonelli M., A., *Thickening up Judicial Independence: The ECJ Ruling in Commission vs. Poland (C-619/18)*, 8 July 2019.

very helpful in examining the current situation in Poland, what is lacking in the literature concerning the recent ECJ judgment, is that the majority of these documents are written before the adoption of the ECJ ruling (24 June 2019) and therefore they do not refer to the actual arguments presented by the parties in the judgment in a thorough manner. Also the mentioned blogs do not contain comprehensive and sequential line of analysis of the arguments of the recent judgment from different angles that I intend to add to the academic literature. The current research combines together legal and political perspectives of the judgment preparing the ground for further research and academic responses about this topic. The following part will give the reader an overview of current political situation and constitutional order in Poland.

## **5. Political Debates and Constitutional Order in Poland in the Light of Judicial Changes**

The PiS – Poland’s ruling party chaired by Jarosław Kaczyński is often mentioned as a party that continuously dictates and strengthens conservative and traditional values in Poland.<sup>10</sup> In addition to conservative attitudes, the party allegedly aims to achieve strong influence over the rule of law and constitutional order of Poland.<sup>11</sup> The democratic system of a state has been described by the leader of PiS party - Jarosław Kaczyński as people having sovereign power represented by parliament and in the Polish case by the elected president.<sup>12</sup> This situation raises valid doubts about the power of a president as having an unlimited political ability to do whatever it intends without further control of a Parliament. Kaczyński as a leader of PiS controls both executive and legislative power of the country.<sup>13</sup> Several statements expressed by the representatives of the PiS and governmental authorities can be presumed as politically influential on the independence of the judicial system of Poland. For example, Kaczyński assessed Polish judiciary as a

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<sup>10</sup> Supra note 2. p. 2; Wanat Z., Politico, Poland’s Ruling Party Faces New Far-right Election Threat, 26 May 2019; Euractiv.com, Brzozowski A., Poland’s PiS Wins EU Polls, Braces for ‘decisive battle’ in Autumn, 27 May 2019.

<sup>11</sup> European Stability Initiative, Stefan Batory Foundation, Where the Law ends, The Collapse of the Rule of Law in Poland – and What To Do, 29 May 2018, pp.1-2.

<sup>12</sup> Tvn24, Polska, Kaczyński: mamy do czynienia z buntem, mamy rebelię, 04 czerwca 2016.

<sup>13</sup> Supra note 11, p. 4.

‘huge scandal’<sup>14</sup> that shall be ended. Also, he noted about Polish courts as the last institutions of post-communism in Poland and in the need of a change.<sup>15</sup> From the point of view of Kaczynski, the interventions from the EU into the Polish judicial sector are not regarded as necessary and even sometimes he holds a cynical attitude towards warnings that come from Brussels. For example during the interview with Reuters, Kaczynski assessed the situation as “an absolute comedy”<sup>16</sup> due to the fact that in Poland there was no threat at all to the rule of law. Liberal-Centrist Civic Platform (*hereinafter*: “PO”) that governed the country from 2007 to 2015, and also most of the legal establishment that represents opposition strongly criticized the judicial reforms, pointing on the lack of independence of courts and on the democratic principle of separation of powers.<sup>17</sup>

It is relevant for the topic of the thesis to review constitutional order of Poland. According to the Polish Constitution, the system of the Republic of Poland shall be based on the separation of powers and balance between the legislative, executive and judicial sectors.<sup>18</sup> However, the question is how the balance of these powers is maintained in the present political atmosphere. Polish judiciary consists of the Supreme Court and lower “common” courts.<sup>19</sup> Apart from the Supreme Court and common courts, the Constitutional Tribunal in Poland is tasked to review whether normative acts concerning judicial independence are in accordance with the Constitution.<sup>20</sup>

The analysis of the jurisprudence of Constitutional tribunal together with the reforms associated with it is very crucial for assessing the current constitutional and rule of law order in Poland. To start with the reforms,<sup>21</sup> the appointment of five judges after removing the composition appointed by the previous government that existed before the

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<sup>14</sup> Polskie Radio, Jedyńka, Jarosław Kaczyński: polskie sadownictwo to gigantyczny skandal, 10 February 2017.

<sup>15</sup> Onet Wiadomości, Kaczyński: Bedziemy rządzić długo, 17 Mar 2017.

<sup>16</sup> Reuters, Sobzak P., and Pawlak J., Poland’s Kaczyński calls EU democracy inquiry “an absolute comedy”, 22 December 2016.

<sup>17</sup> Szczerbiak A., The London School of Economics and Political Science, How is the conflict over judicial reforms affecting Polish politics? Evidence based analysis and commentary on European Politics, 1 August 2018.

<sup>18</sup> The Constitution of the Republic of Poland of 2<sup>nd</sup> April, 1997 as published in Dziennik Ustaw No. 78, item 482, Article 10 (1), available at: <https://www.wipo.int/edocs/lexdocs/laws/en/pl/pl027en.pdf>.

<sup>19</sup> *Id.*, Article 175.

<sup>20</sup> *Id.*, Article 186 (2).

<sup>21</sup> Human Rights Watch Report 2017, pp. 10-11.

PiS,<sup>22</sup> forceful retirement of two judges of Constitutional tribunal – all that were controlled by the majority of Parliament – PiS party can be regarded as controversial for preserving the principle of judicial independence. As Human Rights Watch noted it,<sup>23</sup> the government of Poland intervened in the rules of procedure of appointment of tribunal judges and accordingly it received significant control on the procedures of appointment and removal. Apart from the above appointments, the modifications of the Constitutional Tribunal Act were harshly criticized by the ruling of Constitutional Tribunal;<sup>24</sup> specifically, Tribunal noted about the inconsistency of the amendment to Constitution of Poland, article 7 that require functioning of public organs on the basis of law.<sup>25</sup> Moreover, the Tribunal assessed the new procedures of giving the power to President and Sejm of recalling and determining the expiry of the mandate of judges from Tribunal as inconsistent with article 10 of the Polish Constitution. The latter article requires independence of judiciary system and in this case the separation of the Tribunal from other governmental institutions.<sup>26</sup> Despite explicit wording in the Polish Constitution,<sup>27</sup> about finality and universality of the rulings of Constitutional Tribunal, the Prime Minister of Poland ordered its non-publication basing its order on “procedural flaws”<sup>28</sup> of the ruling. Such a response from the Polish government to that ruling gives rise to the doubts about the alleged intention of the Polish Parliament to take control of the judiciary and attack the rule of law.

Furthermore, after the retirement of Rzeplinski, the president of Constitutional tribunal, and appointment of a new president – Przylebska, the constitutional tribunal turned its jurisprudence into more politically favorable decisions to polish governing party. For example, the ruling of 20 June 2017<sup>29</sup> that announced several provisions of the Act of Polish National Council of the Judiciary inconsistent with the constitution, in

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<sup>22</sup> Matczak M., Poland’s Constitutional Crisis: facts and interpretations, The Foundation for Law, Justice and Society, 2018, p.2.

<sup>23</sup> Supra note 21. p. 12.

<sup>24</sup> Judgment in the name of the Republic of Poland, The Act of 22 December 2015 amending the Constitutional Tribunal Act, Ref no. K 47/15 (/s/k-4715), 9 March 2016, p. 4.

<sup>25</sup> Supra note 18, Article 7.

<sup>26</sup> *Id.*, Article 10.

<sup>27</sup> Supra note 18, Article 190 (1).

<sup>28</sup> Supra note 24, p. 3.

<sup>29</sup> Judgment in the name of the Republic of Poland, The Act on the National Council of the Judiciary, Ref. No. K/17, 20 June 2017, paras. 1-3.

concrete the tribunal declared that articles 11(3) and (4) of the Act on the National Council of Judiciary<sup>30</sup> are inconsistent with article 187 of the Polish Constitution. By this announcement, the Tribunal noted that the different rules for appointment of judges by National Council of the Judiciary are inconsistent with the Polish Constitution.<sup>31</sup> Due to the fact that the Constitution gives a wider possibility without clarifying the concrete criteria for electing judges, the Act shall not establish such criteria.<sup>32</sup> In my opinion, such argumentation of the Tribunal lacks reasoning. It seems that Polish government strives to attain wider and ambiguous procedure for selection of judges to have more authority over it by disregarding concrete criteria offered by the Act on National Council of Judiciary by merely challenging its “constitutionality”. Matczak confirms this presumption<sup>33</sup> that after the ruling of 20 June 2017 Parliament passed a bill that granted members the power to select and appoint judges.

In the following part, the events concerning judicial reforms in Poland and reactions from EU institutions will be presented chronologically and in a detailed manner.

## **6. Descriptive Timeline of Important Events Concerning the Judicial Reform**

The description of the sequence of responses from the EU institutions to judicial reforms in Poland shows the role of Commission in maintaining pressure on Poland to conform its judicial changes to the values undertaken as a member of the Union, especially the rule of law and the principles concerning judicial independence provided under the TEU. This part also explains the legal background of the obligations of the Commission and Poland in strengthening the rule of law.

The proposals concerning the change of the structure of the Supreme Court and National Council of Judiciary started in January 2017. President Duda’s proposals contributed to PiS power to take control of the National Council of Judiciary by terminating the term of office of the existing members and giving the parliamentary

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<sup>30</sup> Act of 12 May 2011 on the National Council of the Judiciary, Journal of Laws of 17 June 2011.

<sup>31</sup> Constitutional Tribunal of Poland, Press release after the hearing, K5/17, available at: <http://trybunal.gov.pl/en/news/press-releases/after-the-hearing/art/9752-ustawa-o-krajowej-radzie-sadownictwa/>.

<sup>32</sup> *Id.*

<sup>33</sup> *Supra* note 22, p. 4.

majority the right to nominate a majority of their positions.<sup>34</sup> President Duda's proposals were sent to parliament without prior consultations with experts and persons having an interest in it and they were adopted in December.<sup>35</sup> Furthermore, the retirement age of judges was lowered to 65 and the extension of the age required the approval of the president. After entry into force of this regulation, 27 judges of the Supreme Court left the office.<sup>36</sup> Parliament through the ruling party has the power to appoint Supreme Court judges and also the right to decide which judge will hear the case. As the Venice Commission has noted it, all these powers are discretionary and there is a risk of having heard a specific case by a composition that is acceptable and appropriate for political powers in a specific situation.<sup>37</sup> Population in streets protested these reforms and also reforms were protested by official institutions and by legal experts.<sup>38</sup>

The process of the rule of law framework for the EU countries consists of infringement proceedings by the Commission, in case of a systemic threat to the rule of law, the Commission gives assessment of a situation that turns into Commission's rule of law recommendation and after in the launch of article 7 of the treaty on European Union (*hereinafter*: "TEU").<sup>39</sup> The rule of law framework enables the Commission to conduct a dialogue with member states to hinder threats to the rule of law. Before resorting to Article 7 of TEU, Commission can consult member states and other EU and international organizations such as the European Parliament, European Council, Organization for Security and Co-operation in Europe and etc. As Halmai describes it, the process of dialogue conducted by the Commission is called 'pre-Article 7 procedure'.<sup>40</sup> One of the examples of conducting a dialogue between the Commission and the Republic of Poland was in January 2016 when they exchanged several letters but unfortunately without a

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<sup>34</sup> *Supra* note 2, p. 5.

<sup>35</sup> Helsinki Foundation for Human Rights, *The situation of the judiciary in Poland*, January 2019, p.3.

<sup>36</sup> Poland in, *Seven Supreme Court Judges rejected from remaining in office*, 13 Jul 2018.

<sup>37</sup> Venice Commission, Poland, *Opinion on the Draft Act amending the act on the National Council of the Judiciary, on the Draft Act Amending the Act on the Supreme Court, proposed by the President of Poland and on the act on the Organization of Ordinary Courts adopted by the Venice Commission at its 113<sup>th</sup> Plenary Session*, Opinion No. 904/2017, Strasbourg, 11 December 2017, para. 86.

<sup>38</sup> Deutsche Welle, *Justice Minister Threatens Poland's Constitutional Tribunal Judges with Legal Action*, 6 April 2016.

<sup>39</sup> European Commission, *Communication from the Commission to the European Parliament and the Council, A New Framework to strengthen the Rule of Law*, Strasbourg, 11.3.2014, COM (2014) 158 final, pp. 6-9.

<sup>40</sup> Halmai G., *The Possibility and Desirability of Rule of Law Conditionality*, Springer, Asser Press, 2018, p. 6 (Halmai 2018).

solution.<sup>41</sup> As Kochenov notes,<sup>42</sup> Article 7 of TEU indeed has its power to achieve its goals if all the institutions acted in a proper way, for example, if Council implemented annual rule of law dialogue, if Parliament could recondition the existing structure of compliance to EU rule of law and if EU member states could actively resort to assistance to Commission to act. As Coli mentions it with respect to Hungary,<sup>43</sup> despite the fact that the Commission started the procedure very late, it still has the meaning of strengthening the importance of rule of law in the EU and restoring the trust of European institutions that in such cases they are responsive.

The Commission adopted three opinions<sup>44</sup> assessing the situation in Poland regarding the rule of law and stating its position. Starting from the first opinion, it mentioned about a systemic threat to the rule of law<sup>45</sup> because of the Constitutional Court's inability to ensure fully effective constitutional review that is essential for the judicial independence in Poland. Also, the situation regarding the rule of law was described as worse in the second and following third opinions.<sup>46</sup> The final fourth opinion<sup>47</sup> described Polish rule of law as in need to be organized in the line of European standards where judicial independence will be guaranteed. The Commission's recommendations were primarily directed to amend the new law of Supreme Court concerning the retirement age of judges and discretionary power of the President.<sup>48</sup>

After unsuccessful series of assessments and recommendations about the rule of law in Poland, the EC initiated the procedure under Article 7(1) in 2017, under which the Council after obtaining the consent of the European Parliament with the majority of 4/5 of its members may determine that there is a clear risk of a serious breach by a member

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<sup>41</sup> *Supra* note 49. p. 11.

<sup>42</sup> Kochenov 2017, p. 11.

<sup>43</sup> Coli 2018, pp. 291-92.

<sup>44</sup> Commission Recommendation of 27 July 2016 regarding the rule of law in Poland, Official Journal of the European Union 2016/1374 (Rec 1); Commission Recommendation 2017/146 of 12 December 2016 regarding the rule of law in Poland complementary to Recommendation (EU) 2016/1374, Official Journal of the European Union; Commission Recommendation (EU) 2017/1520 of 26 July 2017 regarding the rule of law in Poland complementary to Recommendations (EU) 2016/1374 and (EU) 2017/146.

<sup>45</sup> *Id.*, Rec 1, para. 72.

<sup>46</sup> Rec 2. paras. 61-62 and Rec 3. paras. 45-51.

<sup>47</sup> European Commission regarding the Rule of Law in Poland Complementary to Commission Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520, Brussels 20 December 2017, C (2017) 9050 final, paras. 39-44.

<sup>48</sup> *Id.* paras. 45-47.

state of the values referred to in article 2 of TEU.<sup>49</sup> Polish official authorities firmly refused to propose measures to respond to the Commission's concerns.<sup>50</sup> However, this procedure does not have a prospect of success in the future because of the lack of full support vote from the Commission. Different authors of academic articles<sup>51</sup> confirm the weakness of the rule of law procedure because of political disagreements within the union. Furthermore, the same idea is expressed in the work of Carrera and Bard,<sup>52</sup> where they note about the rule of law procedure as solely in the hands of Commission having full discretion over it. Later in 2018 September, the Commission referred the case of Poland to the ECJ in order to challenge newly adopted Polish law that lowered age of judges and put 27 out of 72 sitting judges of Supreme Court at risk of being forced to retire.<sup>53</sup>

Following the above events, in March 2018 the term of fifteen members of the National Council of Judiciary was terminated and the Parliament appointed the new members that were protested by a vast majority of Polish judges due to existing facts of nepotism, unprofessionalism and poor performance of appointed persons.<sup>54</sup> Also, this process of appointment was assessed by the non-governmental organization Helsinki Foundation for Human Rights (based in Warsaw) as non-transparent, influenced with political and private relations.<sup>55</sup> It is visible that Polish authorities intend to have significant influence over the judicial system. Involvement of the EU institutions is frequent and simultaneous throughout the process of judicial changes in Poland. This is logical because as it has been mentioned in the introduction, Poland is not a state that can adopt regulations incompatible with the EU values and it is obliged to take into

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<sup>49</sup> European Union, Consolidate Version of the Treaty on European Union, 13 December 2007, 2008/C 115/1 Article 7 (1) (TEU); European Commission, Reasoned proposal in accordance with article 7(1) of the Treaty on European Union Regarding the Rule of Law in Poland, 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, Brussels 20 December 2017, COM (2017) 835 final, para. 1(3).

<sup>50</sup> *Id.* p.12.

<sup>51</sup> Halmai 2018; Kochenov 2017; Coli 2018; Pech L. and Scheppele K. L. 2017.

<sup>52</sup> Carrera S., and Bárd P., The European Parliament Vote on Article 7 TEU against the Hungarian Government, Too Late, Too Little, Too Political, CEPS, 14 September 2018, p. 3-4.

<sup>53</sup> European Commission – Daily News, Rule of law: European Commission refers Poland to the European Court of Justice to protect the independence of the Polish Supreme Court, Brussels, 24 September.

<sup>54</sup> Matczak M., The Rule of Law in Poland: A Sorry Spectacle, Verfassungsblog on Matters Constitutional, 1 March 2018.

<sup>55</sup> Helsinki Foundation for Human Rights, It starts with the Personnel, Replacement of Common Court Presidents and Vice Presidents from August 2017 to February 2018, Warsaw, April 2018, pp. 27-28.

consideration all obligations that it has taken under the EU law as a member of the EU. Together with other accession criteria to EU, member states must satisfy the rule of law criteria to become a member state and Poland also had this responsibility at the time of accession that continues until now.<sup>56</sup>

The concept of the rule of law as defined in the case of the ECJ<sup>57</sup> is a value that should be common to European member states that share different common values that together form the foundation of the Union. Under article 2 of TEU, EU is founded on the values of democracy, freedom, rule of law and etc.<sup>58</sup> The European institutions such as the Commission, Parliament and the Council are responsible under the Treaties that the principles and the values of the Union and among them the rule of law as a fundamental element of the Union are respected by the member states. As it has been mentioned in the ruling of ECJ - *Associação Sindical dos Juizes Portugueses*<sup>59</sup>, the aim of the effective judicial review is to ensure compliance of the structure and working of the judicial bodies of EU member states with the EU law and to meet the requirements of effective judicial protection according to Article 19(1) of the TEU.

After the above-mentioned events of infringement procedure against Poland and its failure to fulfill its duties under Article 19 of the TEU, the ECJ delivered judgment – *Commission vs. Poland* where the Court declared that the Republic of Poland has failed to fulfill its obligations under Article 19(1)<sup>60</sup> of the TEU that obliges EU member states to provide remedies for ensuring effective legal protection of the different facets of EU law and Article 47 of the Charter of Fundamental Human Rights of the European Union (*hereinafter*: “Charter”) <sup>61</sup> that guarantees right to an effective remedy towards independent tribunal. Furthermore, Article 51 of the Charter obliges institutions and member states of the EU, taking into consideration the principle of subsidiarity to respect

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<sup>56</sup> European Commission, European Neighborhood Policy and Enlargement Negotiations, Conditions for Membership, available at: [https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership\\_en](https://ec.europa.eu/neighbourhood-enlargement/policy/conditions-membership_en); European Commission, Communication from the Commission, Further Strengthening the Rule of Law within the Union, Brussels, 3 April 2019, COM (2019) 163 final, para.3. (Commission Communication on Further Strengthening the Rule of Law, 2019)

<sup>57</sup> Judgment of 27 February 2018, *Associação Sindical dos Juizes Portugueses vs. Tribunal de Contas*, C-64/16, EU:C:2018:117, para. 30.

<sup>58</sup> TEU, Article 2.

<sup>59</sup> Supra note 57. paras. 35-41.

<sup>60</sup> TEU, Article 19(1).

<sup>61</sup> European Union, Charter of Fundamental Rights of the European Union, 26 October 2012, 2012/C 326/02, Article 47, (Charter)

the rights and observe the principles respecting the limits of the powers of the EU.<sup>62</sup> The following part of the thesis will observe the situation regarding judicial independence in Poland from 2015 to 2019 to assess the actual need of the judicial reform in Poland.

## **7. The Situation Regarding Judicial Independence in Poland from 2015 to 2019**

The EU Justice scoreboard presents data on independence, efficiency, and quality of national justice systems of EU member states.<sup>63</sup> This information presented in scoreboards assists national authorities to improve their justice systems.<sup>64</sup> Starting from the EU Justice Scoreboard of 2015<sup>65</sup> that analyses legal tools as possible guarantees of judicial independence of member's national systems, one of the indicators of the 2015 trends is structural independence of the judiciary.

Since the focus of the thesis is on judicial independence and the principle of the irremovability of judges, I will examine these figures that thematically concern these principles together with public trust of society towards judiciary. Figure 51 of the document,<sup>66</sup> shows the statistics about the transfer of judges without their consent and whether this is legally permitted. In Poland, approximately five hundred judges from “closed courts” were transferred to other courts. The graph shows that the transfers of judges in Poland were decided by the Council for the Judiciary, the Court, by the President of the Court, by Minister of Justice, President, Parliament or other body and because of the disciplinary measures. The scoreboard does not explain the clarity of these disciplinary measures or criteria for the transfer. The cases of judges presented by Amnesty International,<sup>67</sup> increase the doubts that Polish governmental authorities are using the disciplinary measures to hide the criticism about judicial independence. In the cases of judges Brazewicz, Frackowiak and Baranska-Maluszek, the disciplinary

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<sup>62</sup> *Id.* Article 68.

<sup>63</sup> European Commission, EU Justice Scoreboard, available at: [https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard\\_en](https://ec.europa.eu/info/policies/justice-and-fundamental-rights/upholding-rule-law/eu-justice-scoreboard_en).

<sup>64</sup> EU Justice Scoreboard 2019: results show the continuing need to protect judicial independence, Brussels, 26 April 2019, available at: [http://europa.eu/rapid/press-release\\_IP-19-2232\\_en.htm](http://europa.eu/rapid/press-release_IP-19-2232_en.htm), p.2.

<sup>65</sup> European Commission, The 2015 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the Economic and Social Committee and the Committee of the Regions, COM (2015) 116 final, p.6.

<sup>66</sup> *Id.* p. 40.

<sup>67</sup> Amnesty International, Poland: Judges who defend the Rule of Law, 2019, pp. 7-9.

measures were adopted without enough clarity of the aim that creates risk of wide discretion of Disciplinary Prosecutor.<sup>68</sup>

The following Justice Scoreboard of 2016 describes the views of citizens concerning judicial independence. Figure 46<sup>69</sup> shows in percentages the views about judicial independence of the general public. In the case of Poland, less than 1% assesses judicial independence as very good, 45% - as fairly good, more than 70% as fairly bad and more than 80% as very bad. This statistics is based on the Euro barometer survey FL435 that was conducted in 2016 and questioned the public about the independence of the justice system.<sup>70</sup> Furthermore, in the same scoreboard, figure 47<sup>71</sup> specifies the main reasons why public rated independence of justice as bad. In the case of Poland, the main reasons are governmental and political interferences that are calculated in approximately 40% percentages.

With respect to the irremovability of judges, figure 52<sup>72</sup> shows in which cases removal/transfer of a judge is allowed and who take a decision about it. In the case of Poland transfer is decided by the Council for the judiciary and by the government officials such as the Minister of Justice, President, Parliament, and these transfers are conducted either for reorganizational, disciplinary or other reasons. The scoreboard presents these procedures concerning judges but does not evaluate whether these procedures are effective or not and whether they guarantee the independence of judges. In this respect, the study conducted by the European Network of Councils for the Judiciary<sup>73</sup> concerning the independence of the judiciary can be useful. In that study on the question of whether the government has respected the independence of a judge – 57% of participants of the survey strongly disagreed.

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<sup>68</sup> *Id.*

<sup>69</sup> European Commission, The 2016 EU Justice Scoreboard, Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions COM (2016) 199 final, p.35. (EU Justice Scoreboard 2016)

<sup>70</sup> Flash Eurobarometer 447, Report, Perceived independence of the national justice systems in the EU among the general public, Fieldwork: January 2017, Publication: April 2017, p. 13.

<sup>71</sup> Directorate-General for Communication, Flash Euro barometer 436: Perceived Independence of the National Justice Systems in the EU Companies, April 2016.

<sup>72</sup> EU Justice Scoreboard 2016, p. 40.

<sup>73</sup> European Network of Councils for the Judiciary, Independence and Accountability of the Judiciary and of the Prosecution, Performance Indicators 2015, ENCJ Report, 2014-2015, p.141, available at: [https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj\\_report\\_independence\\_accountability\\_2014\\_2015\\_adopted\\_ga\\_corr\\_2016.pdf](https://www.encj.eu/images/stories/pdf/workinggroups/independence/encj_report_independence_accountability_2014_2015_adopted_ga_corr_2016.pdf).

Furthermore, the White Paper on Polish judiciary reform<sup>74</sup> noted about the inefficiency of disciplinary proceedings by giving examples of the judges involved in hidden deliberations with governmental officials on how to decide politically sensitive cases and in the facts of bribery. Unfortunately, after the set of such incidents, no radical measures were taken to hire such personnel and to deprive them of administering justice, only transfer to another position. According to the Polish Constitution,<sup>75</sup> the statute shall specify the procedures of the work of the National Council of the Judiciary and the Judiciary as the guarantee of the independence of the judges. Despite numerous recommendations given by the authoritative bodies<sup>76</sup> about National Judiciary Council to function in a manner “independent of the executive and legislative powers” in order to guarantee the independence of judges, the 2017 amendments to the Law on the National Council of Judiciary granted power of election of judges to Sejm. Therefore, the ruling party of PiS in Polish Parliament can have a decisive influence over the composition of the National Council of the Judiciary and accordingly on the appointment of judges, especially those of the Supreme Court. The influence of parliament over the appointment of judges is risky in the sense that parliament decides more on political considerations rather than according to the qualifications of judges.

The EU Justice Scoreboard of 2017 also presents the views of the general public concerning independence of judiciary reflected in figure 51<sup>77</sup> as in the scoreboard of 2016. In comparison to 2016 statistics, in 2017 the same percentage - less than 1% thinks that judicial independence is in a very good condition. As for the public assessment of independence being in very bad conditions, the percentage does not change radically and remains more than 80%. Low trust in the Polish justice system was also measured by the World Justice Project survey in 2017 under the title “Declining Rule of Law” – Poland taking 17<sup>th</sup> place out of 25 countries together with Hungary and the Czech Republic and

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<sup>74</sup> The Chancellor of the Prime Minister, White Paper on the Reform of the Polish Judiciary, Warsaw, 7 March 2018, pp. 20-22.

<sup>75</sup> Supra note 18, Articles 186 and 187.

<sup>76</sup> Council of Europe, Recommendation CM/Rec (2010) 12 and explanatory memorandum, Judges: independence, efficiency and responsibilities, para. 46; OSCE, Opinion on certain provisions of the Draft Act on the Supreme Court of Poland based on an unofficial English translation of certain provisions of the Draft Act commissioned by the OSCE Office for Democratic Institutions and Human Rights, Warsaw, 30 August 2017, paras. 50-51; Commissioner for Human Rights of the Council of Europe, Dunja Mijatović, Report following her visit to Poland from 11 to 15 March 2019, Strasbourg 28 June 2019, paras. 18-21.

<sup>77</sup> EU Justice Scoreboard 2017, p. 37.

other non-European countries.<sup>78</sup> Also as in the 2016 scoreboard, the reason for the lack of trust in the independence of the judiciary was named “interference or pressure from the government and politicians”.<sup>79</sup> With respect to the appointment of judges, figure 57<sup>80</sup> shows that in the case of the Polish government, governmental authorities can reject a candidate and there is no duty of stating reasons or making judicial review why a certain candidate was rejected.

In the Scoreboards of 2018 and 2019,<sup>81</sup> the evaluation of perceived independence by the general public in Poland remains more or less the same – more than 80% and it lacks too little to reach 90%. The reasons for distrust remain the same as in the previous scoreboards – political interference into the judiciary. What seems important to note in the scoreboard of 2019 is that it singles out already the deteriorated situation in Polish judiciary and describes the actions of the Commission in response to the sudden lowering of the retirement age and removal of Supreme Court judges starting from the referral of the Polish case to the ECJ for alleged violation of principles of judicial irremovability and independence and commencement of the infringement procedure. In the following part of the thesis by analysis of the arguments of the EU and the Republic of Poland in the recently delivered ECJ judgment I aim to test the proportionality of measure taken by Poland for the judicial reform.

The following graph summarizes the public trust of judicial independence that was discussed in the above part of the thesis and starts from 2016, since the EU Justice Scoreboards do not give the percentage of public trust in 2015. As a conclusive remark it is apparent that a very few percentage less than 1% assess public trust as very good and this does not change significantly over the years presented in the graph.

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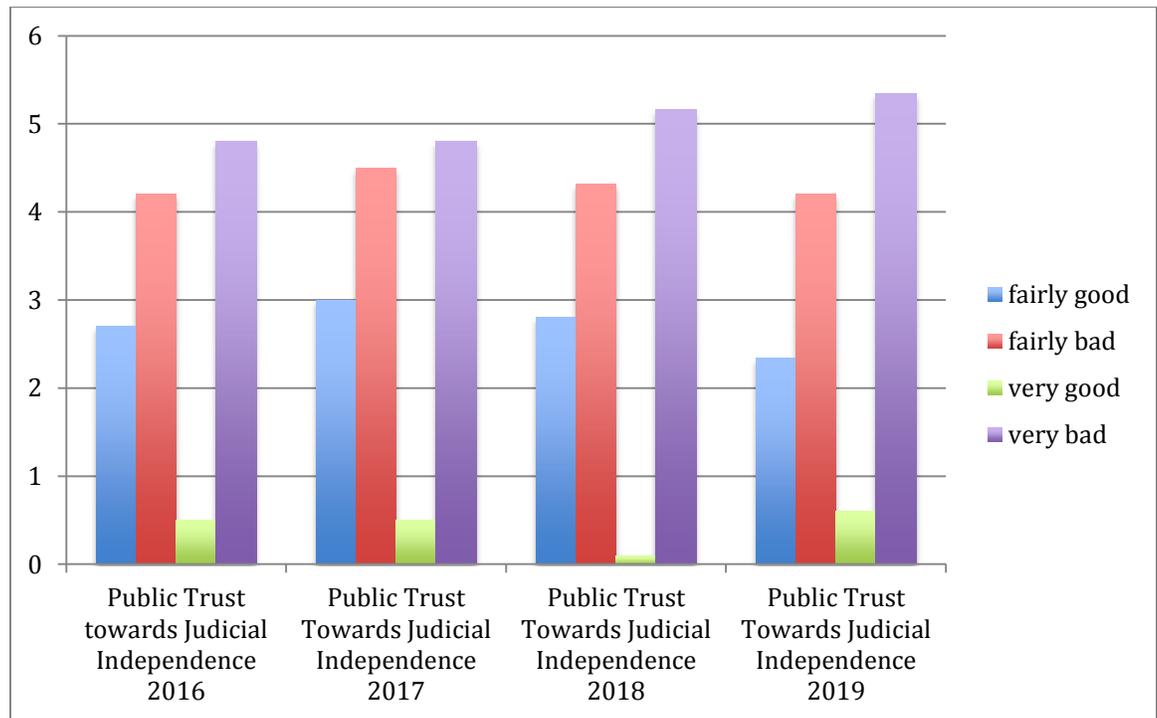
<sup>78</sup> World Justice Project, Rule of Law Index, 2017-2018, p. 30, available at: [https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition\\_0.pdf](https://worldjusticeproject.org/sites/default/files/documents/WJP-ROLI-2018-June-Online-Edition_0.pdf).

<sup>79</sup> *Id.* p. 37.

<sup>80</sup> *Id.* p. 41.

<sup>81</sup> EU Justice Scoreboard 2018, p. 41 and 2019, p. 8.

Graph about “Public trust concerning judicial independence from 2016-2019”<sup>82</sup>



## 8. Analysis of The Main Arguments of the EU and the Republic of Poland Presented in the ECJ Ruling – *Commission vs. Poland*

The main arguments submitted by the Commission<sup>83</sup> are that newly enacted Polish law on lowering age of judges to 65 and giving the President of Poland exclusive right to extend the service of judges after they reached that age violated EU law, particularly the independence of judges and the principle of the irremovability of judges. According to the reasoning of the Court,<sup>84</sup> the requirement of independence of the judiciary has two aspects: the first aspect is connected to the Court’s autonomous nature, non-dependence on any other body and protection from external interventions on its

<sup>82</sup> The information is based on EU Justice Scoreboards from 2016-19 that is narratively analyzed in part seven of the thesis with the difference of 100 percent evaluation system in Scoreboards and 6 per cent evaluation system in the present graph.

<sup>83</sup> Supra note 3, paras. 34, 60, 63; Judgment of 25 July 2018, *Minister for Justice and Equality (Deficiencies in the system of justice)*, C-216/18 PPU, EU:C:2018:586, paras. 21-22.

<sup>84</sup> *Id.* paras. 71-3.

decisions. The second aspect concerns the requirement of objectivity, absence of any subjective interest in the judicial proceedings and only strict dependence on the law.<sup>85</sup>

The principle of irremovability means that judges can remain in the post when they have not reached the obligatory retirement age or until the expiry of their mandate.<sup>86</sup> Under Article 180 of Polish Constitution judges are irremovable and their removal shall be done in exceptional cases of illness, reaching the retirement age limit, reorganization of court and the statute shall specify all these procedures.<sup>87</sup> This principle is strongly safeguarded by International instruments<sup>88</sup> that establish strong legal guarantees against unlawful removal of judges. Removal can be conducted only in the cases of inability to perform its duties and in the event of reaching mandatory retirement age according to relevant regulations containing enough clarity. Exceptions to that principle must be based on the legitimate interest and be subject to the principle of proportionality.<sup>89</sup> Legitimate interest means the reasonable ground that will justify the removal of judges – intervention in the principle of irremovability.<sup>90</sup> Challenged Polish reform of lowering of the age of a judge automatically ceases service of judges and therefore raises reasonable doubts about its legitimacy. The main argument presented by the Republic of Poland is that the decision of lowering of retirement age was taken “to standardize that age with the general age applicable to all workers in Poland and improving the age balance among senior members of that court”.<sup>91</sup> The Court taking into consideration the Polish employment

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<sup>85</sup> European Commission for Democracy Through Law (Venice Commission), Report on the Independence of the Judicial System, Part I: The Independence of Judges, Adopted by the Venice Commission, 82<sup>nd</sup> session, Study no. 494/2008, 16 March 2010, paras. 6-11 (Venice Commission Report on Independence of Judges 2010); The Division for Independence and Efficiency of Justice of the Council of Europe, Seminar on the Independence of Justice, The various aspects of external and internal independence of the judiciary, CDL (2012) 035, Strasbourg 27 April 2012, pp. 3-6.

<sup>86</sup> *Supra* note 18, Article 180.

<sup>87</sup> *Id.*

<sup>88</sup> UN Human Rights Office of the High Commissioner, Basic Principles on the Independence of the Judiciary adopted by the Seventh UN Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985, principles.11-14; Council of Europe, European Charter on the Status of Judges, Strasbourg 1998, Article 3; Consultative Council of European Judges (CCJE), Magna Carta of Judges (Fundamental Principles), Strasbourg 17 November 2010; IBA Minimum Standards of Judicial Independence, adopted 1982, paras. 22-27.

<sup>89</sup> *Id.*

<sup>90</sup> The Commonwealth, Bingham Centre of the Rule of Law, The British Institute of International and Comparative Law, The Appointment, Tenure and Removal of Judges under Commonwealth Principles, A Compendium and Analysis of Best Practice, 2015, pp. 79-80.

<sup>91</sup> *Supra* note 3, para. 80.

policy aims to reach a balanced age structure among other workers and also giving younger individuals chance to enter the judge position, admitted this argument, but also challenged its legitimacy.<sup>92</sup>

It is very interesting to analyze in this respect the economic effects of the lowering retirement age to assess the reasonability of the measure. According to the Organization for Economic Cooperation and Development (*hereinafter*: “OECD”),<sup>93</sup> reducing pensionable age lowers benefits due to the fact that in Poland pension is defined in accordance with contributions taken during life and therefore cutting working hours will automatically result in reducing pensions by 6% for the year. This means that if a judge can perform its duties adequately, the obligatory reduced age establishes a limit on its working ability and also shortens its career duration that results in a lower pension. Furthermore, OECD notes in its findings that the lower pensions will result in a high number of people with a minimum pension that will have an effect of “weakening the financial balance of public pension scheme”.<sup>94</sup>

Economists<sup>95</sup> from the Warsaw-based organization - Civil Development Forum noted that reducing employment time could result in very low pensions, in higher taxes and this will have a negative impact on the economic growth of Poland. They note that the negative effect on the economy will not appear in the long run but simultaneously by an increase in the number of retired people, decrease in the number of pensions that can lead to public pressure for political change that in itself has to be financed by “higher taxes on working people”.<sup>96</sup> As chief economist at Polish Bank Pekao, Mrowiec noted,<sup>97</sup> the Polish economy will be burdened with high budget expenses on pensions. The argument about the negative impact of low retirement age on economic growth was

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<sup>92</sup> *Id.* para. 81.

<sup>93</sup> OECD, Pensions at a Glance 2017, how does Poland Compare? 5 December 2017; European Trade Union Institute, Poland: the restoration of a lower statutory pension age, 8 January 2018; Chłon-Domińczak A., Reversing the 2013 retirement age reform in Poland, European Social Policy Network, ESPN Flash Report 2016/17; Rzeczpospolita Polska, Ageing Working Group, Polish Country Fiche on pension projections 2018, December 2017, pp. 5-6.

<sup>94</sup> OECD 2017, p.1.

<sup>95</sup> Laszek A., Trzeciakowski R., Lowering the Retirement Age in Poland: Costly Long-Term Consequences, *Economy*, 2 November 2017; Forum Obywatelskiego Rozwoju, Komunikat FOR: Obniżenie wieku emerytalnego: Straty dla przyszłych emerytów, pracujących i gospodarki, 20 July 2016.

<sup>96</sup> *Id.*

<sup>97</sup> Polska Ykraina, Poland Keeps Election Promise, Lowers Retirement Age, and 1 October 2017, available at: <https://vilna.polska.ua.com/2017/10/poland-keeps-election-promise-lowers-retirement-age.html>; Reuters, Business News, Polish cut in retirement age comes into force, bucking European trend, 1 October 2017.

shared by Böheim<sup>98</sup> a contributor to the Institute of Labor Economics noting that reducing retirement age lowers the motivation to train and to invest in additional skills and that can result in lower economic growth.

In my opinion, the argument about the age balance as a necessity to lower the retirement age of judges lacks credibility. If a judge can adequately perform its duties and suddenly the enacted law considers him/her unsuited to its position because of his age and this is connected only to the objectives of the employment sector, this argument lacks legitimacy. The age balance in between other professions can be achieved in another way and judiciary is a very peculiar sector for this reform to have such a fast implementation pace. Also from the economic angle the aim of the retirement age balance will presumably have a negative impact on the economic growth of the country in the long run.

The argument by the government of Poland about the communist past of the Polish judiciary that was expressed in the white paper on the Reform of the Polish Judiciary<sup>99</sup> could have more validity because it could have a lustration aim to end service of judges who were involved in the communist regime. As it was noted in the white paper regarding desired reforms in the judiciary, the Supreme Court of Poland contains judges who were in past members of the communist party and they ordered death and lengthy sentences during martial law in 1980.<sup>100</sup> In response to such statement about communist past, the association of Polish judges - 'Iustitia',<sup>101</sup> noted that there are only a limited number of judges in nowadays Supreme Court who served in 1980 and they were not responsible for any misconduct. The association names judges such as Zabłocki, Iwulski who were active defenders of human rights in Poland during communism and assesses their removal as unfair together with drawing parallels to the appointment of Piotrowicz –

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<sup>98</sup> Böhem R., World of Labor, IZA, and The effect of early retirement schemes on youth employment, available at: <https://wol.iza.org/articles/effect-of-early-retirement-schemes-on-youth-employment/long>.

<sup>99</sup> Supra note 74, p.13.

<sup>100</sup> *Id.* pp. 13 and 15-16.

<sup>101</sup> Iustitia Polska, The Arguments of Polish Judges Association Iustitia Related to the PM Mateusz Morawiecki Statement at the Meeting with Foreign Journalists, 27 January 2018, available at: <https://www.iustitia.pl/in-english/2066-the-arguments-of-polish-judges-association-iustitia-related-to-the-pm-mateusz-morawiecki-statements-at-the-meeting-with-foreign-journalists-on-january-10th-2018>.

former awardee of Bronze Cross for Valor of the communist regime as a leading figure for judicial reforms in Poland.<sup>102</sup>

However, even in the case of such an argument about the communist past, the ultimate measure of absolving a certain number of judges from their responsibilities without examining their cases individually does not constitute a justified measure. It is possible to conduct individual review in exceptional cases when there is evidence of systemic corruption or abuse of human rights. Such a possibility was justified by UN Special Rapporteur on the Independence of Judges noting that transitional periods from authoritarian to democratic system justifies “objective limitations to the principle of irremovability”<sup>103</sup> with the aim to end the systemic violations. However, in the present case, such individual reviews were not conducted and also, it should be noted that the argument about the communist past of the Supreme Court judges lacks reasonability in temporal context because of the end of the regime thirty years ago.<sup>104</sup>

Moreover, there exist disciplinary procedures that can be used against judges towards whom there are established grounds that they do not perform their duties adequately. By changing the age of retirement, public authorities allegedly take the very radical decision to “clean” certain corpus of judges without pointing on legitimate reason and this circumstance raises valid doubts. As the Court noted it in its findings,<sup>105</sup> the Republic of Poland has not demonstrated objectively why the measure directed to reducing retirement age differences to all workers is appropriate mean for achieving this aim especially when judges can be still subject to President’s discretionary decision about continuing to perform their service.

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<sup>102</sup> *Id.*

<sup>103</sup> UN General Assembly, Human Rights Council, Eleventh Session, Agenda item 3, A/HR/11/41, Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural rights, including the right to Development, Report of the Special Rapporteur on the independence of judges and lawyers, 24 March 2009, para 64.

<sup>104</sup> Pech L., and Platon S., The beginning of the end for Poland’s so-called “judicial reforms”? Some thoughts on the ECJ ruling in *Commission vs. Poland* (Independence of the Supreme Court case), EU Law Analysis, Expert insight into EU law developments, 30 June 2019, available at: <http://eulawanalysis.blogspot.com/2019/06/the-beginning-of-end-for-polands-so.html>.

<sup>105</sup> *Supra* note 3. para. 90.

### *8.1 The Exclusive Power of a President to Grant an Extension*

Another important aspect of the reform that was criticized by the Commission is the exclusive power of the president to grant an extension to judges to continue their service after the retirement age. The absence of any binding criteria for making the decision about an extension, a duty to give reasons for such decision and non-existence of judicial review, can create a risk of influence of the President over the decisions of extending tenure of judges.<sup>106</sup> A theory of checks and balances mandates the states to have a coordinated decision about extending the tenure of a judge, deliberated together by the Parliamentary majority and opposition to avoid autonomous decision by a President.<sup>107</sup> In Poland, however, in the wake of a one-right parliamentary system without strong opposition power, the president may be more susceptible to take an arbitrary decision.

In this regard the Principles on the Independence of the Judiciary can be of relevance. According to these Principles,<sup>108</sup> suspension of the term of judges shall be conducted in line with the standards of judicial conduct and should include an independent review. Furthermore, the Special Rapporteur on Independence of judges<sup>109</sup> compares reappointment and selection procedures of judges and notes that these two procedures shall be based on similar criteria and is required to undergo attestation procedure. According to the Repporteur an assigning body should also consider recommendations from the Court Chair and take into consideration the judge's previous performance. In the present case, undefined criteria for extending judge's tenure can be risky, since it grants the President an unlimited political power to make an arbitrary decision on extending judge's tenure.

Poland's counter-argument is that the President does not possess the information on voting of judges due the nature of its secrecy and that the other EU countries have

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<sup>106</sup> *Id.* paras. 98-9; Wachowiec P., Rule of Law, AG Tanchev suggests that Poland violated judicial independence, available at: <https://ruleoflaw.pl/ag-tanchev-suggests-that-poland-violated-judicial-independence/>.

<sup>107</sup> International Institute for Democracy and Electoral Assistance, Bulmer E., Judicial Tenure, Removal, Immunity and Accountability, International IDEA, Constitution-BUILDER Primer, 2017, pp.15-16.

<sup>108</sup> *Supra* note 87, principles 19 and 20.

<sup>109</sup> UN Economic and Social Council, Commission on Human Rights, Sixty-second session, Item 11 (d) of the provisional agenda, E/CN.4/2006/52/Add.3, Civil and Political Rights, including the questions of Independence of the judiciary, Administration of Justice, Impunity, Report of the Special Rapporteur on the independence of judges and lawyers, para. 45.

similar systems for extending judge's tenure.<sup>110</sup> This argument however, is not credible since power to appoint or re appoint judges in other EU countries is largely distributed among different branches. For example, in Germany in the election procedure of judges, there are three organs involved – the President, the Election Committee and the members of the German Parliament.<sup>111</sup> Also in France, the system of recruitment is conducted by based on the opinions of two different bodies – that of the President and of a judicial service commission. Belgium too is similar where the King and his ministers together with High Council of Justice take the decision on the appointment of judges.<sup>112</sup> Contrary to Poland, these countries adhere to the principle of checks and balances to avoid accumulation of autonomous power in the hands of one governmental institution.

Moreover, even if the national law of other member state provides for a similar procedure, it cannot rely on a possible infringement of EU law by another member state to justify its violation of EU law.<sup>113</sup> Furthermore, the same rule exists in international law, that a state cannot justify its illegal actions that violate international order by pointing to its national law.<sup>114</sup> Within the setting of two different orders of EU law and international legal order state cannot justify its own infringements by pointing to national law as a legitimate excuse. As Court contends, the power of the president to decide about the extension of judge's service shall be governed with “detailed procedural rules”<sup>115</sup> to exclude bias.

### *8.2 The Necessity of the Transitional Period before Adopting the Reform*

As mentioned by the EU Commission,<sup>116</sup> the Republic of Poland created a drastic change in the court's structure that put under threat judicial independence of judges. In order to prevent such a fast change and to ensure that the reason for lowering age of

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<sup>110</sup> Supra note 3. paras. 106-7.

<sup>111</sup> Bovend'Eert P., Nederlandse Vereniging voor Rechtspraak, Recruitment and Appointment of Judges and Justices in Europe and the US, May 2018, available at: <https://trema.nvvr.org/uploads/documenten/downloads/2018-05-Artikel-BovendEert.pdf>.

<sup>112</sup> *Id.*

<sup>113</sup> Judgment of the Court of 18 September 1986, *Commission vs. Germany*, Case C-116/82, para.11.

<sup>114</sup> International Law Commission, Responsibility of States for International Wrongful Acts, Official Records of the General Assembly, Fifty-sixth Session, Supplement No.10 (A/56/10), 12 December 2001, Article 3.

<sup>115</sup> Supra note 3 para. 111; Judgment of the Court of 16 October 2012, *Commission vs. Austria*, C-614/10, EU:C:2012:631, para 43.

<sup>116</sup> Supra note 3, para. 63.

judges was not the political aim of their removal, the Commission noted that the transitional period would be necessary.<sup>117</sup> In my opinion, such a radical change can have a very negative effect on a judge's performance, taking into consideration the fact that this can deprive him of working/concluding on the important decision that she or he is working. Such attitude can qualify as pressure on judicial independence. It is not concretized in the judgment what the transitional period actually can consist of in the practice, whether it means giving relevant explanations to judges and public why such fast measure of reducing retirement age and their removal is reasonable or whether this means assessing performance of each individual judge and then taking decision about their continuation or non-continuation of service.

In my analysis, such transitional approach before implementing judicial reforms would make the process of reform more transparent and reliable through giving judges, society and interested individuals the right to comment on such changes. This also gives the possibility to judges to adapt to changed circumstances because in reality this change carries a big importance because of the end of their judicial career. After the close look at Commonwealth Latimer House Principles, they provide a good example of how the process of removal of judges should be conducted. According to these principles,<sup>118</sup> the removal of judges must be accompanied by the right of a judge to be fully informed about the charges and by the right to a fair trial. The Court noted that the absence of transitional measures in such a situation violated the principle of proportionality.<sup>119</sup> This means that such a radical measure of reducing retirement age and removing judges is not proportionate to the aim of balancing the retirement age of workers. If there does not exist legitimate explanation of the measure used and the measure is not proportionate to the aim that shall be achieved then dismissal of judges can be regarded as interference within their private and professional life. As ECtHR in *Ozpinar vs. Turkey*<sup>120</sup> has commented on the dismissal of judge's because of his/her incidence of private life constitutes interference into the professional life of a judge if the reason of interference

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<sup>117</sup> *Id.* para. 64.

<sup>118</sup> Commonwealth (Latimer House) Principles on the Three Branches of Government, November 2003, VI) Accountability Mechanisms, p.20 available at: <https://www.cmja.org/downloads/latimerhouse/commprinthreearms.pdf>.

<sup>119</sup> *Supra* note 3. para. 91; Judgment of 6 November 2012, *Commission vs. Hungary*, C-286/12, EU:C:2012:687, para. 80.

<sup>120</sup> *Ozpinar vs. Turkey*, Application no. 20999/04, Judgment of 19 October 2011, paras. 67-79.

was not proportionate to the legitimate aim pursued. The same line of reasoning was adopted in other decisions of the ECtHR.<sup>121</sup>

### *8.3 A Justice System as a National Sovereignty Prerogative*

The Republic of Poland submitted that national rules that were challenged by the Commission couldn't be reviewed under Article 19 of the TEU and Article 47 of the Charter.<sup>122</sup> It went on noting that organization of national justice system constitutes the exclusive authority of member states and EU cannot take possession of it and the above articles noted by the Court are applicable "only in situations governed under the EU law".<sup>123</sup> In this regard, ECJ has clarified in its previous ruling concerning Portuguese judges and their remuneration,<sup>124</sup> that despite the fact that Portugal has its own competence to implement its budgetary policy guidelines, this does not release from the obligation to respect and take into consideration the general principles of EU law, among them judicial independence. This means that member states have an obligation to respect EU law in cases when national reforms do not directly enforce or concern EU law but can have an indirect effect. For example in the present case of Poland, the adoption of reform of lowering retirement age indirectly touches on one of the most essential parts of EU functioning order – the rule of law and therefore causes a reaction from EU institutions.

For the purposes of preserving the EU legal order, the treaties that establish a judicial system shall ensure the consistency in interpreting EU law.<sup>125</sup> Here Poland should not forget its obligations taken under the EU law as a member of the EU. In a number of judgments<sup>126</sup> rendered by the ECJ, they regard the rule of law as one of the important values of the EU that shall be common for member states of the Union and be

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<sup>121</sup> *Kulykov and others vs. Ukraine*, Application nos. 5114/09, Judgment of 19 January 2017, paras.138-39; *Case of Denisov vs. Ukraine*, Application no. 766639/11, Judgment of 25 September 2018, paras.3, 84, 87, 98.

<sup>122</sup> *Supra* note 3. para. 37.

<sup>123</sup> *Id.* paras. 38-40.

<sup>124</sup> *Supra* note 57, para. 15.

<sup>125</sup> Judgment of 6 March, *Achmea BV*, C-284/16, EU:C:2018:158, para 35; Opinion 2/13 of 18 December 2014, Accession of the EU to the ECHR, EU:C:2014:2454, para. 174.

<sup>126</sup> Judgment of 10 December 2018, *Wightman and others*, C-621/18, EU:C:2018:999, paras. 62-3; Judgment of Court of 3 September 2008, *Kadi and Al Barakaat International Foundation vs. Council and Commission*, C-402/05 P and C-415/05 P, EU:C:2008:461, paras. 303-4; Judgment of 6 October 2015, *Maximilliam Schrems vs. Data Protection Commissioner*, C-362/14, EU:C:2015:650, paras. 60, 95.

respected. Also, ECJ notes in several rulings<sup>127</sup> that the EU member states have an obligation to act according to EU law. For the normal functioning of the EU, it is necessary to guarantee that each member state has an interest in preserving fundamental human rights, the justice sector that can reinforce mutual trust between them.<sup>128</sup> The different spheres of the Union such as the rule of law, economy, security, and anti-corruption policies are so strongly interconnected to each other that deficiencies in the functioning of one of them can have the negative spillover effect on another.<sup>129</sup> The effectiveness of public services, the rule of law, the fight against corruption in a respective EU member state can have an impact on the number of investments, economic benefits of a state.<sup>130</sup> Therefore, if Poland regards its justice system as a national sovereignty prerogative and implements reforms that are contrary to EU common values, then it automatically violates EU law and also threatens normal functioning of the above-mentioned spheres.

Also, apart from analyzing the judicial system of Poland from EU law perspective, the review from European Convention on Human Rights (*hereinafter*: “ECHR” or “the Convention”) perspective can be relevant here. ECHR has an important role in Polish national legal system since the ratification of the Convention in 1993 by Poland<sup>131</sup> and because of existing monist system under Polish Constitution<sup>132</sup> that gives international conventions directly applicable power in national legal order. Also, ECJ can rely on ECtHR case law since there exist ruling<sup>133</sup> where ECJ stressed on the significance of Strasbourg Court findings with respect to Article 6 of the ECHR, right to a fair trial. Despite such probable harmonious relationship of ECtHR and ECJ and possibility of reliance on each other, one should not forget the fact that the acts of the EU institutions

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<sup>127</sup> Judgment of 13 November 2018, *Raugevicius*, C-247/17, EU:C:2018:898, para. 45; Judgment of 14 June 2017, *Online Games and Others*, C-685/15, EU:C:2017:452, para. 54; Judgment of 28 March 2017, *PJSC Rosneft Oil Company vs. Her Majesty's Treasury*, C-72/15, EU:C:2017:236, paras. 72-74.

<sup>128</sup> Commission Communication on Further Strengthening the Rule of Law, 2019, Introduction;

<sup>129</sup> Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee, the Committee of the Regions and the European Investment Bank, Annual Growth Survey 2019, for stronger Europe in the face of global uncertainty, Brussels, COM (2018) 21 September 2018, pp. 10-12.

<sup>130</sup> *Id.*

<sup>131</sup> ECtHR, Press Country Profile, Poland, available at:

[https://www.echr.coe.int/Documents/CP\\_Poland\\_ENG.pdf](https://www.echr.coe.int/Documents/CP_Poland_ENG.pdf).

<sup>132</sup> *Supra* note 18, Article 91.

<sup>133</sup> Judgment of 3 September, *Kadi vs. Council of the European Union and Commission of the European Communities*, C-402/05 P and C-415/05 P, ECLI:EU:C:2008:461, para. 5.

cannot be referred to the ECHR and it is up to national courts to resort ECHR with the question of interpretation of EU law.<sup>134</sup> Furthermore, neither ECHR nor ECJ is entitled to invalidate decisions of Polish national courts or to repeal Polish national legislation. Therefore, it will be up to Poland to ensure compliance of its national legislation to the rulings of the Court, which does not appear easy in the light of the current political situation.<sup>135</sup>

## 9. Findings and Conclusive Remarks

After the following analysis of EU Justice Scoreboards together with the reports and recommendations of authoritative international organizations it is easy to answer the first research question about the necessity of reform. The analysis shows that from 2015 the appointment, transfer rules and disciplinary measures of judges in Poland contains ambiguities and this circumstance renders the procedure doubtful and preservation of the principle of irremovability of judges is being questioned. With respect to the principle of independence of the judiciary from 2015 to 2019 the views of the general public concerning the independence of the judicial sector does not change significantly, the highest percentage of the public assesses the perceived independence as very bad throughout these years and the main reason for such evaluation is alleged political influence over the justice processes. Furthermore, the recent report of 2019 prepared by the Helsinki Foundation for Human Rights,<sup>136</sup> notes in its assessment about systemic guarantees of judicial independence in Poland, that after four years of judicial reforms, the changes in disciplinary procedures and modifications in the structure of National Council of the Judiciary caused deterioration of standards protecting judicial independence. Based on all the above information, the necessity of judicial reform was apparent in Poland.

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<sup>134</sup> CCBE, European Lawyers Promoting Law and Justice, The European Court of Human Rights, Questions and Answers for Lawyers, 2014, Question 13.

<sup>135</sup> *Id.*, Question 36; European Union, Court of Justice of the European Union, Overview, [https://europa.eu/european-union/about-eu/institutions-bodies/court-justice\\_en](https://europa.eu/european-union/about-eu/institutions-bodies/court-justice_en).

<sup>136</sup> Helsinki Foundation for Human Rights, The Time of Trial, How do changes in justice system affect Polish judges? 1 July 2019, available at: [http://citizensobservatory.pl/wp-content/uploads/2019/07/czas-proby-EN\\_EMBARGO\\_24072019.pdf](http://citizensobservatory.pl/wp-content/uploads/2019/07/czas-proby-EN_EMBARGO_24072019.pdf).

With respect to the second research question about the reasonability of the reform, the embracive analysis of the arguments presented by the Republic of Poland and the Commission in the recent judgment leads to the conclusion that by the reform of reducing the retirement age of judges the principles of judicial independence and irremovability of judges were violated. The assessment of the arguments of intervention in these principles is conducted by testing their reasonability and proportionality to the aim the Republic of Poland wanted to achieve. After the assessment of different aspects of the argument – such as the autonomous power of president to grant extension in the light of violation of separation of powers under constitutional law, absence of transition period given to judges to adjust to new circumstances taking into consideration Commonwealth principles on the three branches of Judiciary and case law of ECtHR, transforming judiciary as an issue of national jurisdiction with due regard to the EU law and obligations of states as a members of the Union, it becomes clearer that these aspects add more weight to the argument that the measure employed by Poland of lowering retirement age and drastically removing certain number of judges from judiciary system was not reasonable and proportional.

To sum up, the review of the political background in Poland together with the constitutional order in the country draws the following picture – one-party parliamentary system with the considerate power over the judiciary, the inactive opposition and non-maintenance of the separation of powers contribute to dominance of politics into judicial sector and that makes easier to deliver politically favorable decisions for the leading party. This situation can be modified into more reasonable structure of power balance when in parliament no one will have colossal constitutional majority and majority will be forced to deliberate and take into consideration opinions of other parties, become more transparent and rational and the decision about appointment, reappointment or extension of tenure of a judge won't be in the hands of one governmental institution. As a result, the judge will become more independent and this is directly connected to less corruption and more effective and law-abiding public service.

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