

[PiS]sing off the Courts: the PiS Party's Effect on Judicial Independence in Poland

ABSTRACT

By winning both the presidency and a majority of seats in the Parliament in 2015, the Law and Justice Party assumed more control in Poland than any single political party has managed since the fall of communism. The party subsequently focused on taking control of the judiciary as well, proposing legislation that critics claim threatens the rule of law but the government insists is necessary to rid the judiciary of corruption and inefficiency. This Note discusses whether the bills go beyond the rule-of-law norms in the European Union, as well as the EU's response to the situation in Poland so far. It then proposes other methods of influencing Poland's actions through economic and reputational pressure. It further suggests that, while perhaps too late to stop the Law and Justice Party's reforms in Poland, changes originating from within the Polish judiciary could have prevented this crisis, providing a possible warning to countries facing a similar situation in the future.

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I. INTRODUCTION

In 2015, a single political party gained more control over the Polish government than any other has managed since before the fall of communism in the country.¹ The Law and Justice (PiS) Party took control of the executive branch with wins by presidential nominee Andrzej Duda and prime minister nominee Beata Szydło.² The PiS Party subsequently took control of the legislative branch by winning a majority of seats in both houses of the Polish Parliament—the Sejm and the Senate.³ The only branch of government the PiS Party did not control was the judiciary.⁴

Shortly after coming to power, the PiS Party passed amendments inhibiting the Constitutional Tribunal (CT).⁵ The CT resolves constitutional questions regarding actions taken by the other branches

1. *Rightwing Law and Justice Party Wins Overall Majority in Polish Election*, THE GUARDIAN (Oct. 27, 2015, 11:25 AM), <https://www.theguardian.com/world/2015/oct/27/poland-law-justice-party-wins-235-seats-can-govern-alone> [https://perma.cc/RD2W-FQMZ] (archived Aug. 5, 2018) [hereinafter *Rightwing Law and Justice Party*].

2. Adam Easton, *Poland Returns to Conservative Roots with Law and Justice Win*, BBC NEWS (Oct. 26, 2015), <http://www.bbc.com/news/world-europe-34640535> [https://perma.cc/X4MR-UKA8] (archived Aug. 5, 2018).

3. *Rightwing Law and Justice Party*, *supra* note 1.

4. GRZEGORZ EKIERT, HARVARD CTR. FOR EUR. STUDIES, HOW TO DEAL WITH POLAND AND HUNGARY 10 (2017), <https://www.socialeurope.eu/wp-content/uploads/2017/08/Occ-Pap-13-PDF.pdf> [https://perma.cc/JSK9-YM7J] (archived Aug. 5, 2018).

5. It is important to note that the controversy surrounding the CT began when the outgoing ruling party, the Civic Platform, appointed five new judges to the CT. Two of those appointments were to replace judges whose terms did not end until after the PiS Party took office, and the CT ruled those two appointments unconstitutional. However, the PiS Party refused to accept even the three appointments the CT deemed constitutional, instead appointing five judges of its own, and the PiS Party's subsequent actions have completely stripped the CT of its power. See Aleks Szczerbiak, *Is Poland's Constitutional Tribunal Crisis Over?*, THE CONSTITUTION UNIT (Jan. 19, 2017), <https://constitution-unit.com/2017/01/19/is-polands-constitutional-tribunal-crisis-over/> [https://perma.cc/UTM5-T2E7] (archived Aug. 5, 2018).

of government and state institutions.⁶ In July of 2017, the PiS Party took another major step toward taking control of the judicial branch.⁷ The Parliament passed three bills with the cumulative effect of replacing all Supreme Court (SC) judges, and the top officials of all other Polish courts, with new judges selected by the PiS Party.⁸ The bills aimed to replace the former procedure for judicial appointments.⁹ The replaced system relied on the National Council of the Judiciary (KRS), a body composed of judges selected by professional legal bodies, to nominate candidates for judicial appointments.¹⁰ The bills effectively placed this power in the executive office of the Minister of Justice.¹¹ In what was considered a surprise move, Duda vetoed two of the three bills.¹² However, Duda stated he still favored reforming the judicial branch and asked Parliament to revise the bills.¹³ In December of 2017, Parliament passed, and Duda signed, revised reform bills that are almost identical to the original bills.¹⁴ The revised bills force 40 percent of the SC judges into retirement, as opposed to the entirety of the bench, but still change the makeup of the KRS to effectively give the PiS Party control over new judicial nominations.¹⁵

6. Emily Tamkin, *Polish Ruling Party Passed Unconstitutional Laws, Now Controls Constitutional Tribunal*, FOREIGN POLY (Dec. 19, 2017, 3:17 PM), <http://foreignpolicy.com/2016/12/19/polish-ruling-party-passed-unconstitutional-laws-now-controls-constitutional-tribunal-trump-law-justice/> [https://perma.cc/U2BL-28B3] (archived Aug. 5, 2018).

7. *See Poland MPs Back Controversial Judiciary Bill*, BBC NEWS (July 15, 2017), <http://www.bbc.com/news/world-europe-40617406> [https://perma.cc/4Y7V-FUPX] (archived Aug. 5, 2018) (discussing legislation giving the PiS Party more power over the judiciary).

8. EKIERT, *supra* note 4, at 1–2.

9. Marcin Matczak, *Who's Next? On the Future of the Rule of Law in Poland, and Why President Duda Will Not Save It*, VERFASSUNGSBLOG (July 19, 2017), <http://verfassungsblog.de/whos-next-on-the-future-of-the-rule-of-law-in-poland-and-why-president-duda-will-not-save-it/> [https://perma.cc/J5UY-M65T] (archived Aug. 5, 2018).

10. *Id.*

11. Autumn Callan, *Thousands Rally in Poland to Protest Judicial Reforms*, JURIST (July 17, 2017, 3:09 PM), <http://www.jurist.org/paperchase/2017/07/thousands-rally-in-poland-to-protest-judicial-reforms.php> [https://perma.cc/QG6P-VJKP] (archived Aug. 5, 2018).

12. EKIERT, *supra* note 4, at 2.

13. *See Poland Court Bill: President Proposes Compromise Move*, BBC NEWS (July 18, 2017), <http://www.bbc.com/news/world-europe-40647997> [https://perma.cc/FU N6-YYEG] (archived Aug. 5, 2018) [hereinafter *Poland Court Bill*] (mentioning Duda's proposed compromise for new bills).

14. *See Poland Judiciary Reforms: Judge Accuses Government of Coup*, BBC NEWS (Dec. 23, 2017), <http://www.bbc.com/news/world-europe-42464007> [https://perma.cc/99RY-2WF4] (archived Aug. 5, 2018) [hereinafter *Government Coup*] (noting the PiS Party passed the revised bills).

15. *Id.*

After Parliament passed the first reform bills, Polish citizens staged mass protests¹⁶ and the European Union (EU) condemned the bills.¹⁷ The EU strongly considered triggering Article 7 sanctions¹⁸—a previously unused mechanic.¹⁹ Article 7 is a two-step sanctions process.²⁰ The first step provides that, with the approval of a four-fifths majority of member nations, the EU will formally warn a nation that there is a clear risk of a serious breach of EU values.²¹ The second step involves the imposition of sanctions, including the possibility of stripping a nation's voting rights, but requires unanimous approval from EU member states.²² Hungary supports Poland and made it clear it would oppose any sanctions, making it extremely difficult to impose those sanctions.²³

The EU argued the proposed bills eliminated judicial independence and threatened the rule of law in Poland.²⁴ As a result, the EU claimed Poland also threatened the rule of law in all EU member states.²⁵ The rule of law is listed under Article 2 as one of the EU values referenced in and protected by Article 7.²⁶ In response, the PiS Party contended the current judicial nomination process failed to provide any oversight of the judiciary, breeding corruption and allowing ex-Communists to remain on the bench.²⁷ Further, the party's

16. See *Polish Protests as Government Rejects Court Ruling*, BBC NEWS (Mar. 12, 2016), <http://www.bbc.com/news/world-europe-35793914> [<https://perma.cc/HG69-A4KT>] (archived Aug. 5, 2018).

17. See *Poland Court Bill*, *supra* note 13 (providing response to the bills from the vice president of the European Commission).

18. See, e.g., Eszter Zalan, *EU Commission Readies Article 7 Procedure Against Poland* (July 19, 2017, 3:55 PM), <https://euobserver.com/justice/138568> [<https://perma.cc/8M7Y-FLYV>] (archived Aug. 5, 2018) (providing comments from EU officials about launching Article 7 procedures).

19. Maria Fletcher, *Article 7 sanctions: a legal expert explains the EU's 'nuclear option'* (July 28, 2017, 9:34 AM), <http://theconversation.com/article-7-sanctions-a-legal-expert-explains-the-eus-nuclear-option-81724> [<https://perma.cc/7VE6-9PPY>] (archived Aug. 5, 2018).

20. Zalan, *supra* note 18.

21. Consolidated Version of the Treaty on European Union art. 7(1), Oct. 26, 2012, 2012 O.J. (C 326) 13 [hereinafter TEU].

22. *Id.* art. 7(2)–(3).

23. See *Poland Court Reforms: EU Says It Is Launching Legal Action*, BBC NEWS (July 26, 2017), <http://www.bbc.com/news/world-europe-4073184> [<https://perma.cc/TXZ9-CBW7>] (archived Aug. 5, 2018) (“Such a penalty, known as Article 7, requires the agreement of all EU member states, and Hungary says it will back Poland.”).

24. Zalan, *supra* note 18.

25. *Id.*

26. See TEU, *supra* note 21, art. 2 (“The Union is founded on the values of respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights.”).

27. *Poland MPs Back Controversial Judiciary Bill*, BBC NEWS (July 15, 2017), <http://www.bbc.com/news/world-europe-40617406> [<https://perma.cc/EEH5-SM4M>] (archived Aug. 5, 2018) [hereinafter *Poland MPs*].

election campaign focused on reforming the judiciary.²⁸ Accordingly, the party claimed the reforms were the result of a fair, necessary, and democratic process.²⁹

Since the EU has never actually imposed sanctions for rule of law violations, and therefore never had reason to define the rule of law, the question remains whether Poland's reform bills in fact violated the rule of law within the EU framework. Part II provides a more extensive background of Poland's political history, judicial procedures, and the PiS Party's reform bills. Part III analyzes the reform bills with respect to Article 7, judicial independence, and the rule of law, while also discussing standards for judicial independence throughout the EU. Part IV explains why the much-proposed idea of imposing Article 7 sanctions against Poland is not feasible, or maybe even desirable, and discusses alternate responses the EU can take against Poland, as well as how the situation in Poland can serve as a warning to the judiciaries in other nations.

II. BACKGROUND

A. *Rise of the PiS Party*

In the spring of 2010, Polish President Lech Kaczynski and numerous other high-ranking Polish officials flew to Smolensk, Russia.³⁰ The purpose of the trip was to attend an event marking the 70th anniversary of the Katyn massacre, in which the Soviet Union executed approximately twenty-two thousand Polish nationals.³¹ Military personnel and police officers comprised over half of the Katyn victims, and the massacre served to weaken any possible Polish insurrection.³²

President Kaczynski's airplane crashed on descent, killing all ninety-six people onboard.³³ President Kaczynski's identical twin brother, Jarosław Kaczynski, was not on the flight and therefore

28. *Poland Court Bill*, *supra* note 13.

29. *See Poland MPs*, *supra* note 27 (providing comments from a PiS Party official); *see also* EKIERT, *supra* note 4, at 4 ("They claim just to fulfil their promises to the majority of voters who elected them.").

30. Adam Easton, *Smolensk Tragedy Continues to Haunt Poland*, BBC NEWS (Mar. 31, 2016), <http://www.bbc.com/news/world-europe-35924688> [<https://perma.cc/GP3Y-M7HV>] (archived Aug. 5, 2018) [hereinafter *Smolensk Tragedy*].

31. Guy Walters, *The forest of nightmares: The truth about the Katyn massacres—and why Britain turned a blind eye*, DAILY MAIL (Apr. 16, 2010, 6:10 AM), <http://www.dailymail.co.uk/news/article-1266098/The-forest-nightmares-The-truth-Katyn-massacres-Britain-turned-blind-eye.html> [<https://perma.cc/Z59V-SCYH>] (archived Aug. 5, 2018).

32. *Id.*

33. *Smolensk Tragedy*, *supra* note 30.

survived.³⁴ Kaczynski subsequently became chair of the PiS Party, which the brothers had founded together.³⁵

Following the plane crash, Kaczynski attempted to take his brother's former position, but his numerous presidential bids failed.³⁶ Kaczynski later changed his political strategy, choosing other PiS Party members, Duda and Szydlo, to run for the positions of president and prime minister instead of himself.³⁷ Kaczynski's strategy proved successful in 2015: Duda won the national election in May, and Szydlo became prime minister following the parliamentary election in October.³⁸ During the parliamentary election, the PiS Party also won a majority of seats in both houses of Parliament.³⁹ In Poland, a party must find a coalition partner—another party—to work alongside if it does not win a sufficient number of seats in Parliament (the exact number depends on how many other parties earn seats).⁴⁰ By winning a true majority, the PiS Party is the first party to control the legislature without a coalition partner.⁴¹

With the president and prime minister being PiS Party members, the party controlled the executive branch, and with a true majority of seats in both houses of Parliament, the PiS Party controlled the legislative branch. The PiS Party thus gained more control over the Polish government than any other party since the fall of communism.⁴²

As a result, Kaczynski became the most powerful political figure in Poland.⁴³ While Kaczynski is officially only one of 460 members of Parliament, his position as the chair of the PiS Party has given him nearly complete control over the Polish government since the 2015 elections.⁴⁴ The PiS Party is so leader centric that Kaczynski can expel anyone he wants from the party.⁴⁵ In addition, it is unlikely anyone expelled from the party will achieve success afterwards since no other political party will embrace a former PiS Party member due to the

34. *Id.*

35. *Id.*

36. Adam Easton, *Poland Returns to Conservative Roots with Law and Justice Win*, BBC NEWS (Oct. 26, 2015), <http://www.bbc.com/news/world-europe-34640535> [<https://perma.cc/P8EB-RSEY>] (archived Aug. 5, 2018) [hereinafter *Poland Returns to Conservative Roots*].

37. *Id.*

38. *Id.*

39. *Rightwing Law and Justice Party*, *supra* note 1.

40. See Rick Lyman, *Right-Wing Party Roars Back in Polish Elections*, N.Y. TIMES (Oct. 25, 2015), <https://www.nytimes.com/2015/10/26/world/europe/poland-parliamentary-elections.html> [<https://perma.cc/8EUL-SJ5V>] (archived Aug. 5, 2018) (discussing the outcome of the election).

41. *Rightwing Law and Justice Party*, *supra* note 1.

42. *Id.*

43. See *Poland Returns to Conservative Roots*, *supra* note 36 (stating Kaczynski will be making the important decisions in Poland in the coming years).

44. EKIERT, *supra* note 4, at 7.

45. *Id.* at 9.

party's extreme stances and actions.⁴⁶ As a result, even the president and prime minister normally listen to Kaczynski's orders.⁴⁷

After the 2015 elections, the PiS Party began stripping power from anyone who posed a threat to the party's power.⁴⁸ One of the party's first actions was to pass amendments significantly inhibiting the CT.⁴⁹ Because the party controlled the executive and legislative branches, the CT served as one of the only independent checks on the PiS Party within Poland.⁵⁰ The PiS Party refused to publish the CT's decisions, increased the number of judges required to be present for the CT to hold a hearing, and adjusted the CT's schedule of case hearings.⁵¹ As a result of the amendments, the tribunal has effectively become a pawn of the PiS Party rather than an independent branch of government.⁵²

The PiS Party also launched an attack on the Polish media.⁵³ The party passed legislation allowing the executive branch to hire and fire the broadcasting chiefs of state-owned media.⁵⁴ Since most Polish citizens collect their news from state-owned sources,⁵⁵ controlling those sources gives the PiS Party power over the information citizens receive. Duda argued the laws created a more "impartial, objective, and reliable" press that will promote Polish traditions and patriotic

46. *Id.*

47. *Id.*

48. See Matczak, *supra* note 9 (discussing the PiS Party's control over the Constitutional Tribunal and the new bills).

49. Alexis Wheeler, *Poland Passes Controversial Law to Weaken Top Court*, JURIST (Dec. 24, 2015, 3:29 PM), <http://www.jurist.org/paperchase/2015/12/poland-passes-controversial-law-to-weaken-top-court.php> [https://perma.cc/EFN2-JSN7] (archived Aug. 5, 2018).

50. See Laura Smith-Spark, Antonia Mortensen & Paul P. Murphy, *Protests Grow as Polish President Considers Judicial Bill*, CNN (July 23, 2017, 3:15 AM), <http://www.cnn.com/2017/07/21/europe/poland-judicial-bill-pass-upperhouse/index.html> [https://perma.cc/7ARA-CW4N] (archived Aug. 5, 2018) ("The move by the [PiS Party] to control one of the last remaining independent government institutions has prompted concern . . ."). Adam Bodnar, who serves as national Ombudsman and acts as an independent watchdog of human rights and freedoms from within the government, is perhaps the last government official still criticizing the PiS Party. See *Adam Bodnar elected as ombudsman for Poland*, CENT. EUR. U. (Aug. 19, 2015), <https://legal.ceu.edu/article/2015-08-19/adam-bodnar-elected-ombudsman-poland> [https://perma.cc/6U6E-PNGV] (archived Aug. 5, 2018).

51. See Wheeler, *supra* note 49 (discussing the changes to the CT).

52. See Matczak, *supra* note 9 ("[T]he CT is now fully (and unlawfully) under PiS's control . . .").

53. See Constance Johnson, *Poland: Controversial Proposals and Measure on Surveillance Law, Constitutional Tribunal, and Media Law*, LIBR. OF CONG. (Feb. 3, 2016), <http://www.loc.gov/law/foreign-news/article/poland-controversial-proposals-and-measures-on-surveillance-law-constitutional-tribunal-and-media-law/> [https://perma.cc/ZZ8R-62MW] (archived Aug. 5, 2018) (discussing numerous bills passed by the PiS Party shortly after the election).

54. *Id.*

55. *Polish Media Laws: Government Takes Control of State Media*, BBC NEWS (Jan. 7, 2016), <http://www.bbc.com/news/world-europe-35257105> [https://perma.cc/8AC5-ZX35] (archived Aug. 5, 2018).

values.⁵⁶ The PiS Party also passed other controversial legislation, such as bills increasing the ability of the government to conduct surveillance of its own citizens⁵⁷ and limiting the right to peacefully assemble.⁵⁸ However, the legislation receiving perhaps the most international attention is those bills affecting the SC.⁵⁹

B. *The Current Polish Judicial Structure*

The reason the bills affecting the SC have garnered so much attention is because of the important role the SC plays in day-to-day legal matters in Poland. The SC acts as the court of last resort for appeals of lower court decisions.⁶⁰ It also supervises adjudication in general and military courts throughout Poland, including civil law, criminal law, labor law, social security and public affairs, and issues involving military members.⁶¹ The SC also confirms election results.⁶² The number of justices on the SC at any time is capped at ninety,⁶³ and, before the reform bills, there were eighty-two sitting justices.⁶⁴

All judicial nominees for the SC must meet numerous requirements⁶⁵ and be selected by the KRS.⁶⁶ Upon motion by the KRS, the Polish president appoints the selected nominee to the SC.⁶⁷ Prior to the PiS Party's reform bills, the KRS consisted of the Minister of Justice, four Sejm members, two senators, one presidential appointee, the First President of the SC, the President of the Supreme Administrative Court, and fifteen other judges selected by the judiciary.⁶⁸ This means that SC nominees were selected by a KRS that

56. Johnson, *supra* note 53.

57. *Id.*

58. Smith-Spark et al., *supra* note 50.

59. See Zalan, *supra* note 18 (highlighting the intense reaction to the reforms bills from the EU).

60. ACT ON THE SUPREME COURT [SUP. CT. ACT] [CIVIL CODE] art. 1 (Pol.) [hereinafter SUP. CT. ACT]

61. *Id.* art. 1–3.

62. Jan Cienski & Maïa de la Baume, *Brussels Warns Poland over Judicial Reforms*, POLITICO (July 19, 2017, 8:12 PM), <https://www.politico.eu/article/poland-rule-of-law-constitution-brussels-warns-over-judicial-reforms/> [https://perma.cc/5N4Q-ZU7B] (archived Aug. 5, 2018).

63. *Poland*, NETWORK OF THE PRESIDENTS OF THE SUP. CTS. OF THE EUR. UNION, <http://network-presidents.eu/page/poland-0> (last visited Oct. 28, 2017) [https://perma.cc/3DMJ-LTG4] (archived Aug. 5, 2018).

64. Rick Lyman, *Poland's President Offers New Path to End Court Crisis*, N.Y. TIMES (Sept. 25, 2017), <https://www.nytimes.com/2017/09/25/world/europe/poland-courts-andrzej-duda.html> [https://perma.cc/W4S3-AGCQ] (archived Aug. 5, 2018) [hereinafter Lyman, *Poland's President*].

65. SUP. CT. ACT, *supra* note 60, art. 22.

66. *Id.* art. 21.

67. *Id.*

68. ACT ON THE NATIONAL COUNCIL OF THE JUDICIARY [KRS ACT] [CIVIL CODE] art. 7–13 (Pol.).

predominantly consisted of other members of the judiciary—fifteen of the twenty-five members came from within the judiciary.⁶⁹

Prior to the reform bills, SC justices were granted tenure until they reached the required retirement age of seventy, but they could choose to retire early at either age sixty-five or sixty, depending on the length of time they had served.⁷⁰ The KRS also nominates judges for positions on the lower common courts across the country, who are then appointed by the president.⁷¹

C. The PiS Party's Reform Bills

On July 20, 2017, the PiS Party-dominated Parliament passed three bills greatly increasing the ability of the executive and legislative branches to control the judiciary.⁷² The first bill changed the makeup of the KRS, providing for a greater number of government appointees on the council.⁷³ The bill increased the number of KRS members appointed by Parliament from eight to fifteen.⁷⁴ Changing the makeup of the KRS provided politicians, to the exclusion of the judiciary, with complete control over the appointment and promotion of SC justices moving forward.⁷⁵

The second bill amended the Law on Common Courts, placing the power to appoint the heads of the lower courts—the presidents and vice presidents—in the hands of the Minister of Justice.⁷⁶ The bill also changed the procedure by which judges are promoted, but failed to specify the criteria that will be used.⁷⁷ In Poland, the Minister of Justice simultaneously acts as the Prosecutor General.⁷⁸ By reassigning control over the appointment and promotion procedures, the bills allowed the Minister of Justice to choose the leaders of the

69. Amnesty Int'l, *Poland: Three Amendments that Seriously Undermine the Independence of Judiciary*, AI Index EUR 37/6753/2017 (July 18, 2017) [hereinafter Amnesty Int'l].

70. SUP. CT. ACT, *supra* note 60, art. 30 §§ 1–2.

71. Michał Fabisiak, *How Judges are Selected Across Europe*, RADIO POL. (July 24, 2017, 8:00 AM), <http://thenews.pl/1/10/Artykul/317562,How-judges-are-selected-across-Europe> [<https://perma.cc/X7KJ-3TJG>] (archived Aug. 20, 2018).

72. See Matczak, *supra* note 9 (explaining the effects of the bills on the judiciary).

73. See Rick Lyman, *Polish Parliament Approves Law Curtailing Courts' Independence*, N.Y. TIMES (July 21, 2017), <https://www.nytimes.com/2017/07/21/world/europe/poland-courts-independence.html> [<https://perma.cc/4EE9-7DFY>] (archived Aug. 20, 2018) [hereinafter Lyman, *Polish Parliament*] (noting the change in structure of the KRS).

74. Amnesty Int'l, *supra* note 69.

75. Matczak, *supra* note 9.

76. Amnesty Int'l, *supra* note 69.

77. *Id.*

78. *Id.*

lower courts, while also being involved in those same courts' proceedings in his role as the Prosecutor General.⁷⁹

The third bill forced all of the current SC justices into immediate retirement, while giving the Minister of Justice power to grant exceptions and extend tenure to justices of his choosing.⁸⁰ The Minister of Justice could then pick replacements for all of the others.⁸¹ In addition, the bill created a new role for the Minister of Justice within the disciplinary proceedings for SC justices.⁸² Moreover, the bill allowed the Minister of Justice to retroactively question the decisions of SC disciplinary proceedings that occurred before the bill took effect.⁸³

As noted above, Duda vetoed two of these original reform bills but subsequently signed revised bills that are mostly identical in their effects: only 40 percent of the Supreme Court judges are forced into retirement under the new bills, but the composition of the KRS was still changed to effectively give the PiS Party control over the nomination and appointment of judges.⁸⁴

D. *The PiS Party's Justification for the Reform Bills*

In order to understand the PiS Party's justifications for these bills, it is helpful to know some of Poland's post-communism history. In the years immediately following the collapse of communism in 1989, in order to encourage national reconciliation, Poland made no official attempts at restricting the participation of former communists in the new government.⁸⁵ But in 1997, a right-wing party proposed a "lustration" bill which provided that high-ranking officials in all three branches of government, as well as state media, must file affidavits declaring whether they had ever been communist agents.⁸⁶ Before the bill was passed, the president at the time—reformed communist Aleksander Kwaśniewski—amended it in such a manner that most former communists could easily avoid detection.⁸⁷ The Parliament passed a revised lustration bill the following year that reduced former communists' ability to avoid detection and expanded the bill's scope to cover private attorneys as well.⁸⁸ Under the expanded bill, more lawyers were found to have lied on their affidavits than members of

79. *Id.*

80. Lyman, *Polish Parliament*, *supra* note 73.

81. *Id.*

82. Amnesty Int'l, *supra* note 69.

83. *Id.*

84. *See Government Coup*, *supra* note 14.

85. AVIEZER TUCKER, *THE LEGACIES OF TOTALITARIANISM: A THEORETICAL FRAMEWORK* 113 (2015).

86. *Id.*

87. *Id.* at 113–14.

88. *Id.* at 114.

any other profession.⁸⁹ However, over a span of seven years, the lustration bill only uncovered a total of 277 former communists.⁹⁰

The Kaczynski brothers long abhorred communism: their father took part in the Warsaw Uprising during World War II,⁹¹ Lech served six months in a communist internment camp for his role in dissident politics, and Jarosław remains insistent that communists maintained control of Poland through the post-1989 transformation.⁹² After Lech Kaczynski became president, the PiS Party attempted to enforce a more sweeping lustration law in 2006.⁹³ The new lustration law required *all* public officials, legal professionals, academics, and members of the media to submit affidavits concerning any past collaboration with communists.⁹⁴ Anyone found to have lied on their affidavit could be banned from holding another position covered by the lustration law for ten years.⁹⁵ However, the CT declared the PiS Party's law unconstitutional and excluded nongovernment employees from its scope.⁹⁶ The CT also removed the ten-year ban on holding other positions, making the law essentially toothless.⁹⁷ The PiS Party complained that the CT was composed of judges appointed either before 1989 or by a former communist—Kwaśniewski.⁹⁸ In short, the Kaczynskis desired to remove what they considered the older generation of elites and replace them with their own loyalists, but their efforts were impeded by a CT comprised of members of that older generation of elites.⁹⁹

Kaczynski's arguments for the new judicial reform bills are reminiscent of his arguments for the lustration law, as well as reflective of his distaste for the judges who impeded lustration: Kaczynski claims that too many of the country's current judges are holdovers from its communist past, favoring global interests over

89. *Id.*

90. *Id.*

91. Jarosław Adamowski, *Lech Kaczynski Obituary*, THE GUARDIAN (Apr. 11, 2010, 1:33 PM), <https://www.theguardian.com/world/2010/apr/11/lech-kaczynski-obituary> [<https://perma.cc/PLE4-Z27T>] (archived Aug. 20, 2018).

92. Jan Cienski, *Poland's 'powerholic'*, POLITICO (July 8, 2016, 5:30 AM), <https://www.politico.eu/article/polands-powerholic-jaroslaw-kaczynski-warsaw-law-and-justice-party-pis/> [<https://perma.cc/37GH-WKZJ>] (archived Aug. 20, 2018) (discussing the Kaczynski's childhood and ascension to politics).

93. TUCKER, *supra* note 85, at 114.

94. *Id.*

95. *Id.*

96. *Id.*

97. *Id.*

98. *Id.* at 115.

99. See Valentinas Mite, *Poland: Tough Lustration Law Divides Society*, RADIO FREE EUROPE/RADIO LIBERTY (Mar. 23, 2007, 3:16 PM), <https://www.rferl.org/a/1075471.html> [<https://perma.cc/RZC3-FDF3>] (archived Aug. 20, 2018) (positing why the Kaczynskis resent older politicians).

national needs,¹⁰⁰ and as a result are not responsive to the public because they were not appointed by any elected official.¹⁰¹ The PiS Party contends the reform bills were necessary in order to make the judicial system more efficient,¹⁰² effective, and less corrupt.¹⁰³ The party asserts that, as it stood, the judicial branch only served the elite.¹⁰⁴ Also, the PiS Party argues the previous judicial appointment procedures were undemocratic.¹⁰⁵ The Minister of Justice praised the bills as ending “corporatism,” introducing “the oxygen of democracy,” and ending “court-ocracy.”¹⁰⁶ Polish officials and the state-run media also argued the reforms would result in a judicial system comparable to others in the EU.¹⁰⁷ Poland’s Ministry of Foreign Affairs argued the bills sought “only to regain the citizens’ respect for the judiciary.”¹⁰⁸

Moreover, the PiS Party argues the bills were the result of a legitimate and democratic process.¹⁰⁹ Public opinion polls show that over 60 percent of Poles favored judicial reform.¹¹⁰ The PiS Party ran on a platform promising to reform the courts.¹¹¹ As a result, the party claims the bills were the result of a democratic process and that the party was simply responding to popular will.¹¹²

E. Domestic and International Responses to the Reform Bills

Despite the PiS Party’s claims that the reform bills resulted from a democratic process, massive protests erupted in Warsaw, Krakow,

100. Lyman, *Polish Parliament*, *supra* note 73.

101. *Polish justice system ‘deeply flawed’: new PM*, RADIO POL. (Dec. 13, 2017, 2:28 PM), <http://www.thenews.pl/1/2/Artykul/339665,Polish-justice-system-%E2%80%99deeply-flawed%E2%80%99-new-PM> [<https://perma.cc/345X-FKTU>] (archived Aug. 20, 2018) (arguing judges are either holdovers from the communist era or were appointed by other judges, leading to corrupt behavior).

102. James Shotter & Evon Huber, *Poland Senate Passes Contested Judiciary Bill*, FIN. TIMES (July 21, 2017), <https://www.ft.com/content/8ddc360a-6e0d-11e7-b9c7-15af748b60d0> [<https://perma.cc/5Z6H-XQMR>] (archived Aug. 20, 2018).

103. *Poland Court Bill: Parliament Votes for Judicial Reforms*, BBC NEWS (July 20, 2017), <http://www.bbc.com/news/world-europe-40670790> [<https://perma.cc/8WMY-Z473>] (archived Aug. 20, 2018) [hereinafter *Parliament Votes*].

104. *Poland MPs*, *supra* note 27.

105. *Id.*

106. *Id.*

107. See Smith-Spark et al., *supra* note 50 (providing comments from PiS Party officials claiming Poland must change to achieve the EU standards in terms of democracy and the rule of law); see also Fabisiak, *supra* note 71 (comparing the reform bills to the judicial systems of other EU member states).

108. Smith-Spark et al., *supra* note 50.

109. EKIERT, *supra* note 4, at 4.

110. *Parliament Votes*, *supra* note 103.

111. *Id.*; EKIERT, *supra* note 4, at 4.

112. EKIERT, *supra* note 4, at 4.

and Katowice after the Parliament passed the initial bills.¹¹³ Protesters decried the bills as destroying judicial independence¹¹⁴ and called for Duda to veto the bills.¹¹⁵ While over 60 percent of Poles favored some manner of judicial reform, many felt the bills went too far.¹¹⁶ After Parliament passed the bills, a new public opinion poll showed that 55 percent of Poles believed Duda should veto the bills, while only 29 percent said he should not.¹¹⁷ Another poll reported that 76 percent of Poles opposed a politicized judiciary.¹¹⁸

The leaders of the largest opposition parties, the Civic Platform and the Modern Party, joined the protesters in Warsaw.¹¹⁹ Grzegorz Schetyna, the leader of the Civic Platform, called for the parties to work together to fight the PiS Party's legislation.¹²⁰ Schetyna referred to the Parliament's passage of the bills as "the day judicial independence died."¹²¹ The leaders expressed concern that the PiS Party's control over judicial appointments under the bills violates the constitutional separation of powers.¹²² Pawel Kukiz, the leader of another opposition party, argued that the bills failed to reform the judiciary and instead just changed the personnel.¹²³ A general criticism from opposition groups has been that the PiS Party is simply attempting to subvert the rule of law by taking control of the judiciary.¹²⁴

Foreign nations also immediately responded to the reform bills.¹²⁵ Shortly after Parliament approved the bills, the U.S. State Department urged the Polish government to "ensure that any judicial reform does not violate Poland's constitution or international legal obligations and respects the principles of judicial independence and separation of

113. *Poles Rally Against Controversial Reform of Judiciary*, BBC NEWS (July 16, 2017), <http://www.bbc.com/news/world-europe-40622896> [<https://perma.cc/J8WW-XCXV>] (archived Aug. 20, 2018) [hereinafter *Poles Rally*].

114. *Id.*

115. *Parliament Votes*, *supra* note 103.

116. *Id.*

117. Smith-Spark et al., *supra* note 50.

118. Tara John, *Why Poland's Government Is Being Accused of Destroying Democracy*, TIME (July 21, 2017), <http://time.com/4868023/poland-judiciary-democracy-threat/> [<https://perma.cc/57PF-E59H>] (archived Aug. 20, 2018).

119. *See Poles Rally*, *supra* note 113 (noting speakers from those parties spoke at the Warsaw rally).

120. *Id.*

121. *Parliament Votes*, *supra* note 103.

122. *See Poles Rally*, *supra* note 113 ("The opposition fear the law will give parliament - dominated by PiS lawmakers - indirect control over judicial appointments, violating the constitutional separation of powers.").

123. *Parliament Votes*, *supra* note 103.

124. *See Lyman, Poland's President*, *supra* note 64 ("Domestic opponents and European Union officials have accused them of trying to subvert the rule of law by placing the courts more firmly under the control of the right-wing ruling party.").

125. *See, e.g.,* EKIERT, *supra* note 4, at 3 (discussing responses from foreign nations).

powers.”¹²⁶ Many nations within the EU condemned the bills. For example, German Chancellor Angela Merkel stressed that the reform bills seriously threaten the rule of law—a principle necessary for cooperation within the EU.¹²⁷ Likewise, French President Emmanuel Macron criticized the bills as a threat to the EU’s democratic values.¹²⁸ Luxembourg’s Minister of Foreign Affairs questioned whether Poland should remain in the EU, stating “we cannot work with countries that violate fundamental values.”¹²⁹ Other EU nations, such as Slovakia and the Czech Republic, offered more restrained criticism.¹³⁰ Slovakian Prime Minister Robert Fico maintained a neutral tone about Poland’s actions, but simultaneously stressed his country’s need to be “close to the [EU] core, close to France, close to Germany.”¹³¹

The European Commission (EC)—the EU institution responsible for upholding its treaties and general interests—heavily criticized not only the recent reform bills, but also many of the other actions the PiS Party has taken since gaining power. Following the PiS Party’s passage of the restrictive media laws, the EC expressed concern that they conflicted with the EU’s rules on media freedom.¹³² After the PiS Party’s amendments to the CT, the EC opened dialogue with the party over concerns that the amendments subverted the rule of law.¹³³ However, the EC’s criticism of the PiS Party increased after the recent reform bills.¹³⁴ Frans Timmerman, the vice president of the EC, explained that adopting the bills “would abolish any remaining judicial independence and put the judiciary under full political control.”¹³⁵ Timmerman stressed that the threat to the rule of law in Poland threatens every EU member state because upholding EU law becomes

126. Press Release, U.S. Dep’t of St., Poland: Independence of the Judiciary (July 21, 2017), <https://www.state.gov/r/pa/prs/ps/2017/07/272791.htm> [<https://perma.cc/ZV73-V787>] (archived Aug. 20, 2018).

127. Jennifer Rankin, *Angela Merkel: we cannot hold our tongues on risk to rule of law in Poland*, THE GUARDIAN (Aug. 29, 2017, 9:58 AM), <https://www.theguardian.com/world/2017/aug/29/angela-merkel-poland-judicial-reforms-courts> [<https://perma.cc/RJ3B-TW43>] (archived Aug. 20, 2018).

128. *Id.*

129. EKIERT, *supra* note 4, at 3.

130. Rankin, *supra* note 127.

131. *Id.*

132. Ram Eachambadi, *European Commission to review Poland media law*, JURIST (Jan. 3, 2016, 1:29 PM), <http://www.jurist.org/paperchase/2016/01/european-commission-to-review-poland-media-law.php> [<https://perma.cc/KJ3W-D95P>] (archived Aug. 20, 2018).

133. Johnson, *supra* note 53.

134. See Zalan, *supra* note 18 (“These laws considerably increase the threat to the rule of law in Poland.”).

135. *Id.*

unreliable.¹³⁶ Accordingly, Timmerman confirmed the EC is considering triggering Article 7 in hopes of sanctioning Poland.¹³⁷

Hungarian President Victor Orban remains Poland's strongest ally.¹³⁸ Orban's support is understandable considering Orban's government similarly garnered criticism from other EU nations for its own attempt at purging its nation's judiciary in 2013.¹³⁹ Orban subsequently changed his country's election laws in order to retain his power.¹⁴⁰ Following the criticism about Poland's reform bills from other EU nations, Orban asserted Hungary's intention to "use all legal options" within the EU to support Poland.¹⁴¹ Hungary's Foreign Minister reiterated this stance in a warning to the EC not to act like a political body: "We stand by Poland, and we call on the [EC] not to overstep its authority."¹⁴² In short, Hungary will not vote for any EU sanctions against Poland.

III. ANALYSIS

A. Article 7 Sanction Requirements

The EU introduced Article 7 to the Treaty of the European Union (TEU) in 1999.¹⁴³ At the time, the EU was preparing to add eight formerly communist countries as new member states.¹⁴⁴ Fear over the new members' political instability spurred the EU to create Article 7 as an outline of the EU's core principles and values.¹⁴⁵ Article 7 also included a list of consequences, including the suspension of voting rights, for the violation of those values.¹⁴⁶ The values protected by Article 7 are presented in Article 2 of the TEU.¹⁴⁷ The values protected are "respect for human dignity, freedom, democracy, equality, the rule of law and respect for human rights."¹⁴⁸

136. *Id.*

137. *Id.*

138. Smith-Spark et al., *supra* note 50 (singling out Hungary as Poland's supporter within the EU).

139. EKIERT, *supra* note 4, at 7.

140. *Id.* at 6.

141. Smith-Spark et al., *supra* note 50.

142. *Parliament Votes*, *supra* note 103.

143. Fletcher, *supra* note 19.

144. *Id.*

145. See Gráinne Búrca, *The Road Not Taken: The European Union as a Global Human Rights Actor*, 105 AM. J. INT'L L. 649, 689–90 (2011) (discussing why the EU adopted Article 7); see also Fletcher, *supra* note 19 (discussing the enlargement of the EU and adoption of Article 7).

146. *Id.*

147. Fletcher, *supra* note 19.

148. TEU, *supra* note 21, art. 2.

Shortly after Article 7 was created, the far-right Austrian Freedom Party, and its leader Jorg Haider, won enough votes to be included in a coalition Austrian government.¹⁴⁹ The EU responded with symbolic sanctions, but Austria retained its voting rights.¹⁵⁰ The Austrian public, meanwhile, perceived the EU as a bully for placing sanctions on their country when it followed parliamentary procedures, and Haider remained popular.¹⁵¹

The “Haider affair” led to a revision of Article 7 in the Treaty of Nice in 2001.¹⁵² The EU desired a more preemptive way to intervene in future breaches of EU values.¹⁵³ The revisions created an extra warning stage for member states before the imposition of sanctions, turning Article 7 into a two-step process.¹⁵⁴ Article 7 is initiated by the European Council (Council), an EU institution that defines the EU’s political direction and consists of the heads of state of each member state, the Council President, and the EC President.¹⁵⁵ The first step, the warning stage, requires that four-fifths of Council members consent to a finding that there is a “clear risk of a serious breach” of EU values by a member state.¹⁵⁶ At that point, the member state is warned of the risk and, following the same procedure, the Council may provide recommendations to the member state on how to remedy the issue.¹⁵⁷

The second step, the sanctioning stage, requires the Council members’ unanimous agreement that a member state is committing a “serious and persistent breach” of EU values.¹⁵⁸ The Council may impose sanctions of its choosing, with the most severe punishment considered being the suspension of a member state’s voting rights on the Council.¹⁵⁹ After the Haider affair, the new Article 7 procedure has never been used, partly due to fear of the political consequences that may follow.¹⁶⁰ Since unanimous support from the Council is required,

149. Fletcher, *supra* note 19 (explaining why the EU subsequently modified Article 7 procedures).

150. *Policing the Club: What Can the EU Do to punish Poland?*, THE ECONOMIST (July 27, 2017), <https://www.economist.com/news/europe/21725570-its-options-are-limited-what-can-eu-do-punish-poland> [https://perma.cc/MH3E-UW7M] (archived Aug. 20, 2018) [hereinafter *Policing the Club*].

151. See EKIERT, *supra* note 4, at 7 (explaining why sanctions did not work against Austria); see also *Policing the Club*, *supra* note 150 (“[The EU] did impose some (mostly symbolic) sanctions. They didn’t work, and Mr Haider remained popular.”).

152. Fletcher, *supra* note 19.

153. *Id.*

154. *Policing the Club*, *supra* note 150.

155. Fletcher, *supra* note 19.

156. TEU, *supra* note 21, art. 7(1).

157. *Id.*

158. *Id.* art. 7(2).

159. *Id.* art. 7(3).

160. See Fletcher, *supra* note 19 (explaining why Article 7 has never been triggered).

President Orbán's support of the PiS Party presents a substantial obstacle to the use of Article 7 procedures against Poland.

B. *Defining the Rule of Law*

In order for Article 7 sanctions to even be a possibility, however, Poland must breach the values listed in Article 2. Article 2 of the TEU lists the rule of law as one of the EU values that Article 7 was created to protect.¹⁶¹ Therefore, in order to know when Article 7 sanctions may be triggered, it is necessary to look first at the meaning of the rule of law as used in the TEU. Early jurisprudence of the European Court of Justice (ECJ) on the rule of law focused on “principles of legality, legal certainty, confidence in the stability of a legal situation, and proportionality.”¹⁶² The ECJ also recognized procedural guarantees inherent in the rule of law—such as the right to be heard and the right of defense, among others.¹⁶³

However, despite the rule of law being listed amongst the values on which the EU is founded, and the jurisprudence of the ECJ, scholars have not adopted a single definition for the term.¹⁶⁴ For instance, Professor Ricardo Gosalbo-Bono has analyzed the history and understanding of the rule of law in different areas of the world.¹⁶⁵ Gosalbo-Bono argues that any attempt at a universal rule of law requires four main principles: that power may not be exercised arbitrarily, that there is supremacy of the law, that the law must apply equally to all persons, and that there is respect for internationally established human rights.¹⁶⁶ Professor Thomas von Danwitz, meanwhile, argues that the rule of law is a living instrument, such that it changes as society evolves with new economic, social, technological, and political influences.¹⁶⁷ Professors Julio Ríos-Figueroa and Jeffrey K. Staton suggest the rule of law involves three dimensions: an institutional dimension (considering governmental arbitrariness), an individual dimension (considering the prevention of discrimination in

161. TEU, *supra* note 21, art. 2.

162. Thomas von Danwitz, *The Rule of Law in the Recent Jurisprudence of the ECJ*, 37 *FORDHAM INT'L L.J.* 1311, 1314 (2014).

163. *Id.* at 1316.

164. Julio Ríos-Figueroa & Jeffrey K. Staton, *Unpacking the Rule of Law: A Review of Judicial Independence Measures* 3 (CELS 2009 4th Ann. Conf. on Empirical Legal Studies Paper, Apr. 26, 2009) (“Scholars do not share a definition of the rule of law at a level of precision clear enough to suggest specific measurement strategies.”); *see also* Ricardo Gosalbo-Bono, *The Significance of the Rule of Law and its Implications for the European Union and the United States*, 72 *U. PITT. L. REV.* 229, 231 (stating there is no universal agreement about what the rule of law means).

165. *See generally* Gosalbo-Bono, *supra* note 164 (comparing definitions for the rule of law in different regions of the world and under different legal regimes).

166. *Id.* at 290, 296.

167. Von Danwitz, *supra* note 162, at 1346.

law enforcement), and a social dimension (considering how instability and violence in a society may threaten the rule of law).¹⁶⁸

Dariusz Zawistowski, the chairman of the KRS and a justice on the SC, states that the rule of law is founded on the concept that no person is above the law.¹⁶⁹ Zawistowski notes that the rule of law was conceived during the Enlightenment as a response to the prevailing system at the time—absolute monarchy.¹⁷⁰ The rule of law at that time required constitutionalism, separation of powers, and judicial independence, among other elements.¹⁷¹ As society's interests evolved, new elements were added to the concept, such as the existence of guarantees of civil rights.¹⁷²

While Zawistowski acknowledges that scholars differ on some of the elements for rule of law in the present day, he also states “it is beyond doubt that the independence of the courts and judicial independence are the foundations of the rule of law.”¹⁷³ Similarly, Gosalbo-Bono identifies an independent judiciary as an important element for the principle of supremacy of the law, explaining that a separation of powers and an independent judiciary are necessary for the equal application of the law to specific cases.¹⁷⁴ Rios-Figueroa and Staton likewise note that judicial independence is a critical component of the institutional dimension of the rule of law.¹⁷⁵ Therefore, while scholars may not agree on a single all-encompassing definition for the rule of law, judicial independence appears to be generally accepted as a required element in proffered definitions.

C. Defining Judicial Independence

If judicial independence is accepted as a requirement in any understanding of the rule of law, then a threat to judicial independence in Poland would appear to provide the EU with a basis for Article 7 sanctions. However, as with the rule of law, there are differing scholarly opinions on how to define and analyze judicial independence.¹⁷⁶ Some scholars even argue that attempting to create

168. Ríos-Figueroa & Staton, *supra* note 164, at 7–9.

169. Dariusz Zawistowski, *The Independence of the Courts and Judicial Independence from the European Union Law Perspective*, in RUCH PRAWNICZY EKONOMICZNY I SOJOLOGICZNY 7, 7 (2016).

170. *Id.* at 8.

171. *Id.*

172. *Id.* at 8–9.

173. *Id.* at 9.

174. See Gosalbo-Bono, *supra* note 164, at 288 (“The independence of the law, ensured by an independent judiciary, allows effective control of the arbitrary state and guarantees a formal equality of citizens before the law.”).

175. Ríos-Figueroa & Staton, *supra* note 164, at 5.

176. Charles Gardner Geyh, *Judicial Independence as an Organizing Principle*, 10 ANN. REV. L. SOC. SCI. 185, 186 (2014).

a single definition of judicial independence is futile because its meaning will inevitably vary when considered within different theories of adjudication.¹⁷⁷ However, surveying different approaches to understanding judicial independence still provides a useful setting in which to consider how Poland's recent reform bills affect its judiciary's independence.

1. Balancing Independence and Accountability

Professor Charles Gardner Geyh recently proposed a useful framework for conceptualizing judicial independence.¹⁷⁸ Much of his analysis focuses on the US judiciary, but his framework is applicable to other countries as well.¹⁷⁹ Geyh first explains that, in the past, society generally believed judges simply followed the law when making decisions.¹⁸⁰ In other words, so long as judges remain completely independent from outside influences, they will set aside their own ideological beliefs and impartially apply the law to the facts when making their decisions.¹⁸¹ Geyh refers to this framework as the “rule of law” paradigm.¹⁸² However, Geyh argues society's belief in that paradigm is slowly eroding.¹⁸³

After arguing that the rule of law paradigm is eroding, Geyh proposes a new “legal culture” paradigm to take its place.¹⁸⁴ The legal culture paradigm posits that judges take law seriously, yet legal indeterminacy renders extralegal influences inevitable and necessary.¹⁸⁵ In other words, the paradigm accepts that there are situations in which a judge's life experiences are going to influence his or her decision because there are cases where applying the law to the facts still results in more than one possible, and acceptable, outcome and a judgment call is required.¹⁸⁶

Meanwhile, Geyh notes that judicial independence is meant to buffer judges from external pressures that may interfere with what he proposes are judges' main responsibilities—upholding substantive law, respecting parties' procedural rights for a fair hearing, and reaching a

177. *Id.*

178. *See generally* CHARLES GARDNER GEYH, *COURTING PERIL: THE POLITICAL TRANSFORMATION OF THE AMERICAN JUDICIARY* (2016) (proposing a new framework for considering ideas involving judicial independence).

179. *See generally id.* (focusing on developments of the public perception of the US judiciary).

180. *Id.* at 1–44.

181. *Id.* at 2.

182. *Id.*

183. *Id.* at 44–76.

184. *Id.* at 76–101.

185. *Id.*

186. *Id.*

just result in each specific case.¹⁸⁷ However, complete judicial independence may allow judges to pursue their own private agendas.¹⁸⁸ Therefore, independence and accountability are both required in order to ensure judges fulfill their responsibilities.¹⁸⁹

In light of the need to balance independence and accountability, Geyh argues there are three perspectives that must be considered: (1) an adjudicative dimension, recognizing that parties desire a judge who affords them a fair hearing; (2) an ethical dimension, recognizing that judges seek to act honorably according to legal norms; and (3) a political dimension, recognizing that the general public seeks judges it can trust.¹⁹⁰ All three dimensions must be considered to maintain sufficient judicial independence.¹⁹¹ Geyh explains that too much regulation in the political dimension, which could be useful for making the judiciary more responsive to public preferences, could jeopardize either the adjudicative dimension, by creating a risk that litigants will not receive a fair hearing, or the ethical dimension, by compromising the integrity of the judicial role.¹⁹²

2. *De Jure* and *De Facto* Independence

Another framework for analyzing judicial independence, used by numerous scholars, differentiates between *de jure* independence and *de facto* independence.¹⁹³ *De jure* independence refers to the level of independence granted by the actual law.¹⁹⁴ In other words, *de jure* independence is concerned with the formal rules in place that are meant to protect the judiciary from undue influence. *De facto* independence, on the other hand, refers to the level of independence that judges actually enjoy.¹⁹⁵ This framework acknowledges that it is possible for a country's government to respect the judiciary's independence without having formal laws protecting it, while another country's government may ignore formal grants of independence and, in reality, heavily regulate or restrict the judiciary.¹⁹⁶

187. *Id.*

188. *Id.*

189. *Id.*

190. *Id.* at 101–26.

191. *Id.*

192. *Id.* at 159.

193. See, e.g., Lars P. Feld & Stefan Voigt, *Economic Growth and Judicial Independence: Cross-Country Evidence Using a New Set of Indicators*, 19 EUR. J. POL. ECON. 497, 498 (2003) (distinguishing *de jure* and *de facto* judicial independence).

194. *Id.*

195. *Id.*

196. Stefan Voigt, Jerg Gutmann & Lars P. Feld, *Economic Growth and Judicial Independence, a Dozen Years On: Cross-Country Evidence Using an Updated Set of Indicators*, 38 EUR. J. POL. ECON. 197, 200 (2015).

There have been numerous attempts to provide measures for both *de jure* and *de facto* independence. In their work comparing judicial independence and economic growth, Professors Lars P. Feld and Stefan Voigt looked at twelve factors as a measure of *de jure* independence in a given country. These factors included: (1) whether the highest court is anchored in the constitution; (2) how difficult it is to amend the constitution; (3) appointment procedures; (4) term lengths; (5) whether terms are renewable; (6) how judges can be removed from office; (7) whether judicial salaries can be changed by other branches of government; (8) whether judicial salaries are adequate; (9) court accessibility; (10) case allocation; (11) whether there is constitutional review; and (12) whether court decisions are published.¹⁹⁷ When analyzing these factors, Feld and Voigt only considered actual legal documents to see what the law of the country had established.¹⁹⁸

For an indicator of *de facto* judicial independence, Feld and Voigt considered eight variables: (1) the term lengths actually enjoyed by judges; (2) whether that term length is shorter than the length promised in legal documents; (3) whether judges are removed before the end of a term; (4) how often the number of judges changes; (5) whether salaries remain constant in reality; (6) the court's budget as an organization (including number of clerks employed, size of the library, etc.); (7) changes to the legal foundation of the highest court; and (8) whether the government actually enforces the court's decisions.¹⁹⁹ For both the *de jure* and *de facto* measures, Feld and Voigt contend that the variables they use are as objective as possible.²⁰⁰

D. *The European Union's Judicial Independence Norms*

Having established variables for measuring both *de jure* and *de facto* independence, Feld and Voigt then analyzed the judicial independence of numerous countries—sixty-six in their initial study from 2003,²⁰¹ and 118 in a subsequent study conducted in 2015.²⁰² In the initial study, Poland's *de jure* independence score ranked eleventh out of the twenty-five EU member states with data available.²⁰³ Unfortunately, Poland's *de facto* independence data was not available in the initial study.²⁰⁴ In the subsequent study, Poland's *de jure* independence score ranked only twenty-fifth out of the twenty-seven

197. *Id.* at 204–06.

198. *Id.* at 206.

199. *Id.* at 206–07.

200. *Id.* at 199.

201. Feld & Voigt, *supra* note 193, at 498.

202. Voigt et al., *supra* note 196, at 201.

203. Feld & Voigt, *supra* note 193, at 523–24.

204. *Id.* at 525–26.

EU member states with data available.²⁰⁵ However, this information does not reveal data about the individual factors of the Polish judiciary that Feld and Voigt considered, and it also does not include the most recent reform bills that the EU is concerned about.

The EU Justice Scoreboard, on the other hand, provides yearly data on specific aspects of EU member states' judicial systems. Some of the variables that are considered in Feld and Voigt's calculations of judicial independence—such as resources and structural independence—are included in the EU Justice Scoreboard.²⁰⁶ Other factors that are not considered by Feld and Voigt, but that are relevant to an analysis of judicial independence and accountability in Geyh's legal culture paradigm—such as perceived judicial independence and judicial training—are also included in the EU Justice Scoreboard.²⁰⁷

1. Judicial Resources

According to the EU Justice Scoreboard, Poland's courts actually receive a fair amount of resources from the government.²⁰⁸ In 2015, Poland ranked sixteenth in the EU for euros budgeted to the courts per inhabitant,²⁰⁹ but when considered as a percentage of gross domestic product, Poland ranked second in the EU for government expenditure on the courts.²¹⁰ At the same time, though, it is the executive branch that is in charge of determining the financial resources allocated for the judiciary in Poland.²¹¹ There may be concerns that an executive that controls the judiciary's budget could potentially harm judicial independence in Geyh's adjudicative and ethical dimensions. The EU Justice Scoreboard shows, however, that this executive power is fairly standard in the EU—nineteen other member states share this characteristic.²¹²

2. Efficiency of the Judiciary

One of the PiS Party's justifications for its reform bills is that the Polish judiciary was inefficient.²¹³ In an opinion poll conducted in

205. Voigt et al., *supra* note 196, at 210.

206. JUSTICE AND CONSUMERS, THE 2017 EU JUSTICE SCOREBOARD 25, 40 (2017) [hereinafter JUSTICE SCOREBOARD].

207. *Id.* at 28–29, 37.

208. *See id.* at 25–26 (ranking EU member states in order of government expenditure on courts).

209. *Id.* at 25.

210. *Id.*

211. *Id.* at 26.

212. *Id.*

213. *See* Shotter & Huber, *supra* note 102 (stating the PiS Party believes changes are necessary to fix an inefficient system); *see also* Anna Matczak, *Judicial Reforms in Poland—Getting the Public on Board*, LONDON SCH. OF ECON. & POL. SCI. (July 26, 2017),

March 2017, the most frequent criticism of the Polish judiciary was the long duration of court procedures.²¹⁴ Forty-eight percent of respondents complained about the long duration of court procedures and 15 percent complained about frequent delays in deciding cases.²¹⁵ The EU Justice Scoreboard, however, contradicts this sentiment.²¹⁶ Although the most recent data on Poland is from 2014, information from that year shows Poland ranked fourth-best in the EU in terms of the time needed to resolve civil, commercial, and administrative cases.²¹⁷ In nearly all of the measurements of efficiency considered, Poland ranks in the top half of the EU.²¹⁸ On the other hand, the data does show Poland has room to improve in the efficient adjudication of consumer protection cases and communications-rules violations.²¹⁹ Still, the data demonstrates a disconnect between the justification of the PiS Party for the reform bills²²⁰—seemingly accepted by the Polish public²²¹—and reality.

3. Appointment Procedures

When it comes to the appointment procedures, the vast majority of EU member states rely on a Council for the Judiciary, or some other independent body, to nominate judges for appointment.²²² Latvia is the only EU member state that allows an executive to unilaterally nominate a judge for appointment, and even then, the Latvian Parliament must approve of the nomination and appoint the judge.²²³ The only member states that allow the same entity to both nominate and appoint judges are Greece, Italy, and Portugal, and in those countries it is the Council for the Judiciary that makes the

<http://blogs.lse.ac.uk/europpblog/2017/07/26/judicial-reforms-in-poland-getting-the-public-on-board/> [<https://perma.cc/NR9K-R3BK>] (archived July 31, 2018) (providing justifications offered by the PiS Party for judicial reform).

214. CBOS PUBLIC OPINION RESEARCH CENTER, EVALUATION OF THE JUDICIARY 3–4 (2017), http://www.cbos.pl/EN/publications/reports/2017/031_17.pdf [<https://perma.cc/C24S-YMJX>] (archived Aug. 1, 2018) [hereinafter EVALUATION OF THE JUDICIARY].

215. *Id.* at 4.

216. *See* JUSTICE SCOREBOARD, *supra* note 206, at 7–17 (ranking EU member states on judicial efficiency in different types of cases).

217. *Id.* at 7.

218. *See id.* at 7–16 (including rankings for efficiency in resolving cases involving domestic law as well as cases involving EU law).

219. *See id.* at 14–15 (ranking Poland near the bottom of the EU in efficiency for these types of cases).

220. *See* Shotter & Huber, *supra* note 102 (justifying the reform bills because of judicial inefficiency).

221. *See* EVALUATION OF THE JUDICIARY, *supra* note 214, at 3–4 (showing the public views the judiciary as inefficient).

222. *See* JUSTICE SCOREBOARD, *supra* note 206, at 40 (analyzing the nomination and appointment procedures for each EU member state).

223. *Id.*

nominations and appointments.²²⁴ In other words, no EU member state allows either the legislative or judicial branches to unilaterally nominate and appoint judges.²²⁵

The EU Justice Scoreboard shows Poland's appointment procedures as including an initial exam or competition to become a judge that is then followed by a nomination by an independent body—the KRS.²²⁶ The nomination is then followed by an official appointment by the executive branch.²²⁷ If the executive chooses not to appoint the nominated judge, the executive can only choose a replacement from among the other proposed candidates.²²⁸ The EU Justice Scoreboard lists three member states as allowing the executive to reject a nomination and instead appoint *any* other candidate: Ireland, Sweden, and the Czech Republic.²²⁹ However, in practice, this is not true. Ireland always appoints one of the proposed candidates and Sweden requires the executive to seek a new opinion by the nomination board if the executive wants to appoint a different candidate.²³⁰ In the Czech Republic, while judges are appointed by the president, they must complete extensive training within the courts.²³¹

The PiS Party's reform bills changed the appointment procedures in Poland. Under the bills, the heads of the lower courts are all nominated and appointed by a member of the executive branch: the Minister of Justice.²³² The SC judges are still nominated by the KRS and appointed by the executive.²³³ However, the KRS—formerly considered an independent body—has been reconfigured to effectively give control over the nomination process to the legislative and executive branches.²³⁴ As a result, the bills provide the PiS Party with exclusive control over judicial nominations and appointments,²³⁵ distinguishing Poland's system from that of every other EU member state.²³⁶

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.* at 41.

229. *Id.*

230. *See id.* (noting actual practice in individual member states).

231. Michal Bobek, *Update: An Introduction to the Czech Legal System and Legal Resources Online*, N.Y.U. SCH. OF LAW HAUSER GLOB. LAW SCH. PROGRAM (July 2018), http://www.nyulawglobal.org/globalex/Czech_Republic1.html [<https://perma.cc/EUQ7-77R4>] (archived Aug. 1, 2018).

232. Amnesty Int'l, *supra* note 69.

233. Lyman, *Poland's President*, *supra* note 64.

234. *See* Amnesty Int'l, *supra* note 69 (discussing the reconfiguration of the KRS).

235. Matczak, *supra* note 9.

236. *See* JUSTICE SCOREBOARD, *supra* note 206, at 40–41 (outlining the nomination and appointment procedures in each EU member state).

4. Removal from Office

The procedures for removing judges vary widely between the different EU member states, but nearly all of them either provide for a review of a dismissal decision before a court or other independent body or place the final decision in the hands of the judiciary.²³⁷ Malta places the final decision in the hands of Parliament, but the Parliament may only act upon a proposal for removal by an independent body.²³⁸ Ireland is unique among EU member states by permitting removal without the involvement of the judiciary or other independent body.²³⁹ Ireland permits removal by resolution from both houses of the legislature.²⁴⁰ However, in practice, no judge has ever been removed from office in Ireland.²⁴¹

Prior to the reform bills, Poland's SC judges were granted tenure until the age of seventy.²⁴² However, after the reforms, 40 percent of the SC judges were immediately forced into retirement, with the Minister of Justice given discretion over allowing them to continue.²⁴³ Aside from the fact that this bill likely violated the Polish constitution²⁴⁴ and ECJ case law,²⁴⁵ it also placed Poland at odds with the removal procedures of the other EU member states.²⁴⁶

237. *See id.* at 43 (outlining the removal procedures in each EU member state).

238. *Id.*

239. *Id.*

240. *See Removal from Judicial Office*, ASS'N OF JUDGES OF IRELAND, <https://aji.ie/the-judiciary/removal-from-judicial-office/> (last visited Mar. 1, 2018) [<https://perma.cc/P5SS-Q5X6>] (archived Aug. 1, 2018) (noting that the president must be notified of these resolutions).

241. *Id.*

242. *See* SUP. CT. ACT, *supra* note 60, art. 30 §§ 1–2 (stating tenure and retirement rules).

243. Lyman, *Poland's President*, *supra* note 64.

244. *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 (Feb. 23, 2017), <https://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/> [<https://perma.cc/VM2H-MQJE>] (archived Aug. 1, 2018) (noting CT case law stating interference with judicial terms requires extraordinary constitutionally justified reasons and a proportional test to be met).

245. *See generally* Case C-286/12, *European Comm'n v. Hungary*, 2012 E.C.R. 687 (declaring lowering compulsory retirement ages for judges, without sufficient connection to appropriate objectives, goes against equal treatment in employment).

246. *See* JUSTICE SCOREBOARD, *supra* note 206, at 43 (showing no EU member state allows another branch of government to have sole authority over removing judges from office).

5. Training for Judges

Poland currently offers, but does not require, initial and general in-service training for judges.²⁴⁷ In contrast, twenty-two EU member states require at least initial training, and ten of those also require general in-service training.²⁴⁸ Another six member states require in-service training on management of the court, such as handling caseloads.²⁴⁹ Twenty-three EU member states provide judges with training on communication with the press and involved parties.²⁵⁰ Perhaps informative of Poland's training program in this respect, Poland did not communicate its data on communication training to the EC.²⁵¹ Participation rates for judicial training are also low in Poland—fewer than 10 percent of judges participate in training on EU law, which is one of the lowest rates in the EU.²⁵² Based on the data from the EU Justice Scoreboard, then, judicial training in Poland is lacking compared to other EU member states.

In summary, as the PiS Party argues, the Polish judiciary has room for improvement. Polish judges appear to receive very limited training once on the bench²⁵³ and, in certain types of cases, there is room to improve the judiciary's efficiency in adjudication.²⁵⁴ However, for the most part, the PiS Party is incorrect about the judiciary's efficiency—its efficiency in most types of cases ranks in the top half of the EU.²⁵⁵ Further, the PiS Party's claim that the reform bills align Poland with the rest of the EU is false. The changes to the KRS, which give control of the nomination and appointment process to the PiS Party, and the forced retirement of 40 percent of the bench, are at odds with the nomination, appointment, and removal procedures of the rest of the EU.²⁵⁶ Nomination, appointment, and removal procedures are three factors relevant to Feld and Voigt's study of *de jure* and *de facto* independence—greater political control over those procedures will hurt judicial independence.²⁵⁷ Those three procedures also factor into Geyh's legal culture paradigm—more regulation in the political dimension may affect the ethical and adjudicative dimensions.²⁵⁸ As a

247. *Id.* at 28.

248. *Id.*

249. *Id.*

250. *Id.* at 30.

251. *See id.* (showing Poland failed to report this data to the EC).

252. *See id.* at 29 (comparing Poland's participations rates with other EU member states).

253. *See id.* (showing that less than 10 percent of Polish judges participate in continuous training activities in EU law or of another member state).

254. *See supra* Part III.D.2.

255. *See* JUSTICE SCOREBOARD, *supra* note 206, at 7–16.

256. *See supra* Part III.D.3–4.

257. *See supra* Part III.C.2.

258. *See supra* Part III.C.1.

result, the reform bills threaten judicial independence, and therefore the rule of law, in Poland.

IV. SOLUTION

As explained above, the PiS Party's reform bills clearly threaten judicial independence in Poland. As a result, the reform bills threaten the rule of law—one of the EU's core principles and values.²⁵⁹ Duda's unexpected decision to veto two of the reform bills²⁶⁰ only temporarily delayed the PiS Party's attack on the judiciary, as revised bills have now been signed into law,²⁶¹ and the PiS Party continues to pursue other changes to Polish laws.²⁶² Whether the PiS Party ultimately achieves all of its goals or not, the reform bills and the domestic and international responses to them provide a useful lens through which to consider possible solutions. If, as some commentators suggest, the situation in Poland represents the battle between nationalist populism and Western democracy,²⁶³ then it is important to determine how the EU, or groups within Poland, can fight back against these types of attacks on Western values.

A. *The Argument against Article 7 Sanctions*

The most common solution proposed by commentators is the imposition of Article 7 sanctions, which may result in stripping Poland of its voting rights on the Council.²⁶⁴ After all, the EU implemented Article 7 specifically for situations such as the one in Poland.²⁶⁵ The EU desired a process for sanctioning a member state when the member

259. See TEU, *supra* note 21, art. 2 (listing the EU's core principles and values protected by Article 7).

260. See EKIERT, *supra* note 4, at 2 (noting that Duda has supported the PiS Party since he was elected, but unexpectedly vetoed two of the three laws).

261. *Government Coup*, *supra* note 14.

262. Duda recently called for a referendum on changing the Polish constitution. The arguments the PiS Party offers for changing the constitution are familiar—the PiS Party claims the current constitution protects former communists, and that changing it will create a more democratically developed constitution. See *Polish president seeks November referendum on constitution*, AP NEWS (May 3, 2018), <https://www.apnews.com/36a7175572374aa6bbb0dc8149567e8> [<https://perma.cc/VM2H-MQJE>] (archived Aug. 2, 2018).

263. See, e.g., Charles A. Kupchan, *The Battle Line for Western Values Runs Through Poland*, N.Y. TIMES (Jan. 10, 2018), <https://www.nytimes.com/2018/01/10/opinion/europe-western-values-poland.html> [<https://perma.cc/JCH9-8BP7>] (archived Aug. 2, 2018) (“As the temptations of nationalist populism spread, Europe has responsibility for holding down the Western fort. The primary battle right now is over Poland, which is deepening its descent into illiberalism.”).

264. See, e.g., Zalan, *supra* note 18 (discussing launching Article 7 procedures).

265. See Búrca, *supra* note 145, at 689–90 (explaining the reason for adopting Article 7).

state threatened to violate the EU's core values.²⁶⁶ Since Poland is threatening the rule of law, a core EU value, it makes sense to use the Article 7 framework to punish Poland and pressure the PiS Party to realign itself with EU values. However, there are serious problems with this approach.

The first problem is that Article 7 sanctions require unanimous consent by member states, and Hungary steadfastly refuses to vote in favor of any punishments against Poland.²⁶⁷ Orban's government pledged to veto any attempt to impose Article 7 sanctions on Poland.²⁶⁸ The second problem is that even if Hungary did not impede the EU's efforts, the imposition of Article 7 sanctions may simply increase anti-EU sentiment among Poland's populace. In other words, rather than pulling Poland back in line with EU values, the sanctions may push Poland even further away. This concern is credible considering the result of the Haider affair in Austria.²⁶⁹ Haider cast the EU's attempted sanctions as bullying Austria when it followed parliamentary procedures,²⁷⁰ and the PiS Party is likely to do the same—the PiS Party contends its reforms were simply the result of a democratic process.²⁷¹ However, the fear of the Polish people accepting this view is mitigated some by the fact that the Polish public's view of the EU is more positive than held by those of Austria or Hungary.²⁷² Still, regardless of whether the Polish public would support EU sanctions, the unanimous consent requirement makes this route impossible so long as Hungary supports the PiS Party.

Some commentators contend that, even if imposition of Article 7 sanctions is not realistically feasible, the EU should force a vote on Poland's actions anyways.²⁷³ The argument for doing so is that it will force all member states to take a stand one way or the other.²⁷⁴ If the

266. *Id.*

267. Kupchan, *supra* note 263.

268. *Id.*

269. *See, e.g.*, EKIERT, *supra* note 4, at 7 (describing the political fallout of the Haider affair).

270. *Id.*

271. *See, e.g., id.* at 4 (explaining the PiS Party's justifications for the reform bills).

272. *See* CBOS PUBLIC OPINION RESEARCH CENTER, OPINIONS ABOUT MEMBERSHIP IN THE EUROPEAN UNION IN POLAND, CZECH REPUBLIC, SLOVAKIA, AND HUNGARY 1 (2017), http://www.cbos.pl/EN/publications/reports/2017/103_17.pdf [<https://perma.cc/C3TU-H7GR>] (archived Aug. 2, 2018) [hereinafter OPINIONS ABOUT MEMBERSHIP] (showing 52 percent of Poles strongly support membership in the EU while less than one-third of Hungarians, Slovaks, and Czechs say the same).

273. *See* Kupchan, *supra* note 263 (“[E]ven if Hungary blocks these moves, the effort itself will send a strong message to Poles.”); *see also* Maximilian Steinbeis, *Article 7 and Us*, VERFASSUNGSBLOG (Dec. 16, 2017), <https://verfassungsblog.de/article-7-and-us/> [<https://perma.cc/4XCE-BXGZ>] (archived Aug. 2, 2018) (arguing doing so will force the governments of EU member states to announce where they stand on the crisis in Poland).

274. *Id.*

events in Poland are representative of similar actions in other EU member states²⁷⁵ and the broader nationalist populism movement,²⁷⁶ then forcing a vote would require each member state to explicitly show which side they support.²⁷⁷ Therefore, forcing a vote will increase transparency of where member states' leaders stand and create a more open debate about these issues.²⁷⁸ However, there has already been much straightforward international response to Poland's actions. Germany and France condemned the reform bills as a threat to EU values, Luxembourg questioned whether Poland should remain in the EU, Slovakia intimated that it stood by France and Germany, and only Hungary unequivocally supported Poland's actions.²⁷⁹ If the debate is already occurring and is transparent, there seems little use in forcing a vote that will inevitably fail because of Hungary's effective veto power.

Other commentators suggest circumventing Hungary's veto power by imposing Article 7 sanctions on Hungary and Poland simultaneously.²⁸⁰ Voting on imposing sanctions on Hungary and Poland simultaneously would remove Hungary's veto power because the member states under consideration for those sanctions do not get to vote.²⁸¹ Therefore, a single vote against Hungary and Poland would exclude both countries and avoid either being able to veto the sanctions. A couple proposals have been offered for how to justify voting simultaneously on sanctions for Hungary and Poland. One justification is that Hungary and Poland are both committing rule of law violations—due to separate legislation under consideration by Hungary's Parliament that may threaten judicial independence—and, therefore, one vote is sufficient.²⁸² Another justification is that

275. See *id.* (suggesting Romania's government also intends to take control of its judiciary).

276. Kupchan, *supra* note 263.

277. Steinbeis, *supra* note 273.

278. *Id.*

279. See *supra* Part II.E.

280. See, e.g., Alexander Thiele, *Art. 7 EUV im Quadrat? Zur Möglichkeit von Rechtsstaats-Verfahren gegen mehrere Mitgliedsstaaten*, VERFASSUNGSBLOG (July 24, 2017), <https://verfassungsblog.de/art-7-euv-im-quadrat-zur-moeglichkeit-von-rechtsstaats-verfahren-gegen-mehrere-mitgliedsstaaten/> [<https://perma.cc/FG9W-HLSV>] (archived Aug. 2, 2018) (suggesting Hungary's veto can be circumvented by a common procedure against Poland and Hungary); see also Kim Lane Scheppele, *Can Poland be Sanctioned by the EU? Not Unless Hungary is Sanctioned Too*, VERFASSUNGSBLOG (Oct. 24, 2016), <https://verfassungsblog.de/can-poland-be-sanctioned-by-the-eu-not-unless-hungary-is-sanctioned-too/> [<https://perma.cc/93XU-MY37>] (archived Aug. 2, 2018) (“If sanctions are pending against both at the same time, neither should have the legal capacity to veto sanctions against the other.”).

281. Thiele, *supra* note 280.

282. See Scheppele, *supra* note 280 (discussing justifications for launching Article 7 sanctions against two member states simultaneously).

Hungary is colluding with Poland in order to undermine the legitimate imposition of sanctions.²⁸³

However, no matter the justification, this scheme would require an extremely broad reading of Article 7. The text of Article 7 repeatedly refers to voting and imposing sanctions upon a singular member state: “a clear risk of a serious breach by *a* Member State,” “the Council shall hear *the* Member State,” “serious and persistent breach by *a* Member State,” and “*the* Member State in question.”²⁸⁴ Further, even if the Polish people generally have a favorable view of the EU, this approach includes a realistic possibility of only increasing anti-EU sentiment in Hungary. The Hungarian public already has a lower view of the EU,²⁸⁵ so a response similar to that of the Haider affair in Austria is possible.

B. Methods for Applying Exterior Pressure

1. Withholding Structural Funds from Poland

Another potential option for the EU in response to the reform bills is to exert financial pressure on Poland. Poland currently receives more funds from the European Regional Development Fund (ERDF) and Cohesion Fund (CF) than any other EU member state.²⁸⁶ The ERDF provides resources to member states in order to “strengthen economic and social cohesion in the EU by correcting imbalances between its regions.”²⁸⁷ The resources are directed towards innovation and research, growing a low-carbon economy, and supporting small and medium enterprises.²⁸⁸ The CF provides resources to member states with particularly low gross national incomes per capita.²⁸⁹ Most of the CF aid goes towards transportation or environmental projects.²⁹⁰ Between these two funds, Poland is receiving over 62 billion euros between 2014 and 2020.²⁹¹ That amount is approximately three times higher than the next highest total—Italy is receiving a little over 20

283. Thiele, *supra* note 280.

284. TEU, *supra* note 21, art. 7 (emphasis added).

285. OPINIONS ABOUT MEMBERSHIP, *supra* note 272.

286. EKIERT, *supra* note 4, at 11; see also *Available budget 2014–2020*, EUR. COMMISSION (Sept. 15, 2015), http://ec.europa.eu/regional_policy/en/funding/available-budget/ [<https://perma.cc/97XZ-M8BJ>] (archived Aug. 20, 2018) [hereinafter *Available budget*] (providing information on ERDF and CF funds).

287. *European Regional Development Fund*, EUR. COMMISSION (Oct. 15, 2014), http://ec.europa.eu/regional_policy/en/funding/erdf/ [<https://perma.cc/E8ZQ-73L4>] (archived Aug. 20, 2018).

288. *Id.*

289. *Cohesion Fund*, EUR. COMMISSION (Sept. 19, 2015), http://ec.europa.eu/regional_policy/en/funding/cohesion-fund/ [<https://perma.cc/6JAW-VV2A>] (archived Aug. 20, 2018).

290. *Id.*

291. *Available budget*, *supra* note 286.

billion euros during the same period.²⁹² The money Poland receives from these funds comes from EU taxpayers.²⁹³

Discussions on future budgeting of these funds are already underway and provide an opportunity to exert pressure on Poland.²⁹⁴ It may not be possible to refuse to allocate funds to Poland purely on political grounds—such as refusing to allocate funds so long as the PiS Party remains in power.²⁹⁵ However, the EC already places stringent conditions on nations that receive funds.²⁹⁶ Some of these conditions involve antidiscrimination and gender-equality measures.²⁹⁷ If the EC is already capable of placing those specific legal rights as conditions on the funds, it is plausible for the EC to also place requirements about upholding the rule of law more generally.

Unlike Article 7 sanctions, which only impose voting sanctions that the PiS Party may not care about, reducing the funds Poland receives from the ERDF and CF would place serious pressure on the PiS Party. The PiS Party relies on receiving these funds in order to implement Kaczynski's policies.²⁹⁸ Further, some of the funds are currently being allocated by the PiS Party to its political supporters, in violation of rules and procedures meant to ensure fair bidding processes.²⁹⁹ The possibility of losing these funds may be sufficient pressure to force the PiS Party to reevaluate its policies.

2. Suspension from the Schengen Area

The Schengen Area is comprised of twenty-six European countries that entered into an agreement allowing for the free movement of people and goods between their borders.³⁰⁰ In essence, it creates a single external border around all of the Schengen Area countries and

292. *Id.*

293. EKIERT, *supra* note 4, at 11.

294. See *The Future of EU Finances: New Cohesion Report Fuels the Discussion on EU Funds After 2020*, EUR. COMMISSION (Oct. 9, 2017), http://ec.europa.eu/regional_policy/en/newsroom/news/2017/10/10-09-2017-the-future-of-eu-finances-new-cohesion-report-fuels-the-discussion-on-eu-funds-after-2020 [https://perma.cc/GN5N-2WWM] (archived Aug. 20, 2018) (noting the beginning of discussions about budgeting the next round of funds).

295. EKIERT, *supra* note 4, at 11.

296. See EC Observations on the Partnership Agreement with Poland (EC) Ref. Ares (2014)574554 of Apr. 03, 2014, at 34–39 (describing the general ex-ante conditions Poland must meet).

297. *Id.* at 34–35.

298. EKIERT, *supra* note 4, at 11.

299. *Id.*

300. *List of Schengen Area Countries*, SCHENGEN VISA INFO (2017), <https://www.schengenvisainfo.com/schengen-visa-countries-list/> [https://perma.cc/XC22-4TE3] (archived Sept. 6, 2018) (providing background information on the Schengen area).

removes all borders inside the area.³⁰¹ In other words, once someone legally enters one country in the Schengen Area they may freely travel to any other country in the area without going through further border or security checks.³⁰² For example, someone in France can drive through Germany, Poland, the Czech Republic, Austria, Italy, and return home without ever having their passport checked or being subjected to border control procedures. The Schengen Area includes all but six EU member states.³⁰³ The Schengen Area benefits member countries not only by allowing the free movement of their own citizens within the area but also by increasing trade with other member countries and stimulating tourism within each country.³⁰⁴ Poland's membership in the Schengen Area is important to Kaczynski and the PiS Party—when Poland was accepted into the Schengen Area in 2008, Lech Kaczynski was president and held a celebration at Poland's border with Lithuania, during which he applauded the PiS Party's major role in getting Poland accepted.³⁰⁵

Membership in the Schengen Area, however, requires extensive cooperation between member countries.³⁰⁶ One precondition for joining the Schengen Area is being able to efficiently cooperate with law enforcement agencies of the other member countries.³⁰⁷ This includes judicial cooperation.³⁰⁸ Due to the free movement of people throughout the Schengen Area, countries within the area desire similar criminal procedures, regulations governing prosecutorial bodies, and other legislation in each member country.³⁰⁹ It makes sense that before a new country is added to the Schengen Area member

301. *Id.*

302. *Id.*

303. *See id.* (emphasizing only the UK and Ireland opted-out and that the other four EU member states—Romania, Bulgaria, Croatia, and Cyprus—are seeking admission).

304. *See generally* CEMAL KARAKAS, EUR. PARLIAMENT RESEARCH SERV., THE ECONOMIC IMPACT OF SUSPENDING SCHENGEN, (2016), [http://www.europarl.europa.eu/R egData/etudes/ATAG/2016/579074/EPRS_ATA\(2016\)579074_EN.pdf](http://www.europarl.europa.eu/R egData/etudes/ATAG/2016/579074/EPRS_ATA(2016)579074_EN.pdf) [<https://perma.cc/3 HAK-6UTZ>] (archived Aug. 20, 2018) (discussing the economic impact of the Schengen area on member countries).

305. *See* Michal Wojtas, *Poland Joins Schengen as Border-free Europe Expands*, KRAKOW POST (Jan. 10, 2008), <http://www.krakowpost.com/909/2008/01> [<https://perma.cc/N5JW-APTA>] (archived Aug. 20, 2018) (discussing Poland's acceptance into the Schengen area).

306. *The Areas of Schengen Cooperation*, EUROSOP, <https://www.euroskop.cz/8423/sekce/the-areas-of-schengen-cooperation/> (last visited Mar. 1, 2018) [<https://perma.cc/GGJ7-WFA9>] (archived Aug. 20, 2018) [hereinafter *The Areas of Schengen Cooperation*].

307. *Schengen Area*, EUR. COMMISSION, (Mar. 1, 2018) https://ec.europa.eu/home-affairs/what-we-do/policies/borders-and-visas/schengen_en [<https://perma.cc/K7UQ-6AVR>] (archived Aug. 20, 2018).

308. *The Areas of Schengen Cooperation*, *supra* note 306.

309. *See id.* (explaining the different preconditions for acceptance into the Schengen area).

countries want to ensure that the legal system in the new country will treat travelers fairly.³¹⁰ In other words, member countries want to ensure that the rule of law will be followed throughout the area, which is one reason Bulgaria, Romania, and Croatia have not yet been admitted to the Schengen Area.³¹¹

Once a country joins the Schengen Area, however, it still must meet obligations and pass either annual or multi-annual evaluations.³¹² Following an evaluation, a report drafted by EC representatives describes any shortcomings in the country, along with possible remedial actions and a deadline for their implementation.³¹³ If a country fails to remediate the issues, Article 26 of the Schengen Border Code (SBC) allows for the re-establishment of internal border controls between that country and the rest of the Schengen Area.³¹⁴ Unlike Article 7 sanctions,³¹⁵ this action only requires support from a qualified majority, and can last for up to two years.³¹⁶ The EU threatened Greece with this procedure during the migration crisis in 2015 and 2016.³¹⁷ Large numbers of migrants entered Greece's borders—and therefore obtained access to all Schengen countries—without going through appropriate border control.³¹⁸

310. See Heather Grabbe & Stefan Lehne, *Defending EU Values in Poland and Hungary*, CARNEGIE EUR. (Sept. 4, 2017), <http://carnegieeurope.eu/2017/09/04/defending-eu-values-in-poland-and-hungary-pub-72988> [<https://perma.cc/3GB4-Z92P>] (archived Aug. 20, 2018) ("[M]embers rely on each other's police and customs authorities to enforce the law fairly.").

311. See Hugo Brady, *The EU Must Fight Corruption and Defend the Rule of Law*, CTR. FOR EUR. REFORM (June 14, 2012), <http://www.cer.eu/insights/eu-must-fight-corruption-and-defend-rule-law> [<https://perma.cc/GLN9-K5J7>] (archived Aug. 20, 2018) (stating that Bulgaria and Romania's "low judicial standards remain a serious source of concern five years after accession to the Union, damaging both countries' chances of joining Schengen"); see also Georgi Gotev, *Slovenia Says It Would Be 'Very Funny' If Croatia Joined Schengen*, EURACTIV (Sept. 5, 2017), <https://www.euractiv.com/section/enlargement/news/slovenia-says-itwouldbeveryfunny-if-croatia-joined-schengen/> [<https://perma.cc/KK98-J4BG>] (archived Aug. 20, 2018) (quoting Slovenian officials suggesting Croatia's lack of respect for the rule of law threatens their admission to the Schengen area).

312. European Commission Press Release IP/16/211, Commission Adopts Schengen Evaluation Report on Greece and Proposes Recommendations to Address Deficiencies in External Border Management (Feb. 2, 2016) [hereinafter European Commission Press Release].

313. *Id.*

314. Council Directive 1051/2013, art. 26, 2013 O.J. (L 295) 1 (EU) [hereinafter Council Directive].

315. See *supra* Part III.A.

316. European Commission Press Release, *supra* note 312.

317. Gabriela Baczynska & Tom Körkemeier, *Greece Threatened with Expulsion from Schengen over Migration Crisis*, REUTERS (Jan. 25, 2016, 5:05 AM), <https://www.reuters.com/article/us-europe-migrants-ministers/greece-threatened-with-expulsion-from-schengen-over-migration-crisis-idUSKCN0V315L> [<https://perma.cc/MRH6-WPDB>] (archived Aug. 20, 2018).

318. *Id.*

While Poland's judicial reform bills admittedly differ in terms of type of violation from Greece's failure to monitor its borders, the EU should consider threatening Poland with expulsion as well. As noted above, respect for the rule of law is a precondition for admission to the Schengen Area. Article 26 of the SBC refers to "serious deficiencies relating to external border control,"³¹⁹ but Article 3a of the SBC also proclaims, "Member States shall act in full compliance with . . . the Charter of Fundamental Rights of the European Union,"³²⁰ which includes the rule of law.³²¹ Given the importance of judicial cooperation and the rule of law within the Schengen Area, Poland's reform bills that threaten judicial independence and the rule of law also threaten the effective management of the Schengen Area. Requiring member countries to meet preconditions and undergo regular reviews is pointless if member countries can still take actions that would have prevented them from joining the Schengen Area in the first place. Therefore, Poland's reform bills should provide a basis for threatening expulsion from the Schengen Area.

3. Pressure from European Courts

Another avenue available for placing external pressure on the PiS Party is through the European courts. In May of 2016, Poland issued a European Arrest Warrant (EAW) for a Polish national, Artur Celmer, accused of drug trafficking.³²² Celmer was arrested in Ireland and was expected to be extradited back to Poland.³²³ However, following the passage of the reform bills, Celmer argued that the rule of law in Poland had deteriorated and he therefore objected to extradition.³²⁴ Ireland's High Court stated the reform bills "systematically damaged" the rule of law, which is "essential for mutual trust in the operation of the [EAW]."³²⁵ The High Court then referred the issue to the ECJ

319. Council Directive, *supra* note 314, art. 26.

320. Commission Regulation 610/2013 of the European Parliament and of the Council of 26 June 2013, art. 3a.

321. Charter of Fundamental Rights of the European Union, pmbl., 2000 J.O. (C 364) 1.

322. Eóin O'Keefe, *Referrals and Reactions: Poland and the Rule of Law*, INST. OF INT'L & EUR. AFFAIRS (Mar. 23, 2018), <https://www.iea.com/security-and-justice/referrals-reactions-poland-rule-law/> [<https://perma.cc/LZ2W-U4MD>] (archived Aug. 20, 2018).

323. *Id.*

324. Colm Keena, *Extradition to Poland Case Comes Back Before Judge*, IRISH TIMES (Mar. 16, 2018, 1:00 AM), <https://www.irishtimes.com/news/crime-and-law/extradition-to-poland-case-comes-back-before-judge-1.3428657> [<https://perma.cc/N7E-T26H>] (archived Aug. 20, 2018).

325. Michelle Stoddart, *Ireland Refers Landmark Polish Extradition Case to Europe's Top Court*, POLITICO (Mar. 13, 2018, 5:31 PM), <https://www.politico.eu/article/ireland-poland-extradition-case-referred-to-europe-top-court-ecj/> [<https://perma.cc/33PN-CY9J>] (archived Aug. 20, 2018).

before making a final decision.³²⁶ The ECJ was asked to rule on whether the reform bills stripped Poland's judiciary of its independence and whether the EAW system was jeopardized as a result.³²⁷ The PiS Party responded by accusing the High Court of engaging in political games and showing bias.³²⁸

If the ECJ rules that the reform bills undermine the rule of law and the EAW system, then more cases should be brought before the ECJ in other contexts—from contract and family law cases³²⁹ to commercial arbitration disputes.³³⁰ If the ECJ rules that Polish parties are unable to force adjudication or arbitration in Polish courts due to the PiS Party's legislation, then the PiS Party will face increased pressure from its own citizens.³³¹ However, it is also possible that the ECJ rules that the reform bills do not violate the rule of law, or that even if they violate the rule of law they do not undermine the EAW system. The Celmer case can be considered a test case for how the ECJ views the reform bills,³³² and the outcome will determine whether the ECJ can be used to apply pressure on the PiS Party moving forward.

C. Reform from within the Judiciary

Despite the criticism that the PiS Party is removing judicial independence and threatening the rule of law in Poland, the PiS Party is correct that the Polish people desired judicial reform.³³³ At this point, it is too late for the Polish judiciary to prevent reforms from originating in the other branches of government.³³⁴ However, even with the passage of these reform bills, the Polish judiciary should still be interested in implementing self-reform if doing so minimizes the chances and scope of further external reform. Further, with the rise of nationalist-populist movements more broadly,³³⁵ the situation in Poland may be taken as a warning of what is to come for the judiciaries of other countries. As such, looking at how Poland could have

326. *Id.*

327. O'Keeffe, *supra* note 322.

328. Derek Scally, *Poland Accuses High Court of Playing 'Political Games'*, IRISH TIMES (Mar. 17, 2018, 1:06 AM), <https://www.irishtimes.com/news/crime-and-law/poland-accuses-high-court-of-playing-political-games-1.3429921> [<https://perma.cc/8T99-GW9A>] (archived Aug. 20, 2018).

329. *Id.*

330. Christian Davies, *Ireland refuses extradition over concern at Polish justice reforms*, THE GUARDIAN (Mar. 13, 2018, 1:14 PM), <https://www.theguardian.com/world/2018/mar/13/ireland-refuses-artur-celmer-extradition-poland-justice-reforms-ecj> [<https://perma.cc/MQ77-NXAH>] (archived Aug. 20, 2018).

331. *See id.* (discussing potential pressure from companies within Poland).

332. O'Keeffe, *supra* note 322.

333. *Parliament Votes*, *supra* note 103 (finding approximately 60 percent of respondents desired judicial reform).

334. *See Government Coup*, *supra* note 14.

335. Kupchan, *supra* note 263.

prevented this problem in the first place provides a useful case study for other countries' judiciaries.

Looking at Poland's situation under the framework provided by Geyh,³³⁶ reform from within the judiciary makes sense as a solution. The public's concerns about judicial corruption and inefficiency can be seen as damaging in all three of Geyh's offered perspectives—the adjudicative, ethical, and political dimensions. The adjudicative dimension is harmed if the public believes judges are corrupt—parties in a case will not trust that the judge is providing them a fair hearing. Corruption and inefficiency can also harm the ethical dimension—acting corruptly and slowly can be seen as acting in conflict with legal norms. Lastly, under the political dimension, if the public views judges as corrupt, then the public will not trust that the judiciary is acting according to public preferences.

However, as Geyh submits, all three dimensions must be considered in order to maintain sufficient judicial independence.³³⁷ The Polish reform bills are intense regulation in the political dimension. Therefore, even if they create a judiciary that is more responsive to the general public, they will not solve the problems viewed through the adjudicative and ethical dimensions. The PiS Party's bill allowing them to replace judges with new ones of their own choosing³³⁸ will still cause parties in a case to fear that they are not receiving a fair hearing, thereby retaining issues in the adjudicative dimension. The amount of control the PiS Party has over judges' tenures³³⁹ will now cause the public to ask whether the judiciary is acting according to judicial norms or political orders, thereby retaining the issues in the ethical dimension.

Instead, reform from within the judiciary could fix issues within the adjudicative and ethical dimensions while maintaining an appropriate balance with the political dimension. For instance, the Polish judiciary lacks many of the training opportunities that are available in many other EU member states, and many judges within Poland do not participate in the training opportunities that are available.³⁴⁰ Improving this aspect of the judiciary, particularly with respect to participation rates and including training on managing caseloads and communication with the public and involved parties, could result in improvements in the adjudicative and ethical dimensions. If more judges take part in ethical training, then the fears over corruption within the judiciary will be mitigated, improving judicial independence within the ethical dimension. If the judiciary partakes in more training on communicating with the press and

336. *See supra* Part III.C.1.

337. *See supra* Part III.C.1.

338. *See supra* Part II.C.

339. *See supra* Part II.C.

340. *See supra* Part III.D.5.

parties, such that the public is more aware of how the judiciary functions, then there will be improved judicial independence as viewed from the adjudicative dimension. In other words, if the public is more aware of how the judiciary functions, then parties will be more likely to believe they are receiving a fair hearing. Lastly, since the Polish public believes the judiciary is inefficient³⁴¹—even if that claim is false³⁴²—then increasing training on managing caseloads, which should help with increasing judicial efficiency, should improve judicial independence in the political dimension because the public will see that the judiciary is being responsive to the public's criticisms.

Poland's situation may be representative of what is to come as nationalist populist movements take root throughout eastern Europe. Unless other nations' judiciaries pay attention, they risk facing similar forced reform from the other branches of government. Judiciaries that are aware of the need for the public's trust should acknowledge areas in which they can improve. By working to improve its reputation with the public, the judiciary can provide some level of protection against that reputation degrading to the point that the public turns to the other branches of government to reform the judiciary. In doing so, judiciaries can avoid the over-regulation in the political dimension that Poland's judiciary now faces.

V. CONCLUSION

Despite the claims from the PiS Party that reform is necessary and simply a part of the democratic process, the reform bills violate judicial independence—a critical element of the EU value of the rule of law.³⁴³ While the broadly proposed suggestion of implementing Article 7 sanctions is not possible—despite being created for situations such as this—due to support for Poland from Hungary, there are other options available for deterring the PiS Party.³⁴⁴ The structural funds provide a method of placing financial pressure on the PiS Party, and the risk of suspension from the Schengen Area involves reputational pressure as well as financial pressure.³⁴⁵

While it is too late for the Polish judiciary to prevent reform by the PiS Party entirely, it may be able to minimize the risk of further future reforms. By viewing the situation through the three perspectives proposed by Geyh, it is clear that the reform bills are over-regulation in the political dimension that harm the adjudicative and ethical

341. See EVALUATION OF THE JUDICIARY, *supra* note 214, at 3–4 (showing the public views the judiciary as inefficient).

342. See *supra* Part III.D.2.

343. See *supra* Part III.B.

344. See *supra* Part IV.

345. See *supra* Part IV.B–C.

dimensions.³⁴⁶ By implementing self-reform, the Polish judiciary could create changes that respond to the public's desires while also maintaining an appropriate balance between the political, adjudicative, and ethical dimensions.³⁴⁷ While the situation in Poland may be too advanced to be rescued by this type of self-reform, it provides a useful warning to judiciaries in other countries and a possible insight into preventing a similar outcome as nationalist populist movements continue to take hold throughout eastern Europe.

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346. *See supra* Part IV.D.

347. *See supra* Part IV.D.

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