Selecting Judges in Poland and Germany: Challenges to the Rule of law in Europe and Propositions for a new Approach to Judicial Legitimacy

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Abstract

The recent reforms of the Polish Judiciary have sparked a lively debate in Europe on the importance of judicial independence. This Article deals with the new Polish system of selecting and appointing judges and critically assesses it in the light of European standards for judicial appointments. It then compares the new Polish system to the German system of selecting judges, which has been advanced as a point of reference for the reform by the Polish government. Finally, the Article reconsiders and challenges some of the established concepts of German constitutional law as to the selection of judges and judicial legitimacy.

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A. Introduction

In recent years, the role of an independent judiciary in a democratic state and its relationship with the other branches of government has been the subject of serious political conflicts in many states across Europe. For example, since 2011, extensive reforms and reconstructions of the judiciary have taken place in Hungary. Verbal attacks on independent courts by political actors or the press have increased in many countries. In Turkey, an independent judiciary hardly exists after the failed *coup-d'état* in the summer of 2016.[1]

In Poland, wide-ranging reforms of the Constitutional Tribunal have taken place since 2015 and more reforms of the ordinary judiciary have been introduced in 2017 and early 2018. They give rise to serious concerns as to their compatibility with the concept of the rule of law and the standards for an independent judiciary in a modern democracy. These reforms and the political motives behind them also invite to reconsider, on a broader level, the concept of judicial legitimacy and the importance of judicial independence.

To properly assess the reforms in Poland and their implication for the rule of law in general, we will first explain why matters of judicial independence and challenges to the rule of law are not solely a national issue and should indeed concern all supporters of the rule of law in general and the other member states of the EU in particular (Section B). We will then recount the reforms in Poland in their political and social context while also commenting on recent reactions to these developments by the European Commission and the European Court of Justice (Section C). In greater detail, we will discuss the reform of the Polish National Council for the Judiciary in the light of European standards for such councils and will seek to clarify whether or not the reform poses a risk to the independence of the Polish judiciary (Section D). Because the Polish government claims that it drew inspiration for its reform from the systems used in Germany to select and appoint judges, we will then move on to examine the German practices and discuss if and how these claims of the Polish government are pertinent (Section E). Because the debates concerning the selection and appointment of judges in Poland and Germany both heavily focus on the democratization of the judiciary and the democratic legitimacy of judges, we would then like to offer some thoughts on what kind of legitimacy really is necessary for the judicial office (Section F). Finally, we will use these insights to reconsider some pillars of the German discourse on the selection and the appointment of judges and suggest ways in which there might be room within the German constitutional framework to adequately reflect all aspects of the legitimacy of judges (Section G).

[1] The MEDEL-Association stated in their 2017 report titled La Justice en Europe: "Il n'y a plus de Justice en Turquie" (There is no more justice in Turkey), Magistrats Européens pour la Démocratie et les Libertés (MEDEL), *La justice en Europe,* MEDELNET.EU 29, 36 (May 23, 2017), www.medelnet.eu/images/2016/medel_report-2017.pdf.

B. Challenges to the Rule of Law as a European Problem

At the outset, it is not the task of legal academics to question and discuss political plans, motives, and reforms. Special caution must be exercised when political events in another country, marked by a distinct and proud culture, are discussed. Nevertheless, reforms that might influence the independence of a national judiciary and its relationship with other state powers might touch upon the foundation of the modern understanding of the rule of law. While each country can decide for itself how and why to reform its judiciary, it is of crucial importance to the whole community of modern constitutional democracies to maintain the rule of law and to not allow for fundamental changes of essential pillars of the rule of law.

The rule of law as an organizational model of modern constitutional law and supranational- and international organizations such as the EU, the Council of Europe and the United Nations serves the regulation of public power. At its core,[2] the rule of law ensures that all public power is exercised in accordance with the laws, human rights and democratic values. Possible abuse of power within the democratic process is controlled by independent courts.[3] Democratic societies have oftentimes tended to let the sentiments of the majority—which find their expression in the laws—influence the fundamental rights and prerogatives of those who are in the minority. It is the task of an independent judiciary—international and national—to detect those instances in which the majority has overstepped its constitutional powers.[4] Whether a country adheres to this organizational model is not a political debate between conservative and liberal forces or between different legal philosophies—as some have suggested[5]—and is not a matter of imposing a foreign state theory upon a sovereign country. Rather, it is a debate between those who think that the abuse of power within the democratic process at the expense of those who are not in the majority should be controlled by law and guaranteed by independent courts and those who do not.

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[2] *See* European Commission, *A New EU Framework to Strengthen the Rule of Law,* at 1f, COM (2014) 158 final (March 11, 2014) (describing an account of what the rule of law might consist of in detail).

[3] For illustrative purposes:

> It must first be emphasized in this regard that the European Economic Community is a Community based on the rule of law, inasmuch as neither its Member States nor its institutions can avoid a review of the question whether the measures adopted by them are in conformity with the basic constitutional charter, the Treaty.

Case 294/83, Les Verts v. Eur. Par., 1986 E.C.R. 1339, para. 23.

[4] *See* Belcacemi & Oussar v. Belgium, App. No. 37798/13, para. 9 (July 11, 2017) (Spano, J., concurring) for a recent reminder of this principle.

[5] Lech Morawski*, A Critical Response*, VERFBLOG (June 3, 2017), http://verfassungsblog.de/a-critical-response/.

Within the European Union, the vigilance for challenges to the rule of law is of particular importance: The rule of law is one of the main values on which the European Union is based,[6] as it is expressed in Article 2 TEU[7] and in the Preambles of both the TFEU[8] and the EU Charter of Fundamental Rights (CFR)[9]. Respect for the rule of law is a precondition for EU membership (Article 49 TFEU)[10] and one of the pillars of the Council of Europe, which is expressed by the Preamble to the European Convention for the Protection of Human Rights and Fundamental Freedoms (ECHR)[11] and its Article 6. Both the European Court of Justice for Human Rights (ECtHR)[12] and the Court of Justice of the European Union (CJEU)[13] have stressed that the rule of law cannot be reduced to formal considerations but is a substantive tool used in order to ensure compliance with and respect for human rights and the general principles of law. The functioning of the rule of law in all member states of the European Union is vital for the EU's proper function, as it can only fulfill its promise of an "ever closer Union"[14] and ensure the functioning of an "area of freedom, security and justice without internal frontiers"[15] if all EU citizens can legitimately trust all the other national authorities and legal systems. If the rule of law did not function properly in a member state, crucial everyday operations within the European legal order—such as the mandatory execution of a European arrest warrant issued in one member state by any other member state[16]—would not be operable. In fact, the whole structure of EU law rests on the fundamental premise

[6] *See* European Commission, *supra* note 2, at 2–5.

[7] Consolidated Version of the Treaty on European Union art. 2, Feb. 7, 1992, 2012 O.J. (C 326) 13 https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A12012M%2FTXT [hereinafter TEU post-Lisbon].

[8] Consolidated Version of the Treaty on the Functioning of the European Union pmbl., March 25, 1957, 2012 O.J. (C 326) 47, https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1531083180270&uri=CELEX:12012E/TXT [hereinafter TFEU].

[9] Charter of Fundamental Rights of the European Union pmbl., Dec. 12, 2007, 2012 O.J. (C 326) 391, https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex:12012P/TXT.

[10] TFEU, *supra* note 8, art. 49.

[11] European Convention for the Protection of Human Rights and Fundamental Freedoms (as amended by protocols 11, 14) pmbl., Nov. 4, 1950, https://www.coe.int/en/web/conventions/full-list/-/conventions/rms/0900001680063765.

[12] *See* Stafford v. U.K., App. No. 46295/99, para. 63 (May 28, 2002), http://hudoc.echr.coe.int/.

[13] *See* Case C-50/00 P, Unión de Pequeños Agricultores v. Council, 2002 E.C.R. I-6677, paras. 38–39; Joined Cases C-402/05 P & C-415/05 P, Kadi I v. Council & Comm'n, 2008 E.C.R. I-6351, para. 316; *see also* T. von Danwitz, *The Rule of Law in the Recent Jurisprudence of the ECJ*, 37 FORDHAM INT'L L. J., 1311ff (2014).

[14] TEU post-Lisbon, *supra* note 7, art. 1.

[15] *Id*. art. 3 (1).

[16] *See* CJEU, Case C-168/13 PPU, Jeremy F. v Premier Ministre, ECLI:EU:C:2013:358 paras. 34–36.

"that each Member State shares with all the other Member States, and recognizes that they share with it, a set of common values on which the EU is founded, as stated in Article 2 TEU."[17] Through the political and legal interdependence of EU member states, all member states are affected and must be concerned if the rule of law is not fully respected by one member state. It is for this reason that the reforms of the Polish judiciary should be discussed not only on the national level but also by the community of those who wish to uphold the rule of law in Europe.

C. Changing Times in Poland

In the 2015 Polish parliamentary election, the national conservative Law and Justice Party (*Prawo i Sprawiedliwość*—or PiS) won 37.6% of the popular vote and an absolute majority of 235 out of the 460 seats in the Polish parliament, the *Sejm*. Since this election, the PiS-party also has a majority of 61 out of 100 seats in the *Senat Rzeczypospolitej Polskie*, the Polish Senate. Beata Szydło was inaugurated Prime Minister of Poland on November 16, 2015. Since August 6, 2015, the former PiS politician Andrzej Duda is in office as the President of the Republic of Poland after winning the presidential election with 51.55% of the popular vote.

With the PiS now controlling most political offices in the country, a wide variety of reforms have been introduced—ranging from an extension of the military,[18] a reform of public media[19] and a failed attempt to outlaw almost all kinds of abortion[20] to an intensive reorganization of the judiciary.

[17] CJEU, Opinion 2/13, Accession to the ECHR, ECLI:EU:C:2014:2454, para. 168.

[18] *See* Marek Świerczyński, *Czarne Jastrzębie zadziobały afrykańskiego kota. Polska armia nie kupi Caracali*, POLITYKA.PL (Oct. 5, 2015), http://www.polityka.pl/tygodnikpolityka/kraj/1678208,3,czarne-jastrzebie-zadziobaly-afrykanskiego-kota-polska-armia-nie-kupi-caracali.read.

[19] *See* Joanna Plucinska, *A Media Bill in Poland Sparks Concern over Press Freedom*, TIME.COM (Dec. 31, 2015), http://time.com/4164787/poland-media-bill-press-freedom/.

[20] *See Polens Parlament lehnt Abtreibungsverbot ab (Poland's parliament rejects abortion ban)*, TAGESSCHAU.DE (June 10, 2016, 1:37 PM), https://www.tagesschau.de/eilmeldung/polen-abtreibungsverbot-105.html.

I. Profound Reforms of the Judiciary

1. The Reform of the Constitutional Tribunal

The first judicial body to be targeted by the government was the *Trybunał Konstytucyjny*, the Polish Constitutional Tribunal.[21] Among many important changes to the status and organization of the Tribunal, the government introduced procedural reforms[22] and facilitated the introduction of disciplinary proceedings against the judges of the Tribunal by political actors. Further, the publication of judgments now depends on the approval of the Prime Minister and the publication of several judgments had been substantially delayed.

The most prominent action, however, took place when the government replaced five judges nominated for a seat on the Constitutional Tribunal by the former administration with candidates it preferred. Although two of the initial appointments made before the elections were in fact found to be unconstitutional by the Tribunal itself, three of them were not, so the new government would have been allowed to appoint two judges to the Tribunal in December 2015.[23] Regardless, all five of the judges appointed by the PiS were sworn in by the President of the Republic[24] and are by now fully exercising the duties of judges of the Constitutional Tribunal. As a result, there are now three persons that were appointed as judges of the Constitutional Tribunal in accordance with the Constitution but were prevented from taking the oath of office or exercising their duties as judges. Instead, three others have taken their offices. Further, as a replacement for the retiring President of the Constitutional Tribunal, Andrzej Rzepliński, the President of the Republic accepted a proposition by the Tribunal to name the PiS-nominee Julia Przyłębska the new President. Such a proposition of the general assembly of the Court is required by law. This proposition was only made by six out of fifteen judges sitting as a general assembly of the Court, whereas a new law of November 30, 2016 stipulated that the general assembly required the attendance of ten judges. The proposing assembly was summoned by Przyłębska herself in her capacity as "acting President" or "Commissioner"—a newly introduced office that

[21] *See Venice Commission Report* CDL-AD (2016) 001 (March 12, 2016); *Venice Commission Report* CDL-AD (2016) 026 (Oct. 14, 2016) (detailing an account and analysis of the events).

[22] For example, an attendance quorum of eleven out of fifteen judges for certain decisions, the possibility for four judges to postpone any decision they are not satisfied with after an initial internal vote, and the required presence of the prosecutor general—who also happens to be the Minister of Justice—in order to hear certain types of cases.

[23] *See* Wyrok [Judgment] Trybunal Konstytucyjny [Polish Constitutional Tribunal] Dec. 3, 2015, K 34/15.

[24] Most of them were sworn in at a private ceremony at 1:30 am on December 3, 2015.

essentially deprived the Vice President of the Tribunal of his or her capacity to organize the internal election of a new President of the Tribunal.[25]

Since Judge Grzegorz Jędrejek joined the Tribunal on February 27, 2017, Judges appointed by the PiS government are in the majority on the Tribunal. Though some questions remain unanswered concerning the Constitutional Tribunal—for example, how to deal with judgments in which the unconstitutionally elected judges are participating[26]—the government seems to have shifted its focus away from the Constitutional Tribunal to the rest of the Polish judiciary.

2. Restructuring of the Ordinary Judiciary—Reforming the Council for the Judiciary

The ordinary judiciary has also been the subject of several reforms. Most notably, new retirement ages for judges—sixty-five for men and sixty for women—were introduced. Further, the Minister of Justice is now allowed to prolong the term of office for judges that have reached the age of retirement and to discretionarily name and dismiss the Presidents of the courts. Two other Draft Acts were introduced in July 2017, one of which would allow for the termination of the term of office of all members of the Polish Supreme Court and would allow the Minister of Justice to choose their replacements. Another Draft Act suggested altering the nature and composition of the *Krajowa Rada Sądownictwa*, the National Council for the Judiciary of Poland. For the present purposes, we will focus on the reform of the council for the judiciary.

2.1 The Constitutional Role of the Council

The Council has the competence to submit requests to the President of the Republic of Poland for the appointment of judges to the Supreme Court, administrative courts, common courts and military courts, per Article 179 of the Polish Constitution.[27] It may also file applications with the Constitutional Tribunal for constitutional review of normative acts regarding the independence of courts and judges under Article 186 (2) of the Polish Constitution.[28] The Council is a collective body composed of representatives of all three

[25] For details on this procedure, see Marcin Matczak, *Poland's Constitutional Tribunal under PiS control descends into legal chaos*, VERFASSUNGSBLOG.DE (Jan. 11, 2017), http://verfassungsblog.de/polands-constitutional-tribunal-under-pis-control-descends-into-legal-chaos/.

[26] *See* Agnieszka Grzelak, *Sententia non existens—the future of jurisprudence of the Polish Constitutional Tribunal?*, VERFASSUNGSBLOG.DE (March 17 2017), http://verfassungsblog.de/sententia-non-existens-the-future-of-jurisprudence-of-the-polish-constitutional-tribunal/.

[27] *See* CONST. OF THE REPUBLIC OF POLAND, ch. VII, art. 179.

[28] *See id*., art. 186 (2).

branches of government. In an effort to guarantee the protection of judicial independence against undue political influences, Article 187 of the Constitution stipulates that 17 out of 25 members of the Council must be judges.[29] The President of the Supreme Court and the President of the Supreme Administrative Court are members of the Council as of right. The selection of judges for appointment or promotion is therefore mostly conferred to the judiciary itself.

The competences of the Council and its make-up reveal a strong constitutional emphasis on a judiciary that is capable of defending itself from political influences. This is consistent with the role that is explicitly conferred to the Council by the Polish Constitution: Article 186 (1) of the Polish Constitution provides that the Council acts as a guardian of the independence of the judiciary.[30] Judicial independence itself is recognized as an essential element of the right to a fair trial, which is guaranteed in Article 45 of the Polish Constitution.[31] By safeguarding the independence of the judiciary, which is a constitutional principle enshrined in Article 173[32] of the Polish Constitution and by defending it from influences from other branches of government, the Council strengthens the separation of powers, which the Polish Constitution recognizes in its Article 10[33]. This constitutional framework adequately reflects the recommendations made by the CCJE on the role of a council for the judiciary.[34]

2.2 The First Draft Act on the Council for the Judiciary

The Act of January 23, 2017 amending the Act on the National Council for the Judiciary and certain other acts proposed major changes concerning the organization and composition of the Council. Among others, four aspects of the draft were especially striking.

Firstly, the Council would have been split into two sections. The second section would consist of fifteen judges, while all political appointees would sit—together with the Presidents of the Supreme Court and the Supreme Administrative Court—in the first section.[35] The sections would independently consider and evaluate the candidates for judicial posts. If the sections had disagreed on a candidate, the section of the Council that issued a positive

[29] *See id*., art. 187.

[30] *See id*., art. 186 (1).

[31] *See id*., art. 45.

[32] *See id*., art. 173.

[33] *See id*., art. 10.

[34] *See* Consultative Council of European Judges, opinion 10 paras. 8–14 (2007), https://rm.coe.int/168074779b.

[35] *See* Polish Nat'l Council of the Judiciary Draft Act, art. 1 (7) (Jan. 23, 2017).

assessment may adopt a resolution to refer the application for the examination and evaluation by the full Council. In this case, issuing a positive evaluation of a candidate would have required the votes of all seventeen judicial members of the Council.

Secondly, if more than one candidate had applied for a vacant judicial post, the Council would have had to present at least two candidates to the President of the Republic of Poland, who may choose one of them at his or her own discretion.[36]

Thirdly, the power to elect the judicial members of the Council would no longer be exercised by the judges themselves but would be vested in the *Sejm*. The Presidium of the *Sejm* or fifty members of the *Sejm* would have been able to propose their candidates to the Marshal*,* the Speaker of the *Sejm*, who would choose discretionarily from among the candidates presented to him.[37]

Finally, the transitional provisions of the Draft Act provided for the termination of the mandate of the fifteen judges who are currently members of the Council thirty days after the entry into force of the Act,[38] even though their mandates are fixed to a four-year-term by Article 187 (3) of the Polish Constitution. The appointment of their successors shall occur within 30 days from the termination of their mandate and must be carried out in accordance with the new procedure and modalities laid out in the Draft Act.

This proposed increase in legislative and executive influence over the Council had been identified by some as constitutionally questionable.[39] According to Andrzej Zoll*,* a former President of the Polish Constitutional Tribunal, "the incompatibility of the Act with the Constitution is undisputed."[40] The Council itself has issued a negative opinion on the Draft Act, in which it lists seven reasons for why the Draft Act may be unconstitutional.[41] The Draft

[36] *See id*., art. 1 (14).

[37] *See id., art. 1 (1).*

[38] *See id*., art. 5.

[39] *See* Piotr Mikuli, *An Explicit Constitutional Change by Means of an Ordinary Statute? On a Bill Concerning the Reform of the National Council of the Judiciary in Poland,* VERFASSUNGSBLOG.DE (Feb. 23, 2017), http://verfassungsblog.de/an-explicit-constitutional-change-by-means-of-an-ordinary-statute-on-a-bill-concerning-the-reform-of-the-national-council-of-the-judiciary-in-poland/.

[40] *Zoll,* DRiZ 2017, 14 (translation provided by the authors).

[41] *See* Opinia [Opinion] Krajowej Rady Sadownictwa, Polish Nat'l Council for the Judiciary (Jan. 30, 2017), http://www.krs.pl/pl/dzialalnosc/posiedzenia-rady/f,189,posiedzenia-w-2017-r/664,30-styczina/4595,opinia-krajowej-rady-sadownictwa-z-dnia-30-stycznia-2017-r-nr-wo-02-5316-ud-73.

Act has also met with heavy criticism from Polish judges,[42] the Magistrats Européens pour la Démocratie et les Libertés[43] and the European Network of Councils for the Judiciary (ENCJ), among others.[44]

2.3 Involvement of the Constitutional Tribunal

The legislative process concerning the reform of the Council was slowed down when President Duda expressed doubts as to whether the termination of the terms of office of all sitting members of the Council was compatible with Article 187 (3) of the Polish Constitution which states: "The term of office of those chosen as members of the National Council of the Judiciary shall be 4 years."[45] In these circumstances, the Minister of Justice has referred some provisions of the current law to the Council to the Constitutional Tribunal for constitutional review. With its judgment of June 20, 2017,[46] the Tribunal—with the participation of three unconstitutionally elected judges—struck down certain provisions of the law on the Council from 2011 and held in essence that judges of first instance were not sufficiently represented in the Council. Further, the Tribunal held that the four-year term of members of the Council according to Article 187 (3) of the Constitution only fixes the term of the Council as a collective body and does not guarantee an individual term of four years to each member.[47]

It has been submitted that the judgment of the Tribunal would facilitate the reform as uncertainties concerning the meaning of Article 187 (3) of the Constitution are now cleared up and it would be possible to terminate the individual terms of office of sitting members in

[42] *See* Ewa Siedlecka, *Prezes Sadu Naiwvzszego wzvwa sedziow do oporu*, WYBORCZA.PL (Jan. 30, 2017), http://wyborcza.pl/7,75398,21315772,prezes-sadu-najwyzszego-wzywa-sedziow-do-oporu-dramatyczne.html?disableRedirects=true.

[43] *See Magistrats Européens pour la Démocratie et les Libertés (MEDEL), supra* note 1, at 30–36.

[44] *See* Opinion of the ENCJ Executive Board on the request of the Krajowa Rada Sądownictwa of Poland, European Network of Councils for the Judiciary (ENCJ) (Jan. 30, 2017), https://www.encj.eu/index.php?option=com_content&view=article&id=228%3Aebpoland&catid=22%3Anews&lang=en.

[45] Translation provided by the Polish parliament.

[46] *See* Wyrok [Judgment] Trybunal Konstytucyjny [Polish Constitutional Tribunal] June 20, 2017, K 5/17.

[47] *See* CONST. OF THE REPUBLIC OF POLAND, ch. VII, art. 187 (3).

order to constitute a newly composed Council with a collective four-year mandate.[48] The judgment was heavily criticized by academics[49] and the Council itself.[50]

2.4 Subsequent Developments—the New Act

Notwithstanding the heavy national and international criticism of the reform, the *Sejm* proceeded to pass the Act on July 12, 2017.[51] On July 24, 2017, President Duda announced that he would veto the Draft Act, sending it back to the *Sejm* for deliberation. After his veto, President Duda introduced amended Draft Acts. The *Sejm* passed those two amended Draft Acts in December 2017. President Duda signed both despite heavy national and international criticism[52] and they came into force on January 15, 2018. The new law from the Supreme Court introduced new retirement ages for Supreme Court judges—again, sixty-five for men and sixty for women. Judges of the Supreme Court who wish to continue their service can do so only with the permission of the President. Moreover, the law introduced new chambers for disciplinary issues and voting issues,[53] and an extraordinary appeal chamber which has the power to overturn final judgments within five years, or even within twenty years during a transitional period on points of fact or for reasons of social justice.[54]

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[48] *See* Michal Kolanko, *Niepewność PiS w sprawie reformy sądownictwa*, RZECZPOSPOLITA (June 20, 2017), http://www.rp.pl/Polityka/306199919-Niepewnosc-PiS-w-sprawie-reformy-sadownictwa.html#ap-1.

[49] *See* Marcin Matczak, *How to Demolish an Independent Judiciary with the Help of a Constitutional Court*, VERFASSUNGSBLOG.DE (June 23, 2017), http://verfassungsblog.de/how-to-demolish-an-independent-judiciary-with-the-help-of-a-constitutional-court/.

[50] *See Stanowisko Prezydium Krajowej Rady Sadownictwa, z dnia 20 czerwca 2017 r. w związku z wyrokiem składu Trybunału Konstytucyjnego w sprawie K 5/17*, POLISH NAT'L COUNCIL FOR THE JUDICIARY (June 20, 2017), http://krs.pl/pl/aktualnosci/d,2017,6/4841,stanowisko-prezydium-krajowej-rady-sadownictwa-z-20-czerwca-2017-r-w-zwiazku-z-wyrokiem-trybunalu-konstytucyjnego-w-sprawie-zgodnosci-z-konstytucja-rp-obowiazujacego-modelu-wyboru-czlonkow-krs.

[51] *See Polens Parlament stimmt für umstrittene Justizreform (Poland's parliament votes for controversial judicial reform),* SPIEGEL ONLINE (July 12, 2017), http://www.spiegel.de/politik/ausland/polen-parlament-stimmt-fuer-umstrittene-justizreform-a-1157478.html.

[52] *See* Venice Commission, Opinion CDL/AD 031 (Dec. 9, 2017); MEDEL, *Krakow Declaration* (Dec. 18, 2017), http://www.medelnet.eu/index.php/news/europe/408-krakow-declaration.

[53] *See* European Commission, *Recommendation of December 20, 2017 regarding the rule of law in Poland—Complementary to Commission Recommendations (EU) 2016/1374, (EU) 2017/146 and (EU) 2017/1520,* paras. 22–26, C (2017) 9050 final (Dec. 20, 2017).

[54] See *id*., at paras. 18–21; Venice Commission, *supra* note 52, at para. 32–95 for a detailed discussion.

In relation to the new Council, its fifteen judicial members will now be elected, in the first round, by a majority of three-fifths of the *Sejm*.[55] Interestingly, it is not entirely clear what happens if the requested majority is not reached in the first round. In this case, a second round of election is held, in which candidates are elected "by a roll call" under Article 11d (1) of the Act. Under Article 11d (2), each Member of Parliament has one vote, and may vote for only one candidate. Under Article 11d (3), "candidates who have received the highest number of votes shall be deemed to have been elected", and each MP may vote "for" or "against" a candidate or abstain. In the case of a tie, a candidate who received fewer votes "against" will be elected. Therefore, a simple majority of votes or even less could suffice for a candidate to be elected to the Council in the second round.[56] The division of the Council into two chambers—which practically meant a veto power of the political appointees—was given up.

Judicial candidates for a seat in the Council may be nominated either by a group of 2,000 citizens or by twenty-five fellow judges, according to Article 11a (2) of the Act. Nevertheless, Parliament is not obliged to select candidates with sufficient support in the judiciary.[57] The marshal of the *Sejm* presents the candidates who fulfill the requirements to the *Sejm*. Out of these, each party may select up to nine candidates. Of these, the parliamentary committee for law and human rights selects fifteen. The *Sejm* then votes on these candidates.[58]

Still, the Act provides for the termination of the term of office of all sitting judicial members of the Council, per Article 6 of the Act.

II. Political Goals as a Challenge for the Rule of law

In order to fully understand these reforms, it is crucial to note what kind of political motivation produced them. The public statements of the politicians responsible for the reform and the official reasons annexed to the Draft Act help identify what motivated the reforms and what was argued in their favor. The account given here—which, of course, is by no means exhaustive—is trying to illustrate the general terms of the political debate and the most prominent concerns brought forth by the government in defense of its actions. By understanding the motivation behind the reforms, it becomes clear that the events unfolding in Poland should concern all member states of the EU and all those interested in maintaining the rule of law.

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[55] *See* Venice Commission, s*upra* note 52, at para. 19.

[56] *See id*., at paras. 20–23.

[57] *See id.*, at para. 26.

[58] *See* European Commission, *supra* note 53, at para. 32.

1. A Political Mission: "Giving the Judiciary Back to the People"

Concerning the reform of the Constitutional Tribunal, the government advanced concerns that the Tribunal did not adequately reflect the new political majorities in Poland: The Venice Commission—during its visit to Poland to conduct research on the reform of the Constitutional Tribunal[59]—was confronted with the theory that judges appointed by the former government were "opposition judges."[60] In fact, the composition of the Tribunal was presented to the Venice Commission on charts, marking each sitting judge in the color of the party that appointed him or her.[61] The government advanced that the "principle of pluralism"—the idea that the composition of a Constitutional Court should be sufficiently balanced[62]—means that a constitutional Court should be able to represent party interests according to the current political majorities.[63] The Polish government's understanding of what a parliamentarian majority may or may not do with a Constitutional Court became most visible in public statements by the former Prime Minister and PiS politician Jarosław Kaczyński, who stated that: "In a democracy, the sovereign is the people, their representative parliament and, in the Polish case, the elected president. If we are to have a democratic state of law, no state authority, including the constitutional tribunal, can disregard legislation."[64]

Concerning the reforms of the judiciary in general, the focus of the Polish government on the "democratization" of the judiciary is evident. The reasons for the Draft Act concerning the reform of the National Council for the Judiciary included the following statement:

> In practice, judges are currently selected exclusively by judges. . . . The selection of a judge who exercises public authority should. . . be subject to some actual influence of the representatives of other branches of government, in particular the legislative power holding the mandate arising from democratic elections . . . .

[59] *See generally* Venice Commission, *supra* note 21, for a detailed account of the events.

[60] *See* Venice Commission, *supra* note 21 at paras. 115–19.

[61] *See id.* at paras. 115-119.

[62] *See* Venice Commission, CDL-STD 020, para. 21 (1997).

[63] *See* Venice Commission, *supra* note 21, at para. 115–19.

[64] Christian Davies, *Poland is 'on road to autocracy', says Constitutional Court President*, THE GUARDIAN (December 18, 2016), https://www.theguardian.com/world/2016/dec/18/poland-is-on-road-to-autocracy-says-high-court-president.

The Polish minister of Justice Ziobro has publicly stated that it is the aim of the government to give the judiciary "back to the Polish People"[65] by establishing political control over judges. His deputy minister further explained that

> [d]emocratization of the elections to the National Council for the Judiciary is crucial. . . I would like to point out that the best way to ensure a fair and efficient judiciary is to bring control and balance to the judicial power by the other powers: legislative and executive, as well as subjugating the judiciary to the control of the civil society.

He claimed this to be in the "interest of the whole country and its citizens" and urged members of the judiciary to put these "ahead of their own self-interest."[66]

In short, the Polish government is trying to establish real and effective control over the judiciary, exercised by the current political majority in the legislative and executive branch of power. This means that current political majorities should be given a decisive influence over the selection of judges and disciplinary proceedings against judges in order to shape the judiciary to their liking. Even the education of future judges is now under strict control of the ruling party.[67] All of these reforms are justified by a supposed need to strengthen the Polish democracy, which seems to be equated to the rule of the majority.

2. Some Remarks on These Events from the Perspective of the Rule of law

In the light of the importance of the rule of law for a functioning and free democratic society, these developments—especially the idea that courts in general and a constitutional court in particular should be staffed in order to adequately represent new political majorities as an expression of democracy—seem deeply troublesome. Because similar tendencies have been

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[65] *See* wPolityce.pl/TVP Info, *Ziobro: Sądownictwo to nie jest kasta i państwo w państwie. Chcę zmienić to myślenie oraz przywrócić sądownictwo polskiemu społeczeństwu*, POLITYCE (April 27, 2017), http://wpolityce.pl/polityka/337508-ziobro-sadownictwo-to-nie-jest-kasta-i-panstwo-w-panstwie-chce-zmienic-to-myslenie-oraz-przywrocic-sadownictwo-polskiemu-spoleczenstwu.

[66] Speech given by Deputy Minister Warchol at the Polish Lawyers Congress on May 20, 2017 in Katowice; translation was provided by the Polish Judges Association (PJA) Iustitia. The author Sanders was present at the Congress.

[67] See MEDEL, *La justice en Europe (2017)*, pages 30–36 (May 23, 2017), http://www.medelnet.eu/index.php?option=com_content&view=article&id=380:la-justice-en-europe-quinze-systemes-judiciares-passes-au-crible-des-principes-fondametaux&catid=45:an-independent-judiciary&Itemid=61 for further details.

noted in several European countries by the Consultative Council of European Judges (CCJE)[68] and in a joint report by the CCJE and the Consultative Council of European Prosecutors (CCPE),[69] the relationship of the judiciary with the other branches of government from the perspective of the rule of law should be clearly reiterated. As the Venice Commission has stated before, judges have a "duty of ingratitude" towards the authority that selected or appointed them.[70] Of course, certain judges may well be supported and fostered by a political party, but they must never represent that party. The law is applied by the judiciary which exercises its power "independently of either the executive or legislative powers and individual judges base their decisions solely on facts and law of individual cases."[71]

Most notably, the power of constitutional review of a Constitutional Court, especially if its results contradict the will of the current political majority, is not, as claimed by Kaczyński, contrary to a democratic state of law. Rather, it is an important factor in establishing a functioning control of public power and thereby upholding a democratic *État de droit*. A widely held assumption across all European democracies is in fact that,

> [A] Constitution is. . . and must be regarded by the judges as, a fundamental law. It, therefore, belongs to them to ascertain its meaning, as well as the meaning of any particular act proceeding from the legislative body. If there should happen to be an irreconcilable variance between the two, that which has the superior obligation and validity ought, of course, to be preferred; or, in other words, the Constitution ought to be preferred to the statute, the intention of the people to the intention of their agents.[72]

The concept that it is an expression of the democratic principles that courts should be subject to democratic control, resulting in a composition of courts that reflects the political wishes of the current majority and that courts should be democratically—and therefore politically—controlled by parliament and the civil society thus seems to stray away

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[68] *See* Consultative Council of European Judges, opinion 18 para. 44 (2015), https://rm.coe.int/16807481a1.

[69] *See* Consultative Council of European Judges & Consultative Council of European Prosecutors, SG/Inf 3rev, paras. 42–95 (2016), https://rm.coe.int/168066d624

[70] *See* Venice Commission, *supra* note 52, paras. 115–19.

[71] Robert Stein*, Rule of Law: What Does It Mean?,* 18 MINN. J. INT'L L., 293, 302 (2009).

[72] *See* THE FEDERALIST NO. 78 (Alexander Hamilton).

remarkably from the modern understanding of a democratic state that adheres to the principles of the rule of law.

III. Reactions by the European Union and the Possible Way Forward

After about two years of fruitless dialogue and several opinions and recommendations on the current state of the rule of law in Poland by the European Commission, the procedure under Article 7 TEU was launched against Poland by the EU.[73] This could result in the determination of the existence of a serious and persistent breach by Poland of the values referred to in Article 2 TEU by a unanimous vote of the Council. This could lead to the suspension of certain rights deriving from the application of the Treaties. Nevertheless, given the requirement of a unanimous vote in the Council, there is little hope for a successful conclusion of the procedure under Article 7. In fact, this procedure has long been considered an unsuitable instrument to ensure the rule of law and compliance with the values enshrined in Article 2 TEU.[74] There is also talk of linking the reception of funds from the EU budget by member states to the compliance with rule of law.[75]

Further, the European Commission has taken concrete legal action by launching an infringement procedure against Poland under Article 258 TFEU for breaching EU law by passing the new retirement regime for judges.[76] This infringement procedure is based on the concern that the reforms introduced different retirement ages for female and male judges, which the Commission finds to be contrary to Article 157 TFEU and Directive 2006/54 on gender equality in employment.[77] A similar procedure was launched against Hungary for the introduction of a new retirement scheme for judges and notaries in 2012 and the Court of Justice concluded that Hungary had in fact breached EU Law.[78] In this judgment, the Court limited itself to the rather technical questions before it and avoided comments on the

[73] *See* European Commission Press Release IP/17/5367, Rule of Law: European Commission acts to defend judicial independence in Poland (Dec. 20, 2017), http://europa.eu/rapid/press-release_IP-17-5367_en.htm.

[74] *See* Armin Von Bogdandy et al., *Reverse Solange—Protecting the Essence of Fundamental Rights Against EU Member States*, 40 COMMON MKT L. REV., 489, 496-507 (2012); Steven Greer & Andrew Williams, *Human Rights and the Council of Europe and the EU—Towards 'Individual', 'Constitutional' or 'Institutional' Justice?,* 15 EUR. L. J., 462, 474 (2009).

[75] *See* Daniel Brössler & Alexander Mühlauer, *Oettinger warnt Polen und Ungarn*, SUEDDEUTSCHE (February 23, 2018), http://www.sueddeutsche.de/politik/eu-kommisar-oettinger-warnt-polen-und-ungarn-vor-kuerzungen-1.3879517.

[76] Case C-192/18, European Comm'n v Rep. of Poland (pending) https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1531710501971&uri=CELEX:62018CN0192.

[77] *See* European Commission, *supra* note 73.

[78] Case C-286/12, European Comm'n v. Hungary, ECLI:EU:C:2012:687 (Nov. 6, 2012), http://curia.europa.eu/.

troublesome background of the case. It is to be expected that the Court, mindful to facilitate the acceptance of its jurisprudence in countries that have been found to breach EU law,[79] will exercise similar restraint in judging the Commission's claims against Poland if only such technical questions are put before it.

Due to the struggles with constitutional and judicial reforms in Hungary, several models of procedures to safeguard the rule of law in the European Union have been discussed. Most notably, a reinvention of the direct actions of member states against other member states for breaching EU law under Article 259 TFEU as a tool for the enforcement of the Rule of Law was considered.[80] As a legal basis for enforceable claims of a breach of EU law by non-compliance with the rule of law, Articles 2, 4(3), 3(1) and 13 (1) and 19 (1) sub-paragraph 2 TEU were proposed, as well as a broad reading of Article 51 CFR to make its Article 47 applicable to such reforms.[81]

Very recently, the CJEU has laid important groundwork in this area. In a case concerning claims of a Portuguese judge's association against cuts to salaries of the Court of Auditors, the Court elaborated on the obligations of the member states deriving from Article 19 TEU regarding their judiciary and the requirements for judicial independence within the EU.[82] To begin with, the Court pointed to the fact that Article 19 (1) sub-paragraph 2 TUE explicitly obliges the member states to ensure effective legal protection in the "fields covered by Union law."[83] Even though the Court does not clarify how broad this notion might be, it goes on to distinguish it from the requirement of Article 51 CFR, which binds member states by the CFR when implementing Union law. According to the settled case law of the CJEU,[84] consistent with its pre-Charter jurisprudence[85] and the official explanations to the Charter,[86] this encompasses any measure that falls within the "scope of EU law." The Court implies that

[79] *See* T. von Danwitz, *supra* note 13, at 1344.

[80] *See* Dimitry Kochenov, *Biting Intergovernmentalism: The Case for the Reinvention of Article 259 TFEU to Make It a Viable Rule of Law Enforcement Tool*, HAGUE J. RULE L. 153 (2015).

[81] *See* Carlos Closa et al., *Reinforcing Rule of Law Oversight in the European Union* 9ff (EUI Working Paper, RSCAS 2014/2015).

[82] *See* Case C-64/16, Associação Sindical dos Juízes Portugueses v. Tribunal de Contas, ECLI:EU:C:2018:117 (Feb. 27, 2018).

[83] *Id*., at para. 29.

[84] *See* Case C-617/10, Åklagaren v. Hans Åkerberg Fransson, ELI:EU:C:2013:105, para. 20 (May 7, 2013).

[85] *See* Case C-299/95, Kremzow v. Rep. Österreich, 1997 E.C.R. I-02629, para. 15; Case C-309/96, Daniele Annibaldi v. Sindaco del Comune di Guidonia, 1997 E.C.R. I-7493, para. 13.

[86] See O.J. (C 303)17-35 for explanations relating to the charter.

the notion of the "fields covered by Union law" is broader than the "scope of Union law" under Article 51 CFR. This makes it possible for the Court to adjudicate on measures that are neither determined by nor fall within the scope of Union law, which would require some sort of material and specific link of the measure in question to EU law.[87] This link, presumably, would seldom exist for national legislation reforming the national judiciary.[88] Having established this, the Court then—in short—explains that national judges are, in collaboration with the Court of Justice, entrusted with ensuring that EU law is observed in the application and interpretation of EU law.[89] To that end, the organization of national courts falls within the fields covered by Union law. The Court observes that the obligation to ensure effective legal protection is a general principle of EU law[90] and is also rooted in the principle of sincere cooperation derived from Article 4 (3) sub-paragraph 1 TEU.[91] The requirement of effective legal protection derived from Article 19 TEU, which "gives concrete expression to the value of the rule of law stated in Article 2 TEU,"[92] encompasses, among other things, access to independent courts.[93]

This line of argumentation is deeply rooted in the EU's decentralized system of legal protection. In the European Union, all national judges are competent to resolve cases brought by individuals under their rights deriving from EU Law. It is precisely the obligation of national judges to give, within their competences, full effect to Union law and protect the rights that Union law confers onto the individual.[94] If in doubt about the interpretation or the validity of EU Law, the national courts can—and in last instance must—refer these questions to the CJEU under Article 267 TFEU.[95] Article 267 TFEU, which organizes the dialogue between the "specialized" European judge and the "generalist" national judge, is in fact "an instrument of cooperation between the Court of Justice and the national courts,

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[87] *See, e.g.*, *Annibaldi,* Case C-309/96 at paras. 20–23; CJEU, Case C-206/13, Cruciano Siragusa v. Regione Sicilia—Soprintendenza Beni Culturali, ECLI:EU:C:2014:126, paras. 29–35 (March 6, 2014); Case C-198/13, Víctor Manual Julian Hernández v. Puntal Arquitectura SL, ECLI:EU:C:2014:2055, paras. 45–48, (July 10, 2014).

[88] In the case at hand, the measures of salary cuts to the Portuguese Court of Auditors where part of a national scheme to meet the European requirements for reducing the Portuguese budget deficit, but they were in no way imposed or required by EU law and could therefore at best be considered to be European in their motivation only.

[89] *See* CJEU, *supra* note 82, at paras. 32 and 33.

[90] *See id*., at para. 35.

[91] *See id*., at para. 34.

[92] *Id*., at para. 32.

[93] *See id*., at para. 41-43.

[94] *See* Case 106/77, Amministrazione delle Finanze dello Stato v. Simmenthal SpA, 1978 E.C.R. 629, para. 21.

[95] TFEU, *supra* note 8, art. 267.

whereby the former supplies the latter with the information on the interpretation of Community law which is necessary in order to enable them to settle disputes which are brought before them."[96] National judges in this respect are the common judges of EU law.

This deep reach of the EU's system of legal protection into the domestic sphere also explains the necessarily broad approach of "fields covered by Union law" that both Article 19 (1) paragraph 2 TEU and the Court take concerning the compliance of national Courts and Tribunals with Articles 2 and 19 TEU.[97] In fact, the organization of all national courts who are able to pose questions to the CJEU via Article 267 TFEU must conform with Article 19 (1) paragraph 2 TEU, read in conjunction with Article 2 TEU,[98] because they act as courts of EU law and as such, they must meet the requirements of judicial independence derived from EU law. Once again, the procedure of Article 267 TFEU shows its genius and its potential as a "federalizing device."[99] Therefore, the Court has not "reconfigured the EU constitutional order,"[100] but instead it has made use of the special structure of Union law to find a convincing and legally sound way to act as a guardian of judicial independence in EU member states while showing support for the rule of law. Strategically used infringement procedures by the Commission or other member states via Articles 258 and 259 TFEU can take the Court up on these promises.

It remains to be seen what kind of substantive control of the national organization of the judiciary the CJEU will actually be able to exercise through Article 19 (1) sub-paragraph 2 TEU. In the procedures against Hungary, a combined reading of Articles 2 and 19 TEU was considered by the Commission, but ultimately dropped because it was considered that most judicial reforms, however objectionable they may be, would not prevent courts from effectively applying EU law.[101] In its recent jurisprudence, the Court somewhat anticipated this problem by rightly connecting the efficiency of judicial protection to the independence of the Courts providing it.[102] By reference to earlier judgments, the Court indicates that:

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[96] *See* Case C-286/88, Falciola Angelo SpA v Comune di Pavia, 1990 E.C.R. I-191, para. 7.

[97] TEU post-Lisbon, *supra* note 7, art. 2 & 19 (1) para. 2.

[98] *See* CJEU, *supra* note 82, at para. 37.

[99] *See* Richard M. Buxbaum*, Article 177 of the Rome Treaty as a Federalizing Device,* 21 STAN. L. REV. 1041 (1969).

[100] *See* Michal Ovádek*, Has the CJEU just Reconfigured the EU Constitutional Order?,* VERFASSUNGSBLOG.DE (Feb. 28, 2018), https://verfassungsblog.de/has-the-cjeu-just-reconfigured-the-eu-constitutional-order/.

[101] *See* Closa, *supra* note 81, at 10.

[102] *See* CJEU, *supra* note 82, at paras 41-43.

> [T]he concept of independence presupposes, in particular, that the body concerned exercises its judicial functions wholly autonomously, without being subject to any hierarchical constraint or subordinated to any other body and without taking orders or instructions from any source whatsoever, and that it is thus protected against external interventions or pressure liable to impair the independent judgment of its members and to influence their decisions.[103]

It seems that any challenge of national reforms of the judiciary before the CJEU would have to show such structural dependence of the judiciary which also bars them from effectively offering legal protection under EU law.

In the light of these developments, we would like to offer some remarks on the challenges the reform of the Polish Council for the Judiciary presents to judicial independence.[104] While we are, of course, in no position to comment on the constitutionality of the Act or the internal political implications of the reform in Poland, we would like to offer a distinctly European perspective on the reform.

D. A European Perspective on the Reform of the Council

I. Assessment of the Reform in the Light of European Judicial Standards

The frame of reference for such a perspective cannot be found in one national legal text but is established by what has been formulated by European bodies on the matter. These are most notably the recommendations formulated by committees like the Venice Commission, the Consultative Council of European Judges (CCJE) and the European Network of Councils for the Judiciary (ENCJ). We will first explain the nature of these texts and why they can serve as an adequate frame for the assessment of the Polish reform. After a short summary of the standards that have been formulated for councils for the judiciary, we will evaluate the Polish reform as to its compliance with these standards.

[103] *Id.*, at para 44.

[104] The other reforms of the ordinary judiciary in Poland also deserve special attention in this respect. *See* Venice Commission, *supra* note 52, for a detailed analysis of these reforms in general.

1. The Origin and Significance of European Standards for Councils for the Judiciary

The CCJE,[105] the Venice Commission,[106] and the ENCJ[107] have expressed their mostly corresponding views as to the criteria that should be met by councils for the judiciary. These have essentially been endorsed by the EU[108] and explicitly by the Council of Europe.[109] Both recommended to their member states the introduction for councils for the judiciary with the competence to select judges in order to safeguard the independence of the judiciary. These recommendations are built on the founding belief that judicial independence is the best way to serve the rule of law and that judicial autonomy should guide the competences and the makeup of councils for the judiciary.

Some have argued that this focus on judicial independence is due to the fact that all European bodies that have issued such views are dominated by judges.[110] It is true that judges played an important role in describing what circumstances are favorable to their work as an independent judiciary. The explicit endorsement of these recommendations by the Council of Europe clearly shows that they are relevant beyond the comfort zone of judges. Most notably, according to the recent case law of the ECtHR, in certain circumstances, councils for the judiciary must even meet the same requirements of independence and impartiality as regular courts or tribunals according to Article 6 of the ECHR.[111]

Furthermore, judicial independence, its effects, and the safeguards that ensure and strengthen an independent judiciary do not only serve the interest of the judiciary. Instead, the independence of judges is widely recognized as an essential element of the rule of law[112]—an idea that can be traced back to influential legal scholars like Edward Coke, William

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[105] *See generally* Consultative Council of European Judges, opinion 10, *supra* note 34.

[106] *See* Venice Commission, CDL-AD 004, at para. 28–32 (2010).

[107] *See* European Networks of Councils for the Judiciary, *Councils for the Judiciary Report 2010-2011* (2011), https://www.encj.eu/images/stories/pdf/workinggroups/report_project_team_councils_for_the_judiciary_2010_2011.pdf.

[108] *See, e.g.*, Eur. H.R. Rep. European Commission's Regular Report on Czech Republic's Progress towards Accession, at 22–24, SEC (2002) 1402 final (Oct. 9, 2002); Daniel Smilov, *EU Enlargement and the Constitutional Principle of Judicial Independence, in* SPREADING DEMOCRACY & THE RULE OF LAW 313, 323–25 (2006).

[109] *See* Council of Europe, Recommendation CM/Rec 12, paras. 26–29 (2010), https://rm.coe.int/1680702ca8.

[110] *See* FABIAN WITTRECK, BERATUNGEN DER VDDSTRL, 150 (2014); Michal Bobek & David Kosar, *Global Solutions, Local Damages: A Critical Study in Judicial Councils in Central and Eastern Europe*, 15 GERMAN L.J. 1258, 1262 (2015).

[111] *See* Volkov v. Urkaine, App. No. 21722/11 (January 09, 2013), http://hudoc.echr.coe.int/; Mitrinovski v. The former Yugoslav Republic of Macedonia, App. No. 6899/12 (April 30, 2014), http://hudoc.echr.coe.int/.

[112] *See* Stein, *supra* note 71, at 302.

Blackstone, David Hume, and John Locke.[113] Independence of the judiciary is a pre-condition to guarantee equal protection under the law, and only an independent judiciary can effectively implement the rights of citizens. Judicial independence is widely recognized as an intrinsic part of what a judiciary is, and is inherent in the task of adjudication.[114] In fact, without judicial independence, the social function of a judiciary to institutionalize conflicts[115] could not be exercised: If a party reasonably suspected that factors other than law and facts influenced the judge, a judgment would lose its authority. If this occurred, then there would be no reason for the party to accept the judgment and conform to the ruling or to agree to resolve the dispute through an arbiter in the first place. Therefore, former US Supreme Court Justice Sandra Day O'Connor correctly observed that an independent judiciary constitutes the "foundation that underlies and supports the rule of law."[116]

The opinions and recommendations of judicial bodies do not replace normative criteria. They are not democratically passed laws and should not be treated as such. Non-compliance with these standards cannot be considered illegal. Nevertheless, they do mirror the pan-European views of professionals that are confronted with these topics in their daily professional life. As most of the issuing bodies are at least affiliated with international organizations, they are equipped with a certain moral and institutional weight. In this regard, these recommendations could be considered a kind of soft-law, gained through years of comparative studies by different bodies of the Council of Europe. Their recommendations and opinions may, in the absence of normative criteria, serve as points of reference and sources from which key requirements for functioning councils for the judiciary may be deduced.

The strict adherence to European standards for councils for the judiciary is not the only way to appoint judges independently and transparently. A schematic approach to the assessment of specific actions in the light of these standards would not be prudent. Other safeguards and entirely different systems can ensure a functioning, independent and highly qualified judiciary. This means that other systems—especially those that have operated steadily in so-called "established democracies"[117]—are just as valid, as long as they guarantee a degree of transparency and independence similar to that of an ideally

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[113] *See* Friedrich Hayek, *The Origins of the Rule of Law, in* THE CONSTITUTION OF LIBERTY 162, 168–73 (1960).

[114] *See* Belilos v. Switzerland, 1988 Eur. Ct. H.R. 4, para. 64; Case C-17/00, François De Coster v. Collège des bourgmestre et échevins de Watermael-Boitsfort, 2001 E.C.R I-9445, para. 10; Case C-403/16, Soufiane El Hassani v. Minister Spraw Zagranicznych, ECLI:EU:C:2017:960, para. 40 (Dec. 13, 2017).

[115] *See* NIKLAS LUHMANN, LEGITIMATION DURCH VERFAHREN [LEGITIMACY BY PROCEDURE] 100–06 (9th ed. 2013).

[116] Sandra Day O'Connor, *Vindicating the Rule of Law: The Role of the Judiciary*, 2 CHINESE J. INT'L L., 1, 6f (2003).

[117] *See generally* JUDICIAL INDEPENDENCE IN TRANSITION (Seibert-Fohr ed., 2012).

functioning council for the judiciary.[118] Accordingly, the mere existence of a council for the judiciary does not by itself ensure its functionality, efficiency, or even a valuable contribution to the independence of the judiciary. Consequently, European standards for councils for the judiciary serve as a model for achieving and safeguarding judicial independence which should be consulted when designing or reforming such a council. Because councils for the judiciary are designed to safeguard judicial independence in order to serve the rule of law, impartiality and independence of council should guide any assessment based on the European standards.[119]

2. Short Summary of European Standards for Councils for the Judiciary

Where a council for the judiciary exists, there are certain core factors that are likely to contribute to its functioning as an effective guardian of judicial independence. To begin with, it is desirable that a council for the judiciary is either exclusively, or by a substantial majority, composed of judges selected by their peers.[120] This practice aims to prevent manipulation or undue pressure from political parties. The addition of members who are not judges avoids the perception of self-interest, self-protection, and cronyism. However, this may never allow the council to become the subject of political schemes, considerations of political parties and the tit-for-tat-strategies employed in parliament as this would weaken the council's position as a guardian of judicial independence and the rule of law.

The selection of members of the council is equally important. In order to guarantee the independence of the council's authority, judicial members should be selected by their peers or—for a limited number of members—*ex officio*.[121] Although no specific system of selection can be imposed,[122] the selection should guarantee a wide representation of the judiciary at all levels and the equal opportunity for participation in the selection process both by judges who are members of professional associations and those who are not.[123] The interference of political authorities, judicial hierarchies, or any form of appointment by authorities from within or from outside of the judiciary should be avoided.[124] Most notably, continuity in

[118] *See* Venice Commission, CDL-AD 028, paras. 44–50 (2007); Venice Commission, CDL-AD 004, para. 32 (2010).

[119] *See* Council of Europe, Secretary General, 20 CM (2016) 36 final.

[120] *See* Consultative Council of European Judges, *supra* note 68, at paras. 15–20.

[121] *See id*., at para. 25–26.

[122] *See id*., at para. 27.

[123] *See id*., para. 28.

[124] *See id*., para. 29–31.

membership of the council is important. No incoming government should be able to terminate terms of office of sitting members in order to replace them with new members.[125]

3. Critical Assessment of the Polish Reform

Under these standards, the following analysis will focus on whether the reforms of the Polish Council for the Judiciary might adversely affect its independence and capability to fulfill its mission in a state governed by the rule of law—if no other factors intervene to ensure the proper functioning of an independent judiciary.

The Polish Constitution fixes a substantial majority of judges on the Council. The introduction of a two-section-system would have enhanced the influence of non-judicial members considerably by giving them a veto-power over the selection of a candidate. While the votes of judicial members on the Council used to be decisive, now a simple majority of the political appointees in the first section could have blocked any candidate it disapproved of. The possibility to overturn such a veto would have been rather slim. It would have required unanimity among all judicial members of the Council, amounting to 68% of the Council's members—more than a two-thirds majority—just to overrule a veto of a minority of the Council's members. Therefore, dropping the two-chamber model of the first draft was a positive development.[126]

Judged against the European standards for councils for the judiciary, the new Act must be criticized because the judicial members of the Council are elected by the *Sejm,* not by their peers.[127] As explained above, the requirement that the majority of a council's members should be judges elected by their peers is supposed to ensure that the judicial members of a council are elected free from political influence. The new system in Poland, however, might lead to such a politicization of the Council.[128] While the requirement that judges are elected by a three-fifths majority of Members of Parliament is an improvement compared to the first draft, nevertheless new members of the Council will receive their mandate from parliament and will be chosen through a political process.

Moreover, it is likely that at least the majority of candidates will be determined by the ruling party. If an election by a three-fifths majority was the only way in which candidates could be elected, this might encourage the election of candidates acceptable for both the

[125] *See* Venice Commission, CDL-AD 007-e, para. 70ff (2013).

[126] *See* Venice Commission, s*upra* note 52, at para. 20.

[127] *See* European Commission, *supra* note 53, at para. 32.

[128] *See* Venice Commission, s*upra* note 52, at para. 24.

parliamentary majority and minority.[129] In the new Polish system, though, candidates who have not received widespread support can still be elected in the second round. Even if some minority candidates could be elected in the second round—which the Act does not make clear—, the majority of the judicial members would still be selected by the ruling party. A politicization of the Council is—as the Venice Commission has pointed out—not prevented by the nomination procedure of the judicial candidates because judicial candidates do not need the support of a substantial number of their peers.

Six members of the Council are parliamentarians, while the other four are *ex officio* members or are selected by the President of the Republic. The two *ex officio* members, who are the Presidents of the Supreme and the Supreme Administrative Court, are selected to these offices by the President of the Republic. It is therefore substantially easier for any ruling party to control who sits on the Council for the Judiciary and to thereby exercise a decisive influence on the selection and promotion of judges. In the present situation, with the *Sejm* selecting new judicial members and with President Duda in office, at least the large majority of the Council will receive their mandate under the influence of the PiS. Thus, it is to be expected that a council composed according to the new rules will become more political in its composition and potentially in its work.[130]

Further, the termination of the terms of office of all sitting members of the Council is particularly worrying,[131] because it raises the suspicion that the government implemented this change to gain control over the Council. Even if we did not consider the four-year mandate of members of the Council according to Article 187 (3) of the Polish Constitution an individual mandate, there is no apparent necessity to terminate the term of the current Council. Instead, the action swiftly replaces all current members of the Council with persons that are selected under the exclusive control of the current political majority.

Overall, it seems possible and plausible that the Act might entail negative effects on the principle of separation of powers and the independence of the judiciary because it might enable political influence on the Council's work. The reform has introduced a "political dependence"[132] on the Council which may deprive it of its fundamental role—safeguarding the independence of courts and judges. The current selection process for new members seems to confirm this politicization: The opposition and the Polish Judges Associations called for a boycott of the new election. Only eighteen judges out of 10,000 Polish judges agreed

[129] *See id.,* at para. 22.

[130] *See id*., at para. 24.

[131] *See id.,* at paras. 28–31.

[132] *See* Zoll*, supra* note 40, at 15.

to be nominated at all. The majority of these candidates seem to have links to the PiS. Six of the judges have worked for the Ministry of Justice until recently, other candidates have been recently appointed as court presidents by Minister Ziobro or are the spouses of such presidents.[133]

Thus, it is doubtful that the new Polish Council for the Judiciary sufficiently adheres to the European standards discussed above. Of course, this does not rule out the possibility that the judiciary may act independently and transparently. Regardless, in the absence of procedural and substantial rules, other safeguards and practices must ensure this independence and transparency. It remains to be seen if such safeguards can intervene to ensure the application of objective criteria when decisions on judicial appointments are made which would promote a proper functioning independent judiciary in Poland.

While the reform of the Council is worrying, this reform alone may not introduce a political dependence on the entire Polish judiciary where it would fail the test advised by the CJEU under Article 19 (1) sub-paragraph 2 TEU. However, this test would also require the CJEU to consider the other reforms of the Polish judiciary and how they have enhanced political influence over the selection and work of judges in Poland.

In order to contend that these reforms do not pose a risk to the independence of the judiciary and to the rule of law, the Polish government insists that its proposed system is not original. In particular, the government claims that democratizing the appointment procedures for judges adapts the Polish system to the German system. In fact, after the reform took effect, the Polish Prime Minister Morawiecki argued that the new Polish system ensured judicial independence better than the German system.[134] This argument is of particular importance because any criticism of the reform from Europe or Germany would lose its weight if it a similar system was tolerated in Germany.

E. The Reference to Germany

In Germany, no councils for the judiciary exist. In fact, Germany does not select judges by their peers and the executive dominates the appointment procedures for both federal and state judges, especially in the *Länder*. After a brief explanation of the different appointment procedures for judges in Germany, we seek to analyze whether the analogy of the Polish government to the German model is justified and what might differentiate the two systems.

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[133] *See* Marcin Matzak, *The Rule of Law in Poland: A sorry Spectacle*, VERFASSUNGSBLOG.DE (March 1, 2018) https://verfassungsblog.de/the-rule-of-law-in-poland-a-sorry-spectacle/.

[134] *See Morawiecki kritisiert deutsches Justizsystem (Morawiecki criticizes German justice system)*, TAGESSCHAU.DE (January 25, 2018), http://www.tagesschau.de/ausland/polen-justiz-103.html.

I. Different Appointment Procedures in Germany

Three general types of appointment procedures exist in Germany: Appointments by the executive, appointments by the executive in collaboration with a *Richterwahlausschuss,* and appointments by parliament.

1. Appointment by the Executive

Especially in the West German states, judicial appointments for state judges are usually solely entrusted to the competent minister.[135] In this respect, the duty of the competent minister to appoint based on only merit (*Bestenauslese*) is of particular importance: According to the settled case law of the *Bundesverfassungsgericht* (Federal Constitutional Court, or FCC), it can be derived from Article 33 (2) Basic Law (BL) that public positions—including judicial posts[136]—must be staffed based on merit. This means that a candidate is selected based on criteria that directly concern his or her suitability, qualification, and professional performance.[137] This amounts to a candidate's right to have his or her application duly considered on the grounds of only objective considerations. To establish a factual basis for appointments based on merit, regular professional assessments are prepared for each judge by his or her Court's presidium according to §§ 3, 48 I, 49 II *Bundeslaufbahnverordnung* (Federal career regulation)*[138]* in conjunction with § 46 *Deutsches Richtergesetz* (German Law on Judges)[139]. The presidium enjoys a large margin of discretion concerning the evaluation of a judge, but the opinion regarding the suitability of a judge can be challenged in Court as to the presidium's correct use of facts, the standard used, and its objectivity.[140] Regardless, the executive remains entirely responsible for appointing and selecting judges.

[135] This is the so-called "bureaucratic model." RUDOLF WASSERMAN, DER POLITISCHE RICHTER 96ff (1972).

[136] Ulrich Battis, *Article 33 Gleichstellung als Staatsbürger, öffentlicher Dienst, in* SACHS GRUNDGESETZ rn. 24 (7th ed. 2014); *Papier,* NEUE JURISTISCHE WOCHENSCHRIFT [NJW] 2585, 2591 (2002).

[137] *See* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] 139 BVERFGE 19, paras. 59, 76; Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] March 7, 2013, 2 BvR 2582/12 para. 15 [hereinafter Judgment of Mar. 7, 2013]; Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] July 24, 2014, 2 BvR 816/14 para. 10 [hereinafter Judgment of July 24, 2014].

[138] *See* Bundeslaufbahnverordnung [Federal Career Regulation], Feb. 12, 2009, para. 3, 48 I, 49 II, (Ger.).

[139] *See* Deutsches Richtergesetz [German Law on Judges], April 19, 1972, para. 46.

[140] Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] Sept. 20, 2016, 2 BvR 2453/15 para. 19 [hereinafter Judgment of Sept. 20, 2016].

2. Appointment by the Executive in Collaboration with a Richterwahlausschuss

The selection of federal court judges[141] is, according to Art. 95 (2) BL, carried out by the *Richterwahlausschuss*, an appointment committee composed of the federal minister of justice, the ministers of justice of the *Länder*, and the same number of members selected from the Bundestag. The federal Minister of Justice formally appoints the selected judges.

The FCC has recently clarified that, while the federal Minister remains bound by the constitutional duty to appoint based on only merit, the other members of the *Richterwahlausschuss*—who are not members of the judiciary—are free in their electoral choice.[142] Their role is to vote on proposed candidates and elect the judges to ensure that federal judges are "selected in a specifically political sense," thereby embedding their selection within the "democratic basic conditions of the constitutional practice."[143]

According to article 98 (4) BL, states may also set up a *Richterwahlausschuss* to select state judges.[144] Nine out of sixteen states have used this option[145] while others have not set up a *Richterwahlausschuss*—even though failing to do so is contrary to their own constitution.[146] In the states where *Richterwahlausschüsse* exist, they vary strongly in their composition and competences. In Baden-Wuerttemberg, the *Richterwahlausschuss* is composed of eight judges, one attorney, and six political appointees. It only acts when a court's presidium rejects a candidate put forward by the minister of justice and no agreement could be reached upon further negotiations.[147] In Thuringia, the *Richterwahlausschuss* is composed of eight political appointees and four judicial members,[148] and it assesses a candidate put

[141] These are the judges of the Federal Court of Justice, the Federal Administrative Court, the Federal Labor Court, the Federal Social Court and the Federal Finance Court.

[142] *See* Judgment of Sept. 20, 2016 at paras. 28, 32–35.

[143] Hans Joachim von Merkatz, Remarks at the Plenary Minutes of the Bundestag.

[144] *See also* Christian Hillgruber, *Article 98, in* GRUNDGESETZ KOMMENTAR para. 48 (Theodor Maunz & Günter Dürig eds., 59th ed. 2010).

[145] Richterwahlausschuss [Judges Election Committee] Landesrecht Baden-Württemberg (LriStAG) §§ 46–61; Landesrecht Berlin (BerlRiG) §§ 9–18; Landesrecht Brandenburg (BrdRiG) §§ 12–25; Landesrecht Bremen (BremRiG) §§ 7–17; Landesrecht Hamburg (HambRiG) §§ 14–27; Landesrecht Hesse (HessRiG) §§ 8–24; Landesrecht Rhineland-Palatinate (RhPflRiG) §§ 14–24; Landesrecht Schleswig-Holstein (SHRiG) §§ 13–25; Landesrecht Thuringia (ThüRiG) §§ 13–25.

[146] *See* CONST. LOWER SAXONY art. 51 (3); CONST. OF SAXONY art. 79 (3); CONST. OF MECKLENBURG-VORPOMMERN art. 76 (3); CONST. OF SAXONY-ANHALT art. 83 (4).

[147] Landesrecht Baden-Württemberg (LriStAG) §§ 43 (5)–(6), 46.

[148] Landesrecht Thuringia (ThüRiG) § 14.

forward by the minister of justice for a judicial post to ensure their personal and professional suitability for the post.[149] However a *Richterwahlausschuss* may be designed, the influence of the executive and legislative branch remains decisive—either within the *Richterwahlausschuss* or through the general framework of judicial appointments.

3. Appointment by the Legislature

According to Article 94 (1) BL, the Justices of the FCC are elected by the two German legislative bodies: Half of them by the *Bundesrat*, the other half by the *Bundestag*. In both cases, they have to be elected by a two-thirds majority according to §§ 6 and 7 of the *Bundesverfassungsgerichtsgesetz*, (BVerfGG - Law on the Federal Constitutional Court). The direct election of these judges by parliament is used to reinforce the democratic legitimacy of judges in prominent positions.[150] Their appointment is carried out by the President of the Federal Republic according to § 10 BVerfGG.

II. Democratic Principles and Their Influence on the Selection of Judges in Germany

As a result of these appointment procedures, a heavy executive and legislative influence must be considered a structural characteristic of judicial appointments in Germany. This influence is deeply rooted in the German constitutional order. After the German judiciary aided the commission of innumerable crimes during the National Socialist period and operated as an integral and active part of the national socialist regime,[151] the members of the *Parlamentarische Rat*[152] wanted to restore "a basis of trust" in the judiciary.[153] Nevertheless, it was technically impossible to remove the entire judicial personnel from the bench after the War.[154] In fact, about 80-90% of the judges and prosecutors returned to service before the Federal Republic was founded in 1949.[155] This reestablishment of trust in

[149] *Id.* at § 13 (2).

[150] *See* FABIAN WITTRECK, DIE VERWALTUNG DER DRITTEN GEWALT 126, 268ff, 392ff, 413ff, 502ff (2006).

[151] See INGO MÜLLER, FURCHTBARE JURISTEN (7th ed. 2014) for a detailed account of the crimes of the National Socialist Judiciary.

[152] The *Parlamentarischer Rat* (Parliamentary Council) was the West German constituent assembly in Bonn that drafted and adopted the Basic Law for the Federal Republic of Germany.

[153] *See* Klaus-Berto von Doemming et al., 1 JAHRBUCH DES ÖFFENTLICHEN RECHTS (JöR) 704f, 720 (1951) for this argumentation and the quotes used from the comments of members of the *Parlamentarische Rat* Greve, Katz, Rener, Schönfelder, Selbert, Stock, and Zinn.

[154] See WITTRECK, *supra* note 150, at 71f, for details.

[155] *See* M. Stolleis, *Rechtsordnung und Justizpolitik (Legal system and justice policy) 1945-1949*, *in* FS COING 385 (1982).

the judiciary was to be attained by judicial appointment through elected politicians and was referred to a "recreation of the judiciary out of itself."[156] Also, Article 20 (2) BL which stipulates that all state authority is derived from the people—has been understood to mean that it must be possible to trace any exercise of state power back to the act of a democratic vote for it to be democratically legitimate.[157] This notion is similar to Article 4 of the Polish Constitution. It is necessary to show a continuous chain of democratic legitimacy in order to satisfy Art. 20 (2) BL. In this regard, the FCC has constructed a delicate system of hierarchies and chains of legitimacy.[158]

Following the Basic Law's approach, which puts political considerations and democratization of the judiciary at its core, a strong emphasis on the question of the democratic legitimacy of judges has dominated the legal discourse regarding the judicial office in German constitutional law. This has resulted in many far reaching conclusions. For example, the Basic Law's choice to let politicians vote in a *Richterwahlausschuss* on the selection of federal judges is understood by some scholars as meaning that any restriction on their electoral choice that goes beyond the constitutional restriction placed on the minister of justice—namely the consideration of the professional evaluations of candidates for judicial posts—is unconstitutional.[159] In this sense, the professional evaluations of judges are only seen as "helpful tools in forming a personal opinion"[160] for the politicians voting in the *Richterwahlausschuss*. Their statements concerning the professional capability of a judge are supposed to be of no importance for the judge's democratic legitimacy and are considered as constitutionally disposable.[161] In this regard, a potential conflict between the obligations to appoint based on merit and the requirement of a real electoral choice of a *Richterwahlausschuss* is denied: Whatever body is charged with selecting the best candidate

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[156] *See* von Doemming, *supra,* note 153.

[157] Stefan Huster & Johannes Rux*, Article 20, in* BECK'SCHER ONLINE-KOMMENTAR GG para. 94ff (Volker Epping & Christian Hillgruber eds., 33d ed. 2017).

[158] *See* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] 119 BVERFGE 331, para. 158; 1 GRUNDLAGEN DES VERWALTUNGSRECHTS § 6 para. 5 (Wolfgang Hoffmann-Riem et al. eds., 2006); GRUNDGESETZ: GG art. 20, para. 40 (Hans Hofmann et al. eds., 13th ed. 2014).

[159] *See* Huster & Rux*, supra* note 157, at paras. 61, 64; Gerd Reinschmidt*, Zur Legitimationsfrage bei der Richterwahl (The question of legitimacy in the judicial election),* ZEITSCHRIFT FUR RECHTSPOLITIK [ZRP] 160, 161 (1972); Helmut K J Ridder*, Empfiehlt es sich, die vollständige Selbstverwaltung aller gerichte im Rahmen des Grundgesetzes gesetzlich einzuführen? (Is it advisable to introduce the complete self-administration of all courts in the framework of the Basic Law?)* GUTACHTEN ZUM 40TH DJT, Vol. I, 91, 125 (1953).

[160] DEUTSCHER JURISTINNENBUND [GERMAN ASSOCIATION OF WOMEN LAWYERS], section III, para. 1, https://www.djb.de/st-pm/st/st15-06/.

[161] *See* ERNST-WOLFGANG BÖCKENFÖRDE, VERFASSUNGSFRAGEN DER RICHTERWAHL [CONSTITUTIONAL QUESTION OF THE SELECTION OF JUDGES} 70 (1998).

has the prerogative to decide who the best candidate is. Generally, whoever is properly chosen by a *Richterwahlausschuss* is therefore automatically considered to be the best because this is the procedure through which the Constitution wishes to find the most suitable candidate.[162]

Because effective democratic control over independent courts is limited, an analysis focusing on the democratic legitimacy of judges must conclude that democratic control over the judiciary is especially weak.[163] Where a *Richterwahlausschuss* operates, both the executive and the legislature decide together on the selection of a judge which is seen as an enforcement of democratic legitimacy of judges[164]—if not the optimal legitimacy for judges.[165] The *Richterwahlausschuss* is also said to serve as a balance of political forces,[166] a restriction on unfair patronage,[167] and an adequate reflection of decentralized organization of justice.[168] Further, the structural emphasis on democratic legitimacy through appointments by the other branches of government has led some to believesuggests that the participation of members of the judiciary in a *Richterwahlausschuss* on the state level is unconstitutional, if the state legislature does not elect these judicial appointees.[169] Overall, there seems to be strong agreement among scholars that judges are forbidden to influence the selection of judges.[170]

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[162] *See* Klaus F. Gärditz, Opinion for the Bundestag Committee on Law and Consumer Protection, DEUTSCHER BUNDESTAG: DRUCKSACHEN [BT] 3 (Aug. 30, 2016), https://www.bundestag.de/blob/438098/2c33cac66cd5902cb2dfbaa8ebe32cb5/gaerditz-data.pdf.

[163] *See* Claus Dieter Classen, *Wahl contra Leistung? Zur Bedeutung des Leistungsprinzips bei durch Wahl zu besetzenden öffentlichen Ämtern,* JURISTENZEITUNG [JZ] 1009, 1013 (2002).

[164] *See* WITTRECK, *supra* note 150, at 20; CLAUS DIETER CLASSEN, DEMOKRATISCHE LEGITIMATION IM OFFENEN RECHTSSTAAT 55 (2009); MARTIN MINKNER, DIE GERICHTSVERWALTUNG IN DEUTSCHLAND UND ITALIEN 254f (2015).

[165] Monika Jachmann, *Article 95, in* GRUNDGESETZ KOMMENTAR para. 127 (Theodor Maunz & Günter Dürig eds., 59th ed. 2010).

[166] JÖRG ZÄTZSCH, RICHTERLICHE UNABHÄNGIGKEIT UND RICHTERAUSWAHL IN DEN USA UND DEUTSCHLAND [JUDICIAL INDEPENDENCE AND THE SELECTION OF JUDGES IN THE USA AND GERMANY] 160ff (2000); BÖCKENFÖRDE, *supra* note 161, at 102ff.

[167] *See* Jachmann, *supra* note 165, at para. 127.

[168] *Id*., at para. 127; DIETER BRÜGGEMANN, DIE RECHTSPRECHENDE GEWALT [THE JUDICIARY] 135 (1962); K. Ipsen, *Bündnisfall und Verteidigungsfall (Alliance and Defense),* DIE ÖFFENTLICHE VERWALTUNG [DÖV] 468, 472 (1971).

[169] *See* Huster & Rux, *supra* note 157, at paras. 58–64; WITTRECK, *supra* note 150, at 128f.

[170] *See e.g.*: Ulrich Scheuner, *Die Selbständigkeit und Einheit der Rechtspflege (Die Selbständigkeit und Einheit der Rechtspflege)*, DIE ÖFFENTLICHE VERWALTUNG [DÖV] 517, 520f (1953); Eduard Kern, *Über die Mitwirkung von Richtern bei der Berufung von Richtern (About the participation of judges in the appointment of judges),* DEUTSCHES RICHTERZEITUNG [DRiZ] 301, 302 (1958); KLAUS STERN, 2 DAS STAATSRECHT DER BUNDESREPUBLIK DEUTSCHLAND [THE LAW OF THE STATE OF THE FEDERAL REPUBLIC OF GERMANY] 404 (1980); Böckenförde, *supra* note 161 at 80ff.; *See* WITTRECK, *supra* note 150, at 131.

The approach taken and the conclusions drawn in German constitutional law regarding the selection and appointment of judges is similar to polish government wanting to establish a degree of democratic control over the judiciary. On the surface, the claims that the Polish government is drawing inspiration from Germany's accepted and well-established procedures do not seem completely off target. As already mentioned, councils for the judiciary are not the only possible way to ensure a well-functioning, transparent, and independent judiciary. Therefore, Germany's reliance on rather complicated systems to appoint judges is not a problem in itself. European standards expect, however, that every decision relating to a judge's appointment should be based on objective criteria and should be taken by an independent authority or subject to guarantees to ensure that only these criteria are considered.[171] Nevertheless, neither the appointments by a *Richterwahlausschuss*, nor by parliament, nor by the competent minister ensure by themselves that judicial appointments are based on merit, skill, and objective criteria without potential undue influence from politics. Formally, there are few safeguards in the German system that ensure a sufficient consideration of the professional capabilities of a candidate. The different German frameworks allow the other branches of government to influence the selection of judges arguably more than the new Polish system. Most notably, a strong executive and legislative influence makes the process of selecting suitable candidates opaque and is at odds with the necessary depoliticization of judicial appointments.

Nevertheless, some aspects of the procedures in Germany ensure a functional selection of judges which is compatible with a process of selecting judges that is not contrary to the rule of law. These aspects have not been taken into account by the Polish government in their reference to the German system of selecting judges.

III. A Functioning System of Checks and Balances

The German system of selecting and appointing judges is embedded in a well-functioning system of checks and balances. The following mechanisms have so far prevented negative effects on the independence of the judiciary and the rule of law.

1. Federalism

Firstly, in the federal *Richterwahlausschuss*, the competent ministers of the *Länder* must be present, according to Article 95 (2) BL. Therefore, no federal government and parliamentary majority can appoint federal judges based only on its own assessment. The governments of the *Länder* ensure a balance of interest in the selection federal judges.

[171] *See* Consultative Council of European Judges, Opinion 1 para. 37 (2001).

No such counterbalance exists concerning the judges on state level. However, it is nearly impossible for one political party to pack all of the lower courts in Germany with its preferred judges because this would need to happen in all sixteen states. On top of that, it is nearly impossible to staff all of the 20,300 posts for judges in Germany[172] with people who are fostered or supported by a single political party. Therefore, the danger of political appointments usually only arises when posts on higher, federal courts are vacant.

2. Judicial Review

Secondly, the decisions for appointment of judges by the competent minister can be challenged in court which allows for effective judicial control.[173] The influence of the judiciary and selections of candidates based on only merit is most prominent where the minister in charge of the appointment must rely on the professional evaluations for judges. It is then the constitutional duty of the minister to appoint judges solely based on objective criteria.

These principles also guide the work of a *Richerwahlausschuss*. According to the recent jurisprudence of the FCC, the *Richterwahlausschuss* is under an obligation to select a candidate who can be appointed by the competent federal minister without forcing the minister to violate his or her duty to appoint based on only merit, Art. 33 (2) BL.[174] Further, the minister can refuse the appointment of a selected candidate if he or she is manifestly ill-suited for the position in extreme circumstances.[175] If the minister decides to follow the selection made by the *Richterwahlausschuss* even though the professional evaluation of a candidate indicates that he or she might not be suitable for the position, the minister has an obligation to state his or her reasons for the appointment.[176] Concerning the appointments to lower courts, the judiciary has developed an elaborate system of judicial review through

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[172] *See* Bundesamt für Justiz [Federal Office for Justice], *Zahl der Richter, Richterinnen, Staatsanwälte, Staatsanwältinnen und Vertreter, Vertreterinnen des öffentlichen Interesses in der Rechtspflege der Bundesrepublik Deutschland am 31. Dezember 2014* (Number of judges, judges, prosecutors, public prosecutors, representatives of the public interest in the administration of justice of the Federal Republic of Germany on 31 December 2014) (Jan. 28, 2016), https://www.bundesjustizamt.de/DE/SharedDocs/Publikationen/Justizstatistik/Gesamtstatistik.pdf;jsessionid=AA55DE94411975B1219C8B4036755B4B.2_cid377?__blob=publicationFile&v=7.

[173] *See* Classen*, supra* note 163*,* at 1016.

[174] *See* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court], decision of the 2nd Senate in case 2 BvR 2453/15, BVERFGE 143, 22-37, para. 31.

[175] *See id*., at para. 32.

[176] *See id*., at para. 35.

an abundance of lawsuits brought by competitors for judicial posts.[177] Still, this judicial control is limited to the formal requirements of the selection itself because substantial control of the *Richterwahlausschuss* would contradict its constitutional nature of a free electoral choice.[178] The selection of judges remains an electoral prerogative of the *Richterwahlausschuss* that cannot completely be freed of subjective and political considerations. Nevertheless, this judicial control has already proven to effectively prevent appointments that are clearly politically motivated.[179]

3. A Political Culture of Independence

Thirdly, an important factor in the selection process is what could be called a "political culture of independence."[180] The term culture should not be misunderstood as a statement on the superiority or inferiority of certain countries or as disregarding cultural and political particularities of proud, sovereign nations. Instead, we use this term to describe the informal rules on what is considered as acceptable concerning the behavior and respect of other state powers toward the judiciary. In many western European countries, formal safeguards for judicial independence are quite rare—as is the case in Germany. They mostly rely on traditions, customs, and informal rules resulting from a particular mindset and the political environment of those involved. Both formal and informal safeguards are decisive elements to ensure judicial independence and must be considered when evaluating appointment procedures for the judicial office.

In the German experience, ministers and members of a *Richterwahlausschuss* are aware that they are not choosing political representatives but independent judges that answer to only the laws and the Constitution. There are no sound reports that any judges have acted under pressure of political parties or other authorities and there is no reason to suspect that any German judges are subject to any kind of undue influence on their work.[181] Also, there is

[177] *See* Oberverwaltungsgericht für das Land Nordrhein-Westfalen [Higher Regional Administrative Court for North Rhine Westphalia] June 21, 2017, 1 B 232/17 for a recent decision of this kind.

[178] *See* Judgment of Sept. 20, 2016, at para. 28; Classen*, supra* note 163*,* at 1016.

[179] *See* Bundesverwaltungsgericht [BVERWGE] [Federal Administrative Court], 138 BVERWGE 102.

[180] *See* Eirik Holmøyvik & Anne Sanders*, A Stress Test for Europe's Judiciaries,* VERFASSUNGSBLOG.DE (Aug. 23, 2017), http://verfassungsblog.de/a-stress-test-for-europes-judiciaries; Anne Sanders, *Ein Stress-Test der Rechtsstaatlichkeit (A stress test of the rule of law)*, ZEITSCHRIFT FUR RECHTSPOLITIK [ZRP] 230 (2018); THE CULTURE OF JUDICIAL INDEPENDENCE: CONCEPTUAL FOUNDATIONS AND PRACTICAL CHALLENGES 15–68 (Shimon Shestreet & Christopher Forsyth eds., BRILL 2011). Gärditz mentions a "culture of institutional respect" as the reason for the successful work of the German FCC. Klaus F. Gärditz, *Eine Verfassung gegen Krisen (Eine Verfassung gegen Krisen),* LEGAL TRIBUNE ONLINE [LTO.DE] (Feb. 8, 2018), https://www.lto.de/recht/hintergruende/h/grundgesetz-krisen-schutz-verfassung/.

[181] *See* JUDICIAL INDEPENDENCE IN TRANSITION, *supra* note 117, at 515ff.

relatively little political criticism aimed at judges that would amount to disrespect or undue pressure against the judiciary. The public discussion about the suitability of former politician Peter Müller for an appointment to the FCC shows that the public understands the necessity of appointing judges based on only merit and without political considerations.[182] However, comments about Justice Huber's "political loyalty" indicate that some political circles might be more willing to appoint based on political criteria.[183] Also, when deciding whether to re-appoint the German judge at the European Court of Justice,[184] the German government has tended to let political considerations influence its decision[185]—most prominently in the cases of both Judge Everling and, subsequently, of his successor Judge Zuleeg.[186] Nonetheless, there is no basis for doubts concerning the overall independence and professional qualification of the German judiciary.[187]

4. Interim Conclusions

The Polish government may not be entirely wrong to associate the German appointment procedures with a heavy political influence and a strict exclusion of the judiciary. Regardless, the above-mentioned safeguards ensure a functional selection of judges that upholds the basic principles of European standards and ensure that no cause for concern regarding judicial independence and qualification exists.

Even though the German system does not give rise to the same concerns as the new Polish framework does, these mechanisms and traditions do not guarantee that adverse effects on judicial independence and the rule of law could be avoided if the tides turn politically.[188]

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[182] *See, e.g.*, Frank Drieschner*, Plötzlich Richter (Suddenly judge)* , ZEIT ONLINE (Jan. 27, 2011), http://www.zeit.de/2011/05/Bundesverfassungsgericht-Peter-Mueller.

[183] *See* Anna von Notz, *Das Pippi-Langstrumpf-Prinzip: Ich mach' mir mein Verfassungsgericht (The Pippi Longstocking Principle: I make my constitutional court)*, JUNGE WISSENSCHAFT (Apr. 15, 2014), http://www.juwiss.de/de/53-2014/.

[184] According to Article 19 TEU, the Judges and Advocates General of the CJEU and the General Court are appointed for a renewable 6-year term.

[185] *See* Tomas Dumbrovsky*, The European Court of Justice after the Eastern Enlargement: An Emerging Inner Circle of Judges*, *in* Boston 2011 EUSA Conference Papers 13 (Mar. 1, 2013), http://www.mwpweb.eu/TomasDumbrovsky/publication_2081.html.

[186] *See id*., at 16.

[187] *See, e.g.*, T. Rasehorn*, "Um die Bestenauslese" bei der Richterwahl—Eine Erwiderung (About the best selection for the judiciary - a response)*, 1 RECHT UND POLITIK [RUP] 29, 31 (2002).

[188] *See also* Klaus Gärditz & Maximillian Steinbeis, *Die meisten Dinge die in Polen und Ungarn gelaufen sind könnten ohne weiteres auch hier passieren (Most things that happened in Poland and Hungary could easily happen here)*,

Without strict and clear formal safeguards, political movements hostile to judicial independence can disregard a political culture of independence. Similarly, strong formal safeguards can be overturned and changed by political actors who lack respect for the importance of a truly independent judiciary. The reforms in Poland have shown how fast even a structurally and procedurally robust system can be dismantled if the political forces are strong and willing enough. It would be naïve to think that established democracies would not be affected by the methods employed to diminish judicial independence in Poland. In times when increasingly polarized political forces question judicial independence, the resilience of the German system appoint judges in a way that does not pose a risk to the rule of law appears questionable. In this regard, it might be worth designing a stress test for Europe's judiciaries, similar to those developed for European financial institutions. This test could simulate scenarios in other countries where the branches of government have tried to expand their influence over the judiciary.[189]

Even if there is no immediate concern regarding judicial independence in Germany, the reference to Germany's system of selecting and appointing judges advanced by the Polish government in support of their questionable reforms, a critical assessment of the German system seems necessary. In this regard, particular attention must be paid to the structural focus on democratic legitimacy in the German system. It may be worth reconsidering the kind of legitimacy necessary for the judicial office.

F. The Question of Democratic Legitimacy of Judges

I. The Concept of Judicial Legitimacy

The judiciary exercises considerable state power. It decides cases of fundamental importance to society at large. But most importantly, it exercises a crucial influence on the everyday life of each citizen who seeks the aid of the courts. The exercise of state power by the judiciary must be legitimate because those who exercise state power must exercise it in the name of society as a whole.[190] The judiciary must be capable of justifying why it is entitled to wield its considerable powers and from what sources it draws its legitimacy.

VERFASSUNGSBLOG.DE (Feb. 22, 2018), https://verfassungsblog.de/die-meisten-dinge-die-in-polen-und-ungarn-gelaufen-sind-koennten-ohne-weiteres-hier-auch-passieren/.

[189] *See* Holmøyvik & Sanders, *supra* note 180.

[190] *See* CCJE, *supra* note 68, at para. 12.

II. Sources of Legitimacy of Judges

Different concepts of the sources of legitimacy have been developed, but all encompass the same elements with different accentuations.[191] These different concepts should not be seen as exclusive to one another. Instead, they can serve to illustrate the different elements of judicial legitimacy with regards to the circumstances in which they are discussed and are therefore complementary to each other. For the present purposes, it seems appropriate to differentiate between "formal" and "functional" legitimacy.[192]

1. Formal Legitimacy

An appointment in accordance with the laws and the Constitution partly legitimizes a judge. Judges derive the authority and appropriate powers to apply the law as created by the legislature or as formulated by other judges only when they receive a legally correct appointment.[193] This so-called "formal legitimacy"[194] aims at the procedure of judicial appointments.

In this regard, democratic legitimacy is an important aspect of judicial legitimacy. If state power is to be exercised "by the people" it must find its origin in the act of a democratic vote. Because the judiciary also exercises state power, it requires democratic legitimacy.[195] The process of appointing a judge must therefore include elements that would allow it to be traced back to the act of a democratic vote—through a chain of legitimacy that is passed down from parliament. Democratic legitimacy of judges is enhanced by the fact that they apply laws that have been passed by a democratically elected parliament.[196] The adherence to democratic principles in the exercise of state power is important and—at least in Germany—not disposable.[197]

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[191] *Cf.* Koen Lenaerts, *How the ECJ Thinks*, 36 FORDHAM INT'L L. J. 1302, 1306 (2013).

[192] *See* CCJE, *supra* note 68, at para. 14ff (describing these concepts of judicial legitimacy first).

[193] *See id*., at para. 14.

[194] *See id*. at para. 14.

[195] Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] 47 BVERFGE 253 [273]; 77 BVERFGE 1 [40]; 60 BVERFGE 73; Andreas Voßkuhle & Gernot Sydow, *Die demokratische Legitimation des Richters (The democratic legitimacy of the judge),* JURISTENZEITUNG [JZ] 673, 674 (2002); Heinrich Weber-Grellert*, Eigenständigkeit und Demokratisierung der Justiz (Autonomy and democratization of the judiciary),* ZEITSCHRIFT FUR RECHTSPOLITIK [ZRP] 145, 146f (2003).

[196] See WITTRECK*, supra* note 150, at 135ff for the legitimate troubles supposedly caused in this regard by the development of law by judges through case-law.

[197] In this sense, see Heusch, *Article 97, in* GRUNDGESETZ: GG para. 15 (Hans Hofmann et al. eds., 13th ed. 2014).

Nevertheless, if democratic legitimacy were sufficient to establish a judiciary that can fulfill its role as required by the rule of law, the direct election of judges by the people would seem like a logical and reasonable consequence. For good reasons, this model has never been seriously considered in almost all European countries.[198] While formal legitimacy is an important source of judicial legitimacy and democratic legitimacy forms a key aspect of a judge's formal legitimacy, solely focusing on democratic legitimacy carries its own risks.

Namely, the involvement of politics in the selection of judges bears the risk that outside criteria might play a role in selecting judges. Most notably, focusing on democratic legitimacy would allow for appointments based on political considerations aiming to serve the will of the current political majority. After all, the democratically legitimate exercise of state power focuses on representing the current majority. The reforms in Poland show that the quest for sovereignty and legitimacy can easily be misused to outlaw independence and establish unwarranted political control.

Further, an apparent political influence on judicial appointments to the highest courts may decrease the legitimacy of the judiciary in the eyes of the citizens. Compliance with rulings rests most notably on the acceptance of the courts as independent arbiters, which might suffer if judicial decisions were seen as politically influenced or biased. Such a worrying trend can be observed in the United States, where 62% of American voters now consider the Supreme Court split on political grounds like Congress[199] and where trust in the Supreme Court has dropped from 56% in 1985 to 36% in June 2016.[200] This correlates with a politicization of the appointment process of Supreme Court Justices.[201] While the Reagan appointee Antonin Scalia in 1986 and the Clinton appointee Ruth Bader Ginsburg in 1993 enjoyed widespread bi-partisan support in the Senate—they were confirmed by votes of 98:0 and 96:3 respectively—the recent confirmation votes were mostly split along party-lines.[202]

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[198] Special election systems, however, are in place in Switzerland.

[199] *See C-SPAN/PSB Supreme Court Survey 2017,* C-SPAN (Mar. 17, 2017), https://www.c-span.org/scotussurvey2017/.

[200] *See Confidence in Institutions,* GALLUP (June 1–5 2016), http://www.gallup.com/poll/1597/confidence-institutions.aspx%5D.

[201] *See* JEFFREY TOOBIN, THE OATH: THE OBAMA WHITE HOUSE AND THE SUPREME COURT 226–29 (2012) for further anecdotal evidence.

[202] For example, Justice Elena Kagan received only five votes from Republican senators, while the confirmation of Justice Neil Gorsuch provoked the Republican majority to abolish the possibility for the opposition to filibuster a Supreme Court confirmation. In the end, Gorsuch was confirmed with a vote of 54:45 and only three democratic senators voted to confirm him.

Notwithstanding the importance of judicial democratic legitimacy, it does not sufficiently consider the particularities of the judicial office. Among other qualities,[203] a judge's impartiality and professional capability as well as his or her personal and structural independence are too important to the judicial office for them to be diminished in the name of democratic legitimacy.

2. Functional Legitimacy

The specific tasks of the judiciary in democracies under the rule of law require public confidence in and respect for the judiciary. Courts would be left without influence and their judgments would be without consequences if they were not accepted and followed by those who are subject to their rulings.[204] This cannot be attained solely by formally and democratically legitimizing judges. Instead, this confidence must be earned through the quality of a judge's work and how a judge appears to the public. This kind of legitimacy could be called "functional legitimacy"[205] and is earned by an independent, hardworking, well-functioning, ethically and morally stable, and highly competent judiciary.

It is not the task of judges to decide cases in the way the current political majority would like them to decide. A functioning judicial system that is to serve the rule of law can never depend on what the majority—however democratically legitimate it may be—wants or desires. A judge's decision can, and sometimes must, be unpopular. This is a necessary element of a functioning judiciary that serves the rule of law.[206]

Functional legitimacy is multi-layered and complex. Judges need to be well qualified and personally independent and impartial. They must fulfill their duties within the provisions set out in the disciplinary and procedural rules and the criminal law. Judges can earn functional legitimacy by performing their duties according to the highest standard of professional conduct which requires a high degree of self-awareness and humility.[207] By displaying these qualities and a commitment to the values of truth, fairness, and justice, each judge individually can earn and maintain legitimacy while also contributing to the functionality and the legitimacy of the judiciary as a whole.

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[203] *See* Consultative Council of European Judges, opinion 17 at para. 31ff (2014).

[204] *See* Consultative Council of European Judges, opinion 3 at para. 22 (2002).

[205] *See* Consultative Council of European Judges, *supra* note 68, at para. 17–19.

[206] Steffen Detterbeck, *Article 97 Unabhängigkeit der Richter, in* SACHS GRUNDGESETZ pt. 1 (7th ed. 2014).

[207] *See* Consultative Council of European Judges, *supra* note 68, at para. 18.

The quality of a judge's legal reasoning contributes to this legitimacy.[208] The reasons for a decision must—for the purpose of earning functional legitimacy—be sufficiently transparent and convincing, and adequately consider the arguments raised by the parties to the proceedings. Rulings must be coherent with the existing case law and respect the known methods of statutory interpretation.

Further, courts in general—especially supreme and constitutional courts—enhance their legitimacy by restraining themselves to their duty of interpreting and applying the law. If the courts go beyond their "province and duty. . . to say what the law is,"[209] they undermine the separation of powers and risk losing legitimacy. But, in exercising this duty, courts must effectively use their legitimate prerogatives and clearly articulate the limits that the law poses on certain political decisions. As the CJEU's Advocate General Poiares Maduro observed in the famous *Kadi I* case: "[The] responsibility [of the Courts] is to guarantee that what may be politically expedient at a particular moment also complies with the rule of law without which, in the long run, no democratic society can truly prosper."[210] Not doing so would represent an undue deference to the political process at the expense of the rule of law and the credibility of courts.

Simply put, a judge doing the job correctly earns functional legitimacy. This guarantees an effective way to maintain trust in the judiciary and legitimize the exercise of state power by judges. Continuous efforts by the judiciary to earn functional legitimacy can be ensured by the mechanisms of judicial accountability: A public body will be accountable if it explains its actions and assumes responsibility for them. This accountability is as vital for the judiciary as for the other powers of the state because they all serve the public.[211] Being accountable does not mean that the judiciary is responsible or subordinate to another power of the state. Instead, it has to demonstrate to the other powers and to society at large how its power, authority, and independence are being used. This means that it must provide reasons and explain decisions and conduct in relation to cases that the judges decide. Judicial accountability may take on many different forms.[212] Being under an obligation to explain judicial actions and taking responsibility for them are important factors reminding a judge to continuously earn the functional legitimacy necessitated by the judicial office. Accountability may also play an important role in deciding difficult questions, like whether

[208] *See also* Lenaerts, *supra* note 191, at 1306.

[209] Marbury v. Madison, 5 U.S. 137 (1803).

[210] Case C-402/05 P, Kadi v. Council of the European Union, Opinion of Advocate General Poiares Maduro para. 45.

[211] *See* Consultative Council of European Judges, *supra* note 68, at para. 20.

[212] The Consultative Council of European Judges, for example, differentiates between judicial, explanatory, and criminal accountability: *See* Consultative Council of European Judges, *supra* note 68, at para. 26–33.

to tape public hearings or what kind of access to court documents may be granted to litigants or other interested parties.[213]

Overall, judicial independence, the quality of a judge's work, and the due consideration of the particular characteristics of the judicial office also need to be considered when discussing the legitimacy of judges. Special attention must be paid if too much focus is given to the democratic legitimacy of judges because serious threats to the rule of law may arise. In the light of these considerations, we offer some final remarks on the Polish reforms of the judiciary and some challenges to the "fixed beliefs"[214] of German constitutional law concerning its approach to judicial legitimacy.

G. Polish Risks and Challenges for Germany

I. A Necessary Shift Away from a Focus on Democratization of the Polish Judiciary

The foregoing analysis has identified several reasons to criticize the events in Poland from the perspective of the rule of law. Some provisions of the proposed reform of the council for the judiciary prove to be damaging to the independence of the Polish judiciary. But, more importantly, intense democratization of the Polish judiciary seems erroneous because of the importance of functional legitimacy and the risks of emphasizing a judge's democratic legitimacy without the proper safeguards. While it is desirable for the Polish judiciary and political entities to agree on proper safeguards for the independence of the judiciary, it is worth reconsidering if enhancing the democratic legitimacy of the Policy judiciary is necessary.

II. New Approaches to Classic Positions of German Constitutional Law

The considerations that have guided the discussion above should also affect the way the judicial office, its legitimacy, and independence are approached in German constitutional law. Having regard to the concept of functional legitimacy, the worrying events in Poland, and Art. 97 BL—, reconsidering Germany's treatment of the judicial office and its constitutional framework seems necessary. Within the given constitutional boundaries, Germany could improve the process of selecting and appointing judges regarding their independence and functional legitimacy.

[213] *See* Case C-23/15 P, Comm'n v. Breyer, Opinion of Advocate General Bobek para. 77–145, for an interesting, though maybe impractical, initiative to render documents at the European Court of Justice more accessible.

[214] *See* WITTRECK, *supra* note 150, at 131.

1. The Original Intent of the Basic Law and the Question of Trust

When proposals for more judicial participation in the selection of judges are discussed, the original intent of the Basic Law to reestablish trust in the judiciary by allowing political influence of the selection and appointment of judges is often referred to.[215] In this regard, it is crucial to note that, as shown above, the intent of the Basic Law primarily was to reestablish trust in the judiciary in singular circumstances. Enhanced democratic legitimacy was the means by which this goal was to be achieved, not the goal itself.

According to figures from the fall of 2016, 69% of the German public trusts the German judiciary with 27% distrusting it.[216] Political parties, however, are confronted with 64% of the population distrusting them and only 29% trusting them.[217] The distrust in political parties could be observed in Germany for many years now.[218] But, the FCC enjoys—by far—the most trust among the German constitutional bodies.[219] These figures indicate that judges tend to enjoy far more public trust than the persons originally deemed more trustworthy and consequently called to select them. As already mentioned above, an apparent political influence on the selection of judges is rather likely to increase skepticism towards judges as independent and impartial referees.

To establish trust in the judiciary to stay true to the original intent of the Basic Law, it is not enough to focus on democratic legitimacy of judges. Appointing only the best qualified candidates and embedding the judges in a system of judicial accountability is just as vital to establishing trust and confidence in an impartial, independent, and functionally legitimate judiciary. This aspect is consistently overlooked by Germany during discussions on judicial legitimacy. It deserves special attention because it may contribute to a robust system of

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[215] *See* Section E. subsection II of this Article.

[216] *See* European Commission, *How Much do you Trust the Judiciary or the German Legal System?,* TNS INFRATEST FOR THE EUROPEAN COMM'N (Nov. 5–11, 2016), https://de.statista.com/statistik/daten/studie/153813/umfrage/allgemeines-vertrauen-in-die-justiz-und-das-rechtssystem/.

[217] *See* European Commission, *How much do you trust the political parties?,* TNS INFRATEST FOR THE EUROPEAN COMM'N (Nov. 5–11, 2016), https://de.statista.com/statistik/daten/studie/153820/umfrage/allgemeines-vertrauen-in-die-parteien/.

[218] For example, in 2008, 82% of Germans said they would distrust political parties with only 17% trusting them. *See* Infratest dimap, *How much do you trust the political parties?,* (June 2008), https://de.statista.com/statistik/daten/studie/758/umfrage/vertrauen-zu-den-politischen-parteien/.

[219] According to a study by the Allensbach Institute in 2014, the FCC enjoys the trust of 86% of the population, while the Bundestag or the Bundesregierung are deemed substantially less trustworthy—58% and 50% respectively. *See* ROLAND RECHTSREPORT 2014, https://www.roland-rechtsschutz.de/unternehmen/presse_2/publikationen/publikationen.html).

safeguards for judicial independence that could limit the impact of political attacks on the independence of the judiciary. In the light of the foregoing considerations, a deliberately political selection of judges seems rather like a constitutional relict instead of a true necessity to ensure trust in the judiciary.

2. Richterwahlausschüsse and Their Contribution to Democratic Legitimacy

As stated above, the election of judges by a mixed committee of executive and legislative officials usually strengthens the democratic legitimacy of judges—after all, directly elected members of parliament are present.[220] Nevertheless, the cooperation of the legislative and executive branches within the *Richterwahlausschuss* means that they share their political responsibility for the selection of judges. As the FCC has clearly stated, the concept of democratic legitimacy in the sense of Article 20 (2) BL was established to enable democratic and political responsibility: "The citizen must be able to know who can be held responsible for what—most notably in order to award or deny a vote."[221] The mixed-legitimacy conferred onto the judge by a *Richterwahlausschuss,* however, leads to the concealment of said responsibility. If a minister selects and appoints a judge, he or she can directly be held politically and legally responsible for the choice. If members of the executive and legislative branches decide together in a collective body through an anonymous vote, the responsibility for the choice made is concealed. The work of a *Richterwahlausschuss* distributes the responsibility amongst its members and, consequently, none of them individually or as a branch of government can legally or politically be held accountable.[222] Selections by a *Richterwahlausschuss* therefore do not enhance democratic legitimacy of judges but, at best, strengthen democratic elements of the selection procedure.[223]

3. Democratic Legitimacy and Formal Appointments

In this regard, even with the participation of a *Richterwahlausschuss*, it remains the competent minister who formally appoints a judge. According to the FCC, the minister is the only one suited to carry the political responsibility for the appointment and serves as a link

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[220] *See* WITTRECK*, supra* note 150, at 20; *See* Classen*, supra* note 163*,* at 55; MINKNER, *supra* note 164, at 254f; Helmuth Schulze-Fielitz*, Article 95, in* 3 Grundgesetz pt. 24 (Horst Dreier ed., 2008); Jachmann*, supra* note 165, at para. 127.

[221] FCC, supra 158 para 158 (translation provided by the authors).

[222] *See* Klaus Ferdinand Gärditz, *Reformbedarf bei der Bundesrichterwahl?,* ZEITSCHRIFT FÜR BEAMTENRECHT 325, 326 (2015).

[223] DIRK EHLERS, VERFASSUNGSRECHTLICHE FRAGEN DER RICHTERWAHL [CONSTITUTIONAL QUESTIONS OF THE SELECTION OF JUDGES] 40ff (1998); E.G. Mahrenholz, *Darstellung im Überblick (Presentation at a glance),* NIEDERSÄCHSISCHE VERWALTUNGSBLÄTTER [NDSVBL] 225, 234 (2003).

through which legitimacy is passed onto the judge to satisfy the requirements of Article 20 (2) BL.[224] The requirement of democratic legitimacy through the possibility of tracing back an exercise of state power to the act of a democratic vote as required by Article 20 (2) BL can warrant only a certain degree of efficiency of democratic legitimacy.[225] Namely, a public official exercises state power in a democratically legitimate way if he or she is directly elected to the office or has been authorized to exercise the office by an official who can show that his or her own authorization to exercise the office can directly or indirectly be traced back to the act of a democratic vote.[226] According to the FCC, it is only the integrity and efficiency of this chain of legitimacy that is called for by the Constitution,[227] not a strictly defined proximity to the act of a democratic vote.[228] It is well accepted that the degree of democratic legitimacy in the ramifications of the administration can be quite homeopathic[229] without this damaging the democratic legitimacy of the exercise of state power. In terms of democratic legitimacy, it is the act of appointment and the efficient possibility to allocate responsibility for appointments that is decisive. While it is preferable to have shorter chains of legitimacy the more powerful a position is, it would be impossible to strictly and abstractly define the necessary proximity to an act of a democratic vote for any given office. The requirement of democratic legitimacy put forward by Art. 20 (2) BL therefore should not be exaggerated when discussing the legitimacy of judges. After all, Article 20 (2) BL calls for the integrity and sufficient efficiency of democratic legitimacy—no less, but no more.

4. Some Ideas for a Nuanced Approach to Selecting and Appointing Judges

Within the given constitutional and institutional restraints, these considerations allow for certain changes that would facilitate the German judiciary to earn even more functional legitimacy. They would also help shift the discussion away from an easily exaggerated focus on democratic legitimacy and political participation towards judicial independence, impartiality, and the necessary qualifications for the judicial office. These propositions could serve as additions to the German framework to strengthen the independence of judges and to reinforce formal safeguards. There are lessons to be learned from the worrying attacks on the rule of law and judicial independence in other European countries. Germany should aim to preserve and improve its framework for judicial appointments in the light of these events. This does not have to result in radical changes. As stated before, the importance of

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[224] *See* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] May 4, 1998, 2 BvR 2555/96, para. 22.

[225] *See* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] SUPRA 158, para. 158.

[226] *See* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] 107 BVERFGE 59, para. 158.

[227] *See id.*, at para. 156.

[228] *See* Mahrenholz, *supra* note 223, at 234.

[229] *See* Huster & Rux, *supra* note 157, at para. 94.

democratic legitimacy for the judicial office should not be underestimated and the relevant constitutional requirements must be met. Nonetheless, it seems perfectly plausible to call for a less reflexive and vehement rejection of any kind of judicial participation in the process of selecting candidates for the judicial office.

For example, a stronger participation of judges in the *Richterwahlausschüsse* on the state-level could be worth considering. They could intervene to effectively assess the candidates' professional capacities and would not necessarily be bound by political considerations. This would contribute to the new judge's functional legitimacy in the light of Article 97 BL and depoliticize the appointment procedure to create a trustworthy judiciary. Judicial appointment by the competent minister who stands politically responsible for the ultimate choice would ensure democratic legitimacy. This form of judicial participation does not face constitutional obstacles—especially because Article 98 (4) BL does not make any requirements regarding the composition of a state's *Richterwahlausschuss*.

Further, it seems possible to expand the importance of objective criteria relating to a judge's personal competence and suitability for the judicial office in the process of selecting judges. This would strengthen a merit-based appointment system. Of course, it is difficult to objectively find out who the best candidate might be and a professional evaluation will always incorporate subjective aspects. But, guidelines on evaluating judges while minimizing subjective ratings already have been developed.[230] If such evaluations are carried out in an impartial, objective way and can be challenged in court for their correct use of facts, these evaluations are more likely to establish a sufficiently precise factual basis for career decisions than a politician's assessment. While the FCC's recent jurisprudence has conceded that the *Richterwahlausschuss* may only elect a candidate the competent minister can appoint without violating the duty to appoint based on merit,[231] such a violation is—to protect the electoral freedom of the *Richterwahlausschuss*—only considered when a decision for appointment would be incomprehensible and would ignore the basic suitability requirements.[232] If the requirement to appoint based on only merit is to be of any significance, however, the minister must consider all available objective indications concerning the candidates' qualification and professional capacity for the post and should state the reasons for the final choice. This correlates to the finding that it remains the minister who is politically responsible for the appointment, which the FCC has explicitly recognized for state ministers that appoint judges in collaboration with a *Richterwahlausschuss*[233] because the *Richterwahlausschuss* is incapable of bearing political responsibility. Thus, the proposed method does not distort the intention to set up a

[230] *See generally* Consultative Council of European Judges, opinion 17 (2014).

[231] FCC, *supra* note 140 at para. 31.

[232] *Id.*, para. 35.

[233] *See* Bundesverfassungsgericht [BVERFGE] [Federal Constitutional Court] 119 BVERFGE 331, para. 22.

Richterwahlausschuss and its electoral freedom, but rather adequately reflects the system of political responsibility and constitutional duties of the minister in charge of an appointment installed by the Basic Law.

Another possibility to better the conditions to earn functional legitimacy and to depoliticize the process without significantly changing the position of the involved ministers and/or the *Richterwahlausschuss* would be installing an advisory panel similar to those established by Article 255 TFEU or by Council of Europe Resolution CM/Res(2010)26. These panels are made up of eminent lawyers of recognized competence[234] that emit non-binding opinions on the professional qualification of candidates for judicial posts. These panels exist to properly distance the process of judicial appointments from the political process and to ensure the quality of the candidates that is necessary for their future office.[235] While their opinions are not binding for those competent to and responsible for appointing the judges, their moral weight has influenced the appointment process for European judges.[236] A panel following this model could consist of sitting and retired judges and justices of recognized competence, law professors, practicing members of the bar, and members of the civil society. It could issue non-binding opinions on only a candidate's suitability for office for a judicial post on the highest courts in full independence, maybe after a private hearing with the candidate. To avoid a mere shift of politicization from the selection of judges to the selection of the advisors, their selection could be entrusted to many several bodies—for example, the two chambers of parliament, bar associations, associations of judges, etc. These non-binding opinions would be submitted, along with the regular evaluations of candidates, to the *Richterwahlausschuss* and the minister, who would then proceed with their regular process of selecting and appointing the judges. This would allow for a clearer factual basis on which the minister and the *Richterwahlausschuss* could reach their decisions, thereby minimizing potential undue influence of political considerations on the selection of candidates. While the details of the organization of such a panel should be subject to serious debate, their opinions would be equipped with a certain moral weight and could not be criticized for being the result of inner judicial politics as is the case with professional evaluations.[237] The setup of such a panel could also benefit from the experience with the European panels and similar panels in countries such as the UK or Canada.[238]

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[234] *See* Henri de Waele, *Not quite the Bed that Procrustes Built, in* SELECTING EUROPE'S JUDGES 28f (M. Bobek ed., 2015).

[235] *See* Jean Marc Sauvé*, Selecting the European Union's Judges, in* SELECTING EUROPE'S JUDGES 79 (M. Bobek ed., 2015).

[236] *See id.* at 83. After an unfavorable opinion issued by the Article 255 Panel—which occurred in a remarkable 20% of cases for candidatures for a first term of office—no appointment ensued.

[237] *See* Gärditz*, supra* note 162, at 7.

[238] *See* PENNY DARBYSHIRE, SITTING IN JUDGMENT 95FF (2011) for experiences with the British Judicial Appointment Committee; *see* REPORT OF THE INDEPENDENT ADVISORY BOARD FOR SUPREME COURT OF CANADA JUDICIAL APPOINTMENTS, OFFICE OF THE COMMISSIONER FOR FEDERAL JUDICIAL AFFAIRS CANADA, HTTP://WWW.FJA-CMF.GC.CA/SCC-CSC/ESTABLISHMENT-CREATION-ENG.HTML for the Independent Advisory Board for the Supreme Court of Canada Judicial Appointments.

In whatever way the promotion of judicial independence, functional legitimacy of judges, and a strong judiciary in the sense of the rule of law might be achieved, the above considerations show that there is room to allow for these kinds of influences within the current German constitutional and institutional framework.

H. Conclusion

The foregoing considerations have shown that all those interested in upholding and strengthening the rule of law should be concerned by the developments in Poland and that further progress of the reform of the judiciary should be carefully watched and debated. Not only does the reform contradict the relevant standards for councils for the judiciary that have been developed across Europe, but the clear focus on the democratization of the judiciary questions the role a judiciary should play in a democratic state that adheres to the separation of powers and the rule of law. Therefore, the Polish reforms touch upon the founding values of the European Union. It is important not to narrow down the debate on how to select and appoint judges to the question of how to confer democratic legitimacy upon the judges, but it should be considered what other factors contribute to the legitimacy of the judiciary. Namely, the personal and professional suitability of judges should be taken into account. This calls into question the approach taken by both the Polish government and the dominant narrative in German constitutional law on these issues. It also makes room for improvements within the given constitutional framework for a stronger emphasis on qualification, independence, and impartiality of candidates for judicial posts rather than their democratic legitimacy. This should by no means be understood as an undemocratic attempt to strengthen the special interests of the Judiciary but as an effort to strengthen the rule of law to ensure the proper functioning of a free and democratic society.