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The Post-2015 Institutional Shock in Poland: Some Empirical Findings

The system transition initiated in Poland in 1989-1990 required the restoration of market mechanism and institutions. An equally difficult task was the construction of the foundations for the rule of law and open civil society (Kowalski 2019). In the sphere of common practices and democratic rules, Poland and the neighboring post-socialist countries showed a certain path dependence (Artur 1989; David 2005; Kowalski 2013). According to the Democracy Index (DI), Czechia only counted among the full democracies in 2006 and 2010 (belonging to the top 20 in the DI, Figure 1).

Other countries, including Czechia in 2014 and 2017, were classified as flawed democracies. Czechia systematically achieved the highest position among all the Central European Countries included in Figure 1.

STYLIZED FACTS ON THE STATE OF DEMOCRACY AND THE JUDICIAL SYSTEM IN POLAND

The fundamental component of modern democratic states is an independent and efficient judicial system. The Polish Constitution of 1997 provides for the independence of the judicial system. This was reflected in the fulfilment of the Copenhagen Criteria and the 2004 accession of Poland and other CEE countries to the European Union. Both the very principle of judicial independence and its efficiency became primary issues highlighted immediately upon the PiS's victorious electoral campaign.

Table 1 presents data from "The EU Justice Scoreboards." The methodology allows for unbiased international analyzes of judicial systems and the identification and assessment of the trends. Table 1 shows that in 2010 and 2014—the years preceding the change of government—Poland's position was relatively high in relation to Czechia, Slovakia and Hungary, as well as to other European Union member states. In 2016-2017—the period of the legislative and executive responsibility of PiS (Table 1, rows 1, 2, 3)—the situation in Poland either did not improve or even worsened in all three dimensions when compared to other countries.

Table 1 also shows some quantitative measurements of public expenditure on the judicial system. In terms of expenditure, Poland ranked tenth in the European Union along with several other EU coun-

ABSTRACT

The aim of this article is to discuss and assess the post-2015 institutional environment in Poland. As early as December 2015, the newly elected conservative President and the parliamentary majority began to implement their vision of the state. It included a new law-making culture and an overhaul of the judicial system. These changes were supplemented by a sweeping nomenclature in public institutions and state-controlled companies. The new political establishment took full control of public media. The analyses are focused on the institutional shock to the judicial system. The changes are studied through the prism of manager perceptions of the practices of public institutions, law-making and law-enforcement. The primary data were collected annually with the use of surveys conducted on a carefully selected group of middle and high-level managers with a university degree. The picture of 2016-2018 derived from the survey is analyzed and compared with earlier years. There was not only a lack of significant improvement in the main areas of interest of the coalition but in many cases, it deteriorated. Particularly noteworthy is the general perception of increased uncertainty in all the institutional spheres analyzed in the article.

tries. Expenditure on courts in relation to GDP in Poland amounted to 0.5% of GDP and ranked among the highest in the EU. Before 2015, the efficiency of Polish courts and the scale of public expenditure on the courts was above average, with relatively lower costs in nominal terms but relatively high expenditure in relationship to GDP.

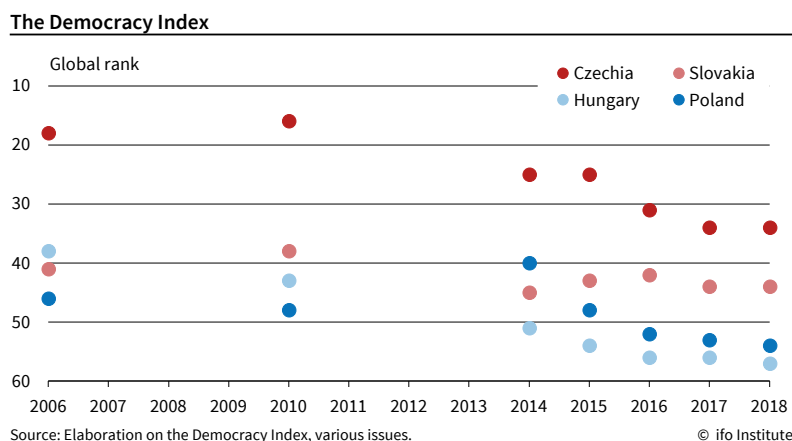
Table 1 indicates certain shortcomings in Poland's judicial system. However, compared to countries with a similar heritage and institutional determinants, the Polish judicial system was relatively efficient. Therefore, objective reasons for the attack on judges and judicial independence that were led by PiS and its government did not exist (Mazur and Żurek 2017).



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Figure 1



CHANGES IN THE INSTITUTIONAL FRAMEWORK

The Practice of Staffing Public Institutions

The main task of the newly established regime in the institutional sphere was to replace people employed in public television, Polish radio, public administration and state-owned companies. The expulsion was facilitated by the amendment to the Civil Service Act, speedily passed on 30 December 2015.¹ The scale and scope of the staff replacement had no precedent in

¹ The Act of 30 December 2015 Amending the Civil Service Act and Some Other Laws, Journal of Laws of 2016, Item 34.

the post-1990 history of Poland (Kopińska 2018). Despite statutory regulations and often contrary to the letter of the law, the purge in public administration included mid-level or even low-level civil servants. Aside from exploiting or circumventing existing regulations, the following methods were used: institution-oriented changes to the law, sector-wide changes to the law, reorganizations and mergers of institutions (Kopińska 2018).

The Practice of Law-making and the Attitude toward the Justice System

The 2015 electoral victory paved the way for an unrestricted use of a specific, short-cut law making by initiating an amendment or a submission of a bill through parliamentary drafts. Such proposals signed by a group of members of parliament did not require any prior, formal considerations and consultations before submitting the bill to the Sejm. This short-cut law led to laws that were pushed through the Polish parliament because this new law eliminated public consultation and suppressed discussions both in parliamentary commissions and during parliamentary plenary sessions. This kind of law-making caused a decrease in the quality of new acts of law. Poland viewed the marginalization of the Parliament and the President as the guardians of the constitution. Simultaneously, an informal PiS collegiate, an extra-parlia-

Table 1

Selected Characteristics of the Judicial Systems of Czechia, Poland, Slovakia and Hungary

| | Description | 2010 | 2014 | 2016 | 2017 |
|---|--|----------|---------|---------|---------|
| 1 | The time needed to resolve civil, commercial, administrative and other cases | PL (3) | PL (5) | H (5) | H (5) |
| | | H (7) | H (5) | PL (6) | PL (7) |
| | | CZ (9) | CZ (15) | SK (10) | SK (10) |
| | | SK (15) | SK (17) | CZ (15) | CZ (15) |
| 2 | The time needed to resolve litigious civil and commercial cases | CZ (3) | H (8) | SK (5) | CZ (7) |
| | | H (6) | CZ (9) | CZ (8) | SK (8) |
| | | PL (8) | PL (12) | H (10) | H (10) |
| | | SK (18) | SK (21) | PL (12) | PL (11) |
| 3 | The time needed to resolve administrative cases | SK (1) | H (2) | SK (2) | H (4) |
| | | PL (3) | PL (3) | CZ (8) | PL (6) |
| | | H (6) | SK (16) | H (10) | SK (14) |
| | | CZ (nda) | CZ (18) | PL (12) | CZ (16) |
| 4 | General government total expenditure on law courts (€ per head) | PL (10) | PL (16) | PL (17) | PL (17) |
| | | CZ (17) | CZ (19) | CZ (19) | CZ (20) |
| | | H (19) | SK (19) | H (21) | H (23) |
| | | SK (nda) | H (20) | SK (23) | SK (26) |
| 5 | General government total expenditure on law courts (as a percentage of GDP) | PL (1) | PL (2) | PL (2) | PL (2) |
| | | CZ (3) | CZ (3) | H (3) | H (6) |
| | | H (3) | H (3) | CZ (4) | CZ (14) |
| | | SK (3) | SK (3) | SK (5) | SK (20) |
| 6 | Number of judges per 100,000 citizens | CZ (7) | CZ (5) | H (3) | H (5) |
| | | H (7) | H (5) | CZ (4) | CZ (6) |
| | | PL (8) | SK (6) | PL (6) | PL (10) |
| | | SK (9) | PL (6) | SK (8) | SK (11) |

Note: nda—no data available. Figures in parentheses indicate the position of each country among all EU countries for which Eurostat publishes data. In rows 1, 2 and 3, the lower the number, the better the relative position of a country compared to other EU member states. The data in rows 4, 5 and 6 show the relative position of the countries in the order of highest values respectively of the expenditure (rows 4 and 5) and the number of judges compared to other EU countries.

Source: The EU Justice Scoreboard, various issues.

Table 2

Public Institutions and the Functioning of Legislation in Poland

| Symbol | Question | Answer variants |
|--------|--|---|
| I.1 | Please apply the following statement to your country: 'Laws and regulations are so complicated, unclear and sometimes even contradictory, that it is impossible to adhere to them on a regular basis. Therefore, civil servants can always find ways and means to give you a hard time (long delays, arbitrary decisions).' This happens: | |
| I.2 | Assume that you are confronted with clearly unfair procedures or outright demands for bribes by a civil servant. Would you try to resist and fight back by appealing to their superior or to an administrative court? You would (...) fight back: | - never 1 - rarely 2 |
| I.3 | Please apply the following statement to your country: 'As an entrepreneur, you are always afraid of committing a minor "error" here and there in the eyes of the regulatory bodies because these "errors" can be abused by civil servants in order for them to gain a position of power (and to build a case to blackmail you).' This is (...) the case: | - sometimes 3 - frequently 4 - mostly 5 - always 6 |
| I.4 | If you know the civil servant you have to deal with personally, can this speed up the procedure? Knowing the civil servant personally will (...) speed up the procedure: | |
| I.5 | If you know the civil servant you have to deal with personally, can this influence their decision (e.g., amount in taxes, issuing a business license)? This will (...) influence the decisions of civil servants: | |

Source: Borner et al. (1995).

mentary, non-governmental center of power emerged (Zielonka 2018).

The simplified law-enactment process was also used to overhaul the judiciary system. All the key elements of the judicial system—i.e., the Constitutional Tribunal (CT), the National Council of the Judiciary (NCJ), the Supreme Court (SC) and the system of ordinary courts—became targets of a coordinated legislative action. All the changes were presented to the general public as fundamental steps in the indispensable state reform process.

The Constitutional Tribunal was the first judicial body to become the object of verbal attacks from the parliamentary majority, the government and the President. They were reinforced by the public television channels controlled by PiS. The CT's position became marginalized through the unconstitutional election of three illegally appointed CT judges and by appointing a new President of the CT in an unlawful manner. The CT became subordinated to the parliamentary majority and ceased to act as a guardian of the constitutionality of legislation.

The National Council of the Judiciary was also "reformed" in a similar political climate. In line with the Constitution, the function of the NCJ is to uphold the independence of courts and judges and plays a key role in the process of appointing judges. The law was pushed through parliament and passed on 8 December 2017, and enabled a replacement of NCJ members and thus, in fact, subordinated this body to the will of the parliamentary majority.

Finally, the Supreme Court also became the target of a state propaganda campaign. The law enacted on 8 December 2017 to regulate the Supreme Court initiated an attempt to reconstruct and purge the SC (Sweeney 2018). This new act of law violated the Constitution and thus the Supreme Court's independence. The most important "reforms" included a change in the court's structure with the creation of two new chambers: the Disciplinary Chamber and the Extraordinary Control and Public Affairs Chamber, and the

introduction of extraordinary rights of appeal. The new law shortened the term of office for some judges by lowering their retirement age.

In the years that followed, PiS also introduced changes in the system of ordinary courts. These changes further violated the principle of the separation of powers. In practice, the Ministry of Justice as a political executive body gained the freedom to interfere in the staffing of the management of courts and thus was able to influence the careers of individual judges. The Minister obtained the potentially strongest tool of power and repression against judges in the new law report (2018): "control over the creation of bodies responsible for conducting disciplinary proceedings against judges and prosecution in these proceedings, but also the possibility to directly influence any disciplinary case from the request to initiate proceedings to the request to conduct them, even when the disciplinary ombudsman does not see [any] reason to do so."

These post-2015 changes to the judiciary introduced in Poland by the legislative and executive powers were the object of unequivocal criticism from judges and their professional associations. There were numerous street demonstrations to defend the independence of judges and courts. As early as December 2017, the EU advisory body—the Venice Commission—unambiguously and unequivocally recognized the constitutional crisis in Poland caused by the executive branch, the legislature and the President. The Venice Commission considered that the new Polish laws on the system of ordinary courts and the President's draft laws on the SC and the NCJ "put the independence of all parts of the judiciary in Poland at serious risk[s]." Moreover, the Venice Commission states that the Law on the SC "contributes to a weakening of the independence of justice as a whole." The situation raised concerns in the European Commission (EC). These concerns referred not only to the actions presented above but also to the systemic implications of the reorganization and political control over the

Table 3

Law-making in Poland

| Symbol | Question | Answer variants |
|--------|--|--|
| S.1 | As an entrepreneur, do you regularly have to cope with unexpected changes in laws and/or policies that could seriously affect your business? Changes in the laws and policies are: | - completely predictable 1 - highly predictable 2 - fairly predictable 3 - frequently unpredictable 4 |
| S.2 | As an entrepreneur, are you officially or unofficially informed (through the press, business association, etc.) about new laws and/or plans to change the existing laws or policies? You are (...) informed: | - mostly unpredictable 5 - completely unpredictable 6 |
| S.3 | In case of important legal changes affecting your business, can you voice your concerns (...) indirectly and/or are you directly consulted? You are (...) consulted: | - never 1 - rarely 2 - sometimes 3 - frequently 4 |
| S.4 | Do you expect the government to stick to announced major policies (e.g., new tax law, an infrastructure project, a budget goal)? The government's announcement is (...) credible: | - mostly 5 - always 6 |

Source: Borner et al. (1995).

public prosecutor's office and even over the National School of Judiciary and Public Prosecution. The EC first attempted to consult the Polish authorities and—when these consultations failed—EC used another tool—recommendations. The lack of an adequate response from the Polish government to the recommendations led the College of Commissioners of the EC to refer the Polish government to the Court of Justice of the European Union under Article 7(1) of the Treaty on European Union.

INSTITUTIONAL CHANGES IN POLAND—THE PERCEPTION OF MANAGERS

The Scope and Methodology of the Study

To collect primary information on perception of the functioning of public institutions, law-making and law enforcement in Poland the Borner et al. questionnaire (1995) was used. The survey includes sixteen questions or statements (Tables 2–4). In this paper, the data for 2014–2018 is analyzed with the results of 2014–2015 used as the background for comparisons.² The respondents used the scale ranging from 1 to 6 to answer the survey questions, and used the 1-to-3

² The annual survey was done on a non-random, targeted sample of over 140 managers with higher education. It was conducted electronically ensuring the full anonymity of respondents.

Table 4

Law Enforcement in Poland

| Symbol | Question | Answer variants |
|--------|---|--|
| E.1 | Imagine that a private conflict is brought into court with the evidence very clearly in your favor. Do you have confidence that the assigned judge will enforce the law objectively? Courts can (...) be trusted to enforce the law objectively according to transparent rules: | |
| E.2 | Please apply the following statement to your country: 'The party who pays more (e.g., bribes or for better lawyers) will win the case. Even if the evidence is clear, money can change the result. This is (...) the case: | - never 1 - rarely 2 - sometimes 3 - frequently 4 |
| E.3 | Is it irrelevant which individual judge decides on a case? Is it advantageous to know the assigned judge? If you know the assigned judge personally, this will (...) influence the procedure and result: | - mostly 5 - always 6 |
| E.4 | If you were treated unfairly in court (i.e., because of bribery demands or a decision you deem "incorrect"), would you fight this by appealing to a higher court? You would (...) appeal: | |

Source: Borner et al. (1995).

scale to answer questions pertaining to uncertainty. In total, the survey questions cover the institutional environment that might influence—from the economic perspective—transaction costs, investment risk and uncertainty, and exert an impact on social capital (Acemoglu and Robinson 2012; Alesina and Giuliano 2015; Helpman 2008; Kowalski 2013; Pistor 2019).

The Survey

The first group of questions (Table 2) refers to public institutions and the functioning of legislation in Poland. The second concerns the perception of the law-making process (Table 3). The third group of questions and statements concerns the perception of law enforcement in Poland (Table 4). Each part of the survey ended with a question on the overall assessment of trends in the development of uncertainty for the area concerned (Table 5). Thus, manager responses for 2018 reflected their perception of the past from the perspective of the present year's experiences.

The Results

Table 6 summarizes the trends in the arithmetic mean of responses to the survey questions. The assessment of the course of changes in 2016–2018 is shown against 2014 and 2015 - the two last years of

Table 5

The Perceived Changes in Uncertainty in the Institutional Environment in Poland

| Symbol | Question | Answer variants |
|--------|---|-----------------------------|
| I | Do you think that during the last 10 years, uncertainties in dealing with government agencies have (...)? | - increased 1 |
| S | Do you think that during the last 10 years, uncertainties in law-making have (...)? | - remained about the same 2 |
| E | Do you think that during the last 10 years, uncertainties in law enforcement have (...)? | - decreased 3 |

Source: Börner et al. (1995).

the previous Sejm's term of office. In the sphere of public institutions and the functioning of law, a dominant picture of stagnation or one-time improvement (see I.4 and I.5 for 2017) prevailed.

In the overview of law enforcement for individual years, no clear improvement and even a decline (Table 6; question S.1) or continuation (Table 6; questions S.2 and S.3) was marked. One exception is the perception of the credibility of government announcements (Table 6; questions S.4). In this sphere, the respondents noted an improvement in 2015. In the following years, they maintained their 2015 ratings.

Part three of the survey—Law Enforcement—refers to the perception of judicial practices, and directly concerns the areas that were targeted during the electoral campaign and were the objects of a publicly funded PiS crusade against judges after the formation of the new government. Despite the political pressure and the government-controlled media, the vast majority of judges resisted, showed perseverance and continued to work and adjudicate according to the rules of good practice and the letter of the law. The respondents provided the highest scores in the sphere of judge neutrality (Table 6, question E.3). In the three other spheres, i.e., judge objectivity (Table

6, question E.1), financial influence (question E.2), and confidence in the appeal system (question E.4), the responses were more varied. In the entire sample of twelve 2016–2018 annual evaluations, five showed an improvement, five no change or minor change compared to the previous year, and two showed a decline.

Table 7 presents annual cross-sections of uncertainty perception. The results clearly indicate that, according to managers, uncertainty in the functioning of public institutions, law-making, law enforcement increased as early as in the year of presidential and parliamentary elections. In all the following years and all three areas, the perceived uncertainty continued to grow.

CONCLUSIONS

Poland was one of the leaders of economic and institutional transition among the CEE countries from 1990–2015. Privatization, the separation of powers, the independence of the central bank and an apolitical civil service—responded to citizens' hopes for an efficient economy and a rule of law.

The judicial system and judicial independence were key topics of the victorious presidential and par-

Table 6

Changes in the Perception of Institutional Environment Quality in Poland in the Years 2016–2018 Based on Annual Surveys Compared to 2014–2015

| Survey questions | 2014 | 2015 | 2016 | 2017 | 2018 |
|--|------|------|------|------|------|
| Public institutions and the functioning of law | | | | | |
| I.1. Laws and regulations are so complicated... | +/- | + | - | +/- | +/- |
| I.2. Assume that you are confronted with clearly unfair procedures... | + | - | +/- | +/- | +/- |
| I.3. You are always afraid of committing a minor error... | + | + | - | +/- | +/- |
| I.4. Knowing the civil servant personally will speed up the process... | - | + | +/- | + | - |
| I.5. Knowing the civil servant personally can influence the decision... | +/- | + | +/- | + | +/- |
| Law-making | | | | | |
| S.1. Do you regularly have to cope with unexpected changes in laws...? | + | - | - | - | +/- |
| S.2. Are you officially or unofficially informed...? | +/- | - | +/- | +/- | +/- |
| S.3. In case of important legal changes... | +/- | - | +/- | - | +/- |
| S.4. Do you expect the government to stick to announced major policies...? | - | + | +/- | +/- | +/- |
| Law enforcement | | | | | |
| E.1. Courts can be trusted to enforce the law objectively according to transparent rules... | + | + | - | + | + |
| E.2. The party who pays more (...) will win the case... | + | - | + | +/- | - |
| E.3. Is it irrelevant which individual judge decides on a case? | - | +/- | + | +/- | + |
| E.4. If you were treated unfairly in court (...), would you fight the decision by appealing to a higher court? | + | + | +/- | +/- | - |

Note: + improvement compared to the previous year; +/- no change or a very minor change (less than/equal to 0.1) compared to the previous year; - decline compared to the previous year.

Source: Own surveys.

Table 7

Changes in Uncertainty Perception in Poland in 2016–2018

| | 2014 | 2015 | 2016 | 2017 | 2018 |
|---|------|------|------|------|------|
| Uncertainty in the sphere of public institutions' functioning | + | – | – | – | – |
| Uncertainty in the sphere of law-making | + | – | – | – | – |
| Uncertainty in the sphere of law enforcement | + | – | – | – | – |

Note: + improvement: decrease in uncertainty; +/- no change or minor change (less than/equal to 0.05) compared to the previous year; – decline compared to the previous year: increase in uncertainty.

Source: Own surveys.

liamentary electoral campaigns in 2015. The judiciary then became the object of systematic actions of the new parliamentary majority leading to unconstitutional changes in the system's organization and functioning. As a result, Poland experienced a negative institutional shock starting in 2015. The perception of the scale and nature of the changes in this area, with their future negative implications, were effectively neutralized by the favorable external and internal economic situation.

The survey results are not favorable to the right-wing coalition. The picture of its first years in power not only signals a lack of significant improvement in the main areas of interest of the coalition but in many cases, it indicates a decline. Particularly noteworthy is the general perception of increased uncertainty in all the three institutional spheres analyzed in the article. In the view of the scale of the institutional shock and the state capture, the opinions and changes in the perception of the surveyed stakeholder group are somewhat surprising. It could have been expected that managers who were more highly educated would show a more refined ability to identify current and future threats stemming from the subordination of judicial bodies and abolition of the modern civil service.

The case of post-2015 Poland shows how, without persistent and deep interest throughout the population, in a very short time, the judiciary system, without changes being made to the Constitution, might be overhauled and actually subordinated to the executive powers. The case of post-2015 Poland also signals the importance of civic education and development of a modern civic society. Without better education and strong independent mass media, populist rhetoric based on manipulation of emotions and facts might become a common political practice. The cases of Hungary and Poland also highlight the key role of the European Union institutional framework. It also indicates the need in the EU to work out a system of early institutional warnings to prevent such developments in the future.

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