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A Polish Reform of Judiciality: How to Demand and Bury Judicial Accountability[3]

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Abstract

The article explores the outcomes of the judicial reform in Poland after 2015, which diminished judicial independence; and it has also been counter-productive in terms of the proclaimed need of judicial accountability. The changes made to how judges are appointed, disciplinary procedure and the management of the courts are discussed from this perspective, observing the capacity to give an account of the power entrusted to judges. The aim of the study is to show that the reforms introduced under the banner of increasing judicial accountability have made that accountability synonymous with the judges being held politically dependent, which is quite the opposite of accounting for the power entrusted. The research methods used in the text are the dogmatic method and case study.

Keywords: Poland, judicial reforms, judicial independence, accountability of judges, accountability paradoxes.

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Polska reforma sądownictwa – jak domagać się sędziowskiej rozliczalności i jednocześnie ją grzebać[4]

Streszczenie

W paradygmacie rozliczalności władzy sądzenia, w artykule poddano rozważaniu skutki reformy sądownictwa przeprowadzanej w Polsce po 2015 roku. Dowodzi się, że zmniejszyła ona niezależność sądów i przyniosła efekt przeciwny do zamierzonego, jeśli chodzi o głoszoną przez prawodawcę potrzebę wzmocnienia sędziowskiej rozliczalności. Z tej perspektywy poznawczej poddano analizie zmiany w sposobie powoływania sędziów, postępowaniu dyscyplinarnym i zarządzaniu sądami, zwracając uwagę na zdolność do rozliczania się z powierzonej sędziom władzy. Reformy wprowadzone pod hasłem zwiększenia sędziowskiej rozliczalności uczyniły ją synonimem politycznego uzależnienia sędziów, co jest całkowitym przeciwieństwem rozliczania się z powierzonej władzy.

Słowa kluczowe: Polska, reforma sądownictwa, niezawisłość sędziowska, rozliczalność sędziowska, paradoksy rozliczalności.

[4] Niniejszy artykuł został napisany w ramach projektu „Rozliczalność jako kategoria prawa konstytucyjnego", finansowanego przez Narodowe Centrum Nauki (Polska), UMO 2018/29/B/HS5/01771.

Introduction

The judicial reforms carried out between 2015 and 2023 have sparked a revolution in the Polish judiciary, breaking the paradigm of judicial independence. The incompatibility of the legislative measures introduced with the principle of the rule of law, and the threats to the judiciary independence that have resulted have already been widely and thoroughly discussed.[5] They provide a unique illustration of the tension between elected politicians and judges, a subject that has been also broadly analysed in legal science.[6] In this paper, we focus on how accountability and judicial independence are interwoven.[7] An analysis of the legal regulations and their consequences leads us to the conclusion that, by undermining the foundations of judicial independence, the accountability of judges has vanished. We illustrate this thesis by using three examples of post-2015 reforms in Poland: how judges are appointed, their disciplinary responsibility, and appointments of presidents of common courts. The changes made in all three of these areas have resulted in a systemic threat not only to judicial independence, but also to the ability of the judiciary to give an account of its exercise of power in the face of an accompanying accusation of bias and dependence on political processes.

5 P. Bárd, *In Courts We Trust, or Should We? Judicial Independence as the Precondition for the Effectiveness of EU Law*, "European Law Journal" 2021, 27; T. Drinoczi, A. Bień-Kacała, *Illiberal Constitutionalism: The Case of Hungary and Poland*, "German Law Journal" 2019, 20, pp. 1140–1160; W. Sadurski, *Poland's Constitutional Breakdown*, Oxford University Press 2019; A. Śledzińska-Simon, *The Rise and Fall of Judicial Self-Government in Poland: On Judicial Reform Reversing Democratic Transition*, "German Law Journal" 2018, 7; M. Szwed, *The Polish Constitutional Tribunal Crisis from the Perspective of the European Convention on Human Rights*, "European Constitutional Law Review" 2022, 18; P. Mikuli, M. Pach, *Disciplinary Liability of Judges: The Polish Case*, [in:] P. Mikuli, G. Kuca (eds.), *Accountability and the Law Rights, Authority and Transparency of Public Power*, Routledge 2022, pp. 71–77; M. Wyrzykowski, *Experiencing the Unimaginable: The Collapse of the Rule of Law in Poland*, "Hague Journal on the Rule of Law" 2019, 11, p. 417.

6 R. Hodder-Williams, *Judges and Politics in the Contemporary Age*, London 1996, p. 124.

7 Although the portrayal of these reforms is incomplete without the problems related to the appointment of judges of the Constitutional Tribunal (CT) and members of the new National Council of the Judiciary (NCJ) have been analysed widely in: W. Sadurski, *On the Relative Irrelevance of Constitutional Design: Lessons from Poland*, "The University of Sydney Law School Legal Studies Research Paper" 2019, 19/34, p. 7 et seq.; B. Bugarič, *Central Europe's Descent into Autocracy: A Constitutional Analysis of Authoritarian Populism*, "International Journal of Constitutional Law" 2019, 17(2), p. 602 et seq.; P. Bogdanowicz, M. Taborowski, *How to Save a Supreme Court in a Rule of Law Crisis: the Polish Experience. ECJ (Grand Chamber) 24 June 2019, Case C-619/18, European Commission v. Republic of Poland*, "European Constitutional Law Review" 2020, 16, p. 332 et seq.; W. Sadurski, *How Democracy Dies (in Poland): A Case Study of Anti--constitutional Populist Backsliding*, "Sydney Law School Legal Studies Research Paper" 2018, 18/01, p. 31 et seq.; A. Śledzińska-Simon, op. cit., p. 1850 et seq.

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Judicial Accountability – Multiple Meanings and Constituents

Accountability, as a 'golden idea' of contemporary politics and public law, is seldom questioned, but even more rarely is it defined unanimously.[8] Further, accountability concerning the exercise of judicial power is an issue that is neither uncontested nor uniformly understood. The principal problem raised against accountability is the question of its compatibility with judicial independence.[9] Proponents of holding judges accountable for their power argue that in a democracy all authorities, including the judiciary, must be held accountable by the sovereign to avoid a risk of a dictatorship of unaccountable judges.[10] Opponents suggest that it is merely a pretext for interfering with judicial independence, the cornerstone of the rule of law.[11] On both sides of the argument, then, an appeal is made to fundamental values: independence or accountability and more broadly: democracy or the rule of law.[12] This has been particularly the case concerning the reforms made to the Polish judiciary.

Accountability in public law means the obligation to submit an account of the performance of the entrusted activities.[13] This allows for instrumentalizing the assumption of the entrustment of power and the necessity to give an account of the manner and effects with which that power has been exercised.[14] Accountability involves using specific instruments in order to obtain an account of the exercise of power; in the case of judiciary, they are as follows: supervision by a higher level authority, social control of the actions of the judiciary, managerial accountability,

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8 N. Bamforth, P. Leyland, *Accountability in the Contemporary Constitution*, Oxford University Press 2013, pp. 2–8.

9 B.C. Smith, *Judges and Democratization: Judicial Independence in New Democracies*, Routledge 2017, p. 183.

10 See: W.J. Quirk, R. Bridwell, *Judicial Dictatorship*, Transaction Publishers 1995.

11 W. Sadurski, *Poland's Constitutional Breakdow*n…, p. 8 et seq.; J.E. Moliterno, L. Berdisová, P. Čuroš, J. Mazúr, *Independence without Accountability: The harmful consequences of EU policy toward Central and Eastern European Entrants*, "Fordham International Law Review" 2018, 42(2), pp. 484, 487–488, 538–540.

12 A review of the positions in this regard is carried out by J.A. Ferejohn and L.D. Kramer, *Independent Judges, Dependent Judiciary: Institutionalizing Judicial Restraint*, "N.Y.U. Law Review" 2002, 77, pp. 962–975. Cf.: C.G. Geyh, *Judicial Independence, Judicial Accountability, and the Role of Constitutional Norms in Congressional Regulation of the Courts*, "Indiana Law Journal" 2003, 78(1), p. 160, https://www.repository.law.indiana.edu/ilj/vol78/iss1/7 (access: 15.01.2024). For the discussion of the collision between democracy and the rule of law in this context, see: J.M. Maravall, *Rule of Law as a Political Weapon*, [in:] J.M. Maravall, A. Przeworski (eds.), *Democracy and the Rule of Law*, Cambridge University Press 2009, pp. 261–301, at 262.

13 M. Bovens, *Analysing and Assessing Accountability: A Conceptual Framework*, "European Law Journal: Review of European Law in Context" 2007, 13(4); M. Bovens, T. Schillemans, E. Goodin, *Public Accountability*, [in:] M. Bovens, E. Goodin, T. Schillemans (eds.), *The Oxford Handbook of Public Accountability*, Oxford University Press 2014, p. 9; M. Maciejewski, *Imposybilizm prawny a rozliczalność administracji*, "Krytyka Prawa" 2021, 13(3), p. 203 et seq.

14 G. Lenz, *Follow the Leader: How Voters Respond to Politicians' Performance and Policies*, Chicago 2012; S. Gailmard, *Accountability and Principal–Agent Theory*, [in:] M. Bovens, E. Goodin, T. Schillemans (eds.), op. cit., pp. 90–105.

and disciplinary responsibility. The multiplicity of forms and contexts that exist has led to attempts to classify the accountability of judges considering the subject of accountability,[15] the object of accountability,[16] and the manner of execution[17] or the model in which it is implemented.[18] Two questions remain central to the above classification: *to whom* and *for what* should judges be held accountable for the authority they have been entrusted with?

The first point refers to the basic premise of accountability: the relationship between the Principal, who entrusts power, and the Agent, to whom it is entrusted, as well as to the conditions and procedure under which that entrustment takes place. This is not an obvious task from the point of view of guaranteeing judicial independence in a democratic state, where fundamentally power originates from the political community, represented by elected representatives. Hence, the requirement for the democratic election of judges and the meritocratic criterion, which remains in the hands of the judges themselves, are intertwined here.

Secondly, accountability pertains to a judge's behaviour as a power entrusted subject. It is particularly difficult to determine which behaviours of the judge are the subject of accountability and, again, for whom are they obliged to submit a report of their activities, in which they must remain independent for the courts to function effectively at all.

Finally, the courts should also be held accountable for the efficiency and effectiveness of their performance – the manner in which they exercise power.[19] This, too, necessitates shaping the structures and actors of judicial power and the administration

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15 Stephen Colbran identifies: public scrutiny, instance-based scrutiny, accountability for the exercise of judicial power by the legislature and the executive, opinions formulated by legal professionals and academics, and oversight exercised by judicial authorities. S. Colbran, *The Limits of Judicial Accountability: The Role of Judicial Performance Evaluation*, "Legal Ethics" 2003, 6(1), p. 56.

16 Charlie Geyh puts forward a distinction between institutional accountability, behavioural accountability and accountability for decisions made. C.G. Geyh, *The Elastic Nature of Judicial Independence and Judicial Accountability*, [in:] S.K. Yamaguchi (ed.), *The Improvement of the Administration of Justice*, 7th ed., ABA Press 2002, pp. 167, 168. Joe McIntyre puts it similarly (*The Judicial Function*, Springer 2019, p. 249). A. Le Sueur distinguishes accountability for content, process, performance and probity (*Developing Mechanisms for Judicial Accountability in the UK*, "Legal Studies" 2004, 24, p. 81).

17 Shimon Shetreet identifies three types of this: (1) legal accountability, in the form of disciplinary responsibility, appellate review, and civil and criminal liability, (2) public accountability, exercised through parliamentary and executive scrutiny, and (3) informal (social) accountability, exercised by the legal professionals. S. Shetreet, *Judicial Accountability: A Comparative Analysis of the Models and the Recent Trends*, "International Legal Practitioner" 1986, 11(2), p. 38.

18 Mauro Cappelletti distinguishes three models in which accountability can be exercised: a repressive model, an autonomous (corporate) model, and a responsive or consumer-oriented mixed model. M. Cappelletti, *Who Watches the Watchmen?* [in:] S. Shetreet, J. Deschêness (eds.), *Judicial Independence: The Contemporary Debate*, Martinus Nijhoff Publishers 1984, pp. 570–574.

19 J. McIntyre, op. cit., pp. 282–283.

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of the courts in such a way that they are autonomous and thus meet the requirement of the real entrustment of power.

These three issues have become the subject of paradigmatic changes in Poland in recent years. We demonstrate on this example that the accountability of judicial power is not in conflict with judicial independence; on the contrary, the two values reinforce each other. An independent judge must be held accountable, yet a judge can only be held accountable if he or she is independent.

Appointment of Judges

The constitutional system in Poland relies primarily on a meritocratic criterion in the process of appointing judges, performed by the judicial body – the National Council of Judiciary. According to the Constitution (Article 186), the NCJ protects the independence of the judiciary and the autonomy of judges, and as regards the appointment process, is the gatekeeper to the judiciary. The Constitution predetermines that the majority of Council members are judges. Pursuant to the law that was in force until 2017, Council members were appointed by judges, but in December 2017 the Sejm decided that the 15 judge members of the NCJ should be elected by the Sejm from among candidates proposed by at least 2,000 citizens or 25 judges. The amended law terminated the terms of office of the 15 existing members of the NCJ elected from among judges, and this was accepted by the Constitutional Tribunal.[20]

This reform of the way in which judges are appointed to the NCJ has triggered a strong reaction from international bodies, particularly the Grand Chamber of the CJEU of 19 November 2019,[21] the ECtHr rulings,[22] and the Polish Supreme Court (ruling of the combined Civil, Criminal and Labour and Social Security Chambers of 23 January 2020[23]). The Court stipulated a person appointed to the office of a judge at the request of the new NCJ could mean that the court is unduly formed and unlawful according to the provisions of civil and criminal procedure (Article 439(1)(2) of the Code of Criminal Procedure and Article 379(4) of the Code of Civil Procedure, respectively) and the defect in the appointment process led, in specific

[20] Constitutional Tribunal judgment of 25 March 2019, ref. K 12/18. The Tribunal was defectively staffed and this ruling (as all others) has been widely contested in Polish jurisprudence.

[21] Cases: C-585/18, C-624/18 and C-625/181.

[22] Reczkowicz v. Poland ruling of 22 July 2021, app. No. 43447/19; Dolińska-Ficek and Ozimek v. Poland rulings of 8 November 2021, app. Nos. 49868/19, 57511/19. Advance Pharma v. Poland ECtHR judgment of 3 February 2022, app. No. 1469/20.

[23] BSA Act I–4110–1/20.

circumstances, to a violation of the standard of independence and impartiality.[24] The door was thus left wide open to the status of the new judges being questioned.

From the point of view of accountability, the result of the reform of the NCJ, and the subsequent appointment of judges with NCJ participation was the emergence of two categories of judges: those appointed at the request of the NCJ in its old composition, and new judges appointed by a body deemed politically dependent (so called neo-judges). The presumption of their independence and impartiality was undermined, and this has created a need to assess whether the standard of independence and impartiality normally required of a judge had been breached by him or her having been improperly appointed. This has led to confusion and uncertainty concerning judgments handed down, since such rulings can be challenged on the basis that the judge was wrongly designated upon a motion by the new NCJ.

The position of the CJEU, and later of the Supreme Court, led to the implementation of a mechanism called the 'judge independence test'. The Act amending the Act on the Supreme Court, enacted on 9 June 2022,[25] provides that it is permissible to examine a judge's compliance taking into account the circumstances surrounding their appointment and their conduct following the appointment 'if under the circumstances of the particular case it may lead to a breach of the standard of independence or impartiality influencing the outcome of the case.' The *rationale* was vague and the procedure was inconvenient (the request for an examination must be made within 7 days of the notification of the panel hearing the case), but the consequences are significant. A judge is no longer held accountable only for the process of adjudication, but for his or her nomination procedure, a circumstance over which the judge has no control. Obviously, candidates for the state of judgeship know the law and knew about the doubts about the composition of the Council, but it must be acknowledged that they had no choice at all as to who was to appoint them and how they were to be appointed – this is especially true of those who wanted to be appointed first time, after completing years of difficult training for the judicial profession. This was the only way for judicial candidates to enter the profession after completing their training and passing vocational exams. Meanwhile, this 'original sin' of appointment is irremovable, accompanying the judge forever. Thus neo-judges must continually explain and account for who appointed them.

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[24] This resolution of the Supreme Court was commented on by the Polish Constitutional Tribunal (acting *ultra vires*, as the Tribunal has no jurisdiction to review acts of the application of the law), which ruled on 20 April 2020 that it was unconstitutional. See: A. Płoszka, *It Never Rains but It Pours: The Polish Constitutional Tribunal Declares the European Convention on Human Rights Unconstitutional*, "Hague Journal on the Rule of Law" 2022, https://doi.org/10.1007/s40803-022-00174-w (access: 15.01.2024).

[25] Act of 9 June 2022 amending the Act on the Supreme Court and Certain Other Acts, Journal of Laws, item 1259.

This outcome contradicts the true idea of accountability, for it calls into question the very relationship of entrusting power. Since it is assumed that the judge is to be held accountable for the process under which they were appointed, the entire chain of entrustment is called into question. The judge is held accountable for the actions of the constitutional public authorities (the NCJ and the President), which is beyond judicial power and *ex ante*, when true accountability should pertain to verifying and giving an account of what was done within the framework of the power entrusted.[26]

Disciplinary Responsibility

One particular instrument of judicial accountability is disciplinary responsibility. The definition of the acts for which a judge bears disciplinary responsibility is a sensitive element of accountability, and various regulatory strategies have been adopted in this respect.[27] In order to determine whether there has been misconduct, a standard of behaviour appropriate to judges must be catalogued and specified by judicial bodies, guaranteeing the independency and impartiality of proceedings.[28] On the other hand, entrusting judges themselves with disciplinary liability may render this type of accountability ineffective, because of the 'guild mentality'.[29]

Up until 2015, the disciplinary responsibility of Polish judges was regulated in the manner traditional for European countries: a judge was subject to disciplinary action for official misconduct, including a manifest and flagrant violation of the law or for breaching the dignity of office.[30] The disciplinary courts within the courts of appeal and the Supreme Court were selected by lot from among all the judges of a given court. However, the system did not work effectively.[31] This led to a major change in 2017. A Disciplinary Chamber was created in the Supreme Court to rule on disciplinary cases concerning Supreme Court judges and as an appellate court

26 P. Birkinshaw, *Decision-making and Its Control in the Administrative Process – An Overview*, [in:] P. McAuslan, J. McEldowney (eds.), *Law, Legitimacy and the Constitution*, Oxford University Press 1985, p. 152.

27 D. Cavallini, *Judicial Discipline: Different Approaches in Five EU Member States*, [in:] R. Coman, C. Dallara (eds.), *Handbook of Judicial Politics*, IAŞI Institutui European 2010, pp. 125–155.

28 The Bangalore Principles of Judicial Conduct (2006), ECOSOC 2006/23, UN Doc E/RES/2006/23, Bangalore Implementation Measures, Articles 15.5; 56 B.

29 D. Bam, *Legal Process Theory and Judicial Discipline in the United States*, [in:] R. Devlin, S. Wildeman, *Disciplining Judges: Contemporary Challenges and Controversies*, Edward Elgar Publishing 2021, p. 350.

30 For the entirety of this discussion, see: M. Laskowski, *Uchybienie godności urzędu sędziego jako podstawa odpowiedzialności dyscyplinarnej*, Warszawa 2019.

31 The number of cases was strikingly small – around 50 out of 11,000 of judges annually in 2010–2013 (data delivered by Ministry of Justice in 2014 in a reply to interpellation No. 25438 on disciplinary proceedings).

for common court judges.[32] It was composed of neo-judges only.[33] The Minister of Justice (who is at the same time the Prosecutor General) selects both the disciplinary officers from among the judges (Article 112 § 3), and assigns the composition of the disciplinary court adjudicating at first instance (Article 110a).[34] Thus, the judges of the disciplinary court were appointed by the executive, and the disciplinary chamber of the Supreme Court was composed entirely of judges appointed by the body elected in significant part by the parliamentary majority. Hence, the solutions adopted departed drastically from the model of judicial independence and impartiality.

On 19 November 2019,[35] the CJEU stated that the circumstances under which the system was set up and its characteristics gave rise to reasonable doubts as to its independence from external factors. Following this judgment, the Chamber of Labour and Social Security of the Supreme Court ruled, in judgments of 5 December 2019 and 15 January 2020, that the Disciplinary Chamber could not be considered a court either under EU law or under Polish law.[36] The issue of the functioning of the DC of the SC was also addressed by the ECtHR in a judgment of 22 July 2021, in *Reczkowicz v. Poland*.[37]

The consequences of these rulings for judicial accountability are significant. Judges started to be perceived as parties to a political conflict, as ministerial vassals implementing a certain policy in the courts. Simultaneously, the undermining of trust in the Principal alters the legal and factual position of the Agent; in the absence of a properly empowered Principal, the Agent does not have to report on their activities. Under the cover of strengthening the accountability of judges, a nullification of the meaning and function of disciplinary responsibility occurred, along with a reduction in the systemic accountability of judges.

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[32] Act on the Supreme Court of 8 December 2017, Journal of Laws of 2018, item 5 as amended.

[33] A. Bień-Kacała, *Illiberal Judicialisation of Politics in Poland*, "Comparative Law Review" 2019, 25; S. Patyra, *Sądownictwo dyscyplinarne w kontekście ograniczeń konstytucyjnych*, "Przegląd Prawa Konstytucyjnego" 2020, 4; A. Rytel-Warzocha, *Contemporary Problems of the Judicial Power in Poland*, "Gdańskie Studia Prawnicze" 2020, 24(4).

[34] Act of Common Courts System Journal of Laws of 2001 No. 98, Iss. 1070, as amended.

[35] CJEU judgment of 19 November 2019, cases C-585/18, C-624/18 and C-625/18, EU:C:2019:982, paras. 149–151, 153.

[36] M. Szuleka, M. Kalisz, *Disciplinary Proceedings against Judges and Prosecutors*, Helsinki Foundation for Human Rights, Warsaw 2019.

[37] App. No. 43447/19. In order to assess the violation of the Convention, the ECtHR applied the three-stage test adopted in its judgment of 1 December 2020 in Ástráðsson v. Iceland: manifest breach of national law, breach of standard fundamental to the procedure for the appointment of judges, and whether the breach could be effectively assessed and remedied by a domestic court.

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This chaos was further exacerbated by an amendment act passed on 20 December 2019[38] (the so-called Muzzle Act) which, expanded the catalogue of disciplinary offences with, among others,[39] 'actions questioning the existence of an official relationship of judges, the effectiveness of a judge's appointment or the legitimacy of a constitutional organ of the Republic of Poland', and 'public activities incompatible with the principles of judicial independence and the independence of judges'. New offences were introduced as the legislature's reaction to the behaviour of those judges who had begun to refuse to adjudicate with judges appointed by the new NCJ and to exclude judges from participating in political protests related to judicial reforms.

This regulation was contested by CJEU in its judgment of 15 July 2021 and in judgment of 15 June 2023.[40] The ECtHR also refused to treat Disciplinary Chamber as independent court.[41]

The main criticism[42] voiced against the new offences introduced by the act of 2019 concerned the attack on judicial independence forced the Sejm to pass another amendment in June 2022.[43] The bone of contention has been namely resolved: the Supreme Court's Disciplinary Chamber has been replaced by a Chamber of Professional Responsibility composed of judges appointed by the President of the Republic of Poland from among judges of the Supreme Court drawn by lot. However, new provisions leave the courts operating within the courts of appeal, the disciplinary officer is also appointed by the Minister of Justice. Nonetheless, the NCJ, predominantly formed by a political body, and the Minister of Justice have retained considerable influence over the formation of those bodies that decide on disciplinary responsibility. It is hard to accept that a disciplinary system designed this

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38 Act of 20 December 2019 amending the Act on the System of Common Courts, the Act on the Supreme Court and Certain Other Acts, Journal of Laws of 2020, item 190.

39 Other disciplinary offence classifying some judicial activities like asking preliminary questions as disciplinary conduct are omitted here – see further: CJEU ruling of 15 July 2021 C-791/19, https://curia.europa.eu/juris/liste.jsf?num=C-791/19 (access: 15.01.2024).

40 C 204/21. In the judgment, the Court also referred to a jurisdiction of the Extraordinary Review and Public Affairs Chamber of the Supreme Court to examine complaints and questions of law concerning the lack of independence of a court or a judge and found it failing to fulfil obligations under the Article 19(1) § 2 TEU, read in conjunction with Article 47 of the Charter and under Article 267 TFEU and the principle of the primacy of EU law.

41 Reczkowicz v. Poland ruling of 22 July 2021, app. No 43447/19, Grzęda v. Poland ruling of 15 March 2022, app. No 43572/18, Żurek v. Poland of 16 June 2022, app. No 39650/18. The other cases of Polish judges have also been communicated to the Polish government; among others: P. Gąciarek, app. No 27444/22, Synakiewicz and other v. Poland, app. No. 46453/21.

42 The Act is the subject of a complaint procedure by the CJEU in case C 204-21.

43 It excluded, among others, a request to the Court of Justice of the European Union for a preliminary ruling on a question as referred to in Article 267 TFEU or an examination of whether a judge is duly independent and impartial.

way can meet the condition of giving an objective, bias-free account of possible abuse of power. This discrediting of the Polish system of disciplinary responsibility has also been to the detriment of accountability. The lack of independence of the disciplinary courts have nullified the disciplinary accountability true function: to give an account of the exercise of judicial power and tenure of office in conditions which enable these to be objectively and factually assessed.

Efficiency of the Courts: Authorities of the Court

The courts exercise public authority and should therefore give an account of how they perform public tasks, and what public money is spent on. This is particularly challenging; the efficiency of the judiciary is hardly measurable, as there is no quantitative indicator for the quality of judicial decision-making. It is therefore crucial for an accountability in this sphere to regulate the manner how the administration is accounted for. In this respect, there has also been one particularly notable reform in Poland in recent years.

The activities of the common courts in Poland are subject to administrative supervision by the Minister of Justice and presidents of courts. Prior to July 2017, the presidents of appellate and regional courts were appointed by the Minister of Justice, after consultation with the assembly of judges of these courts. The presidents of lower (district) courts were appointed by the president of a court of appeal after obtaining the opinion of the assembly of judges of the district court. In the case of a negative opinion of the assembly, the Minister of Justice could appoint the president of the court after receiving a positive opinion from the NCJ.

In 2017, an amendment to the Law on the System of Common Courts was passed.[44] Its aim was to make the director fully subordinate to the Minister of Justice, who was given unfettered power of appointment and dismissal.[45] The draft's explanatory memorandum also argued that the proposed regulations would bring certain benefits: 'they reduce the scope of duties of presidents of courts in the area of internal administrative supervision'.

The amendment removed the obligation to consult assemblies of judges, leaving the Minister of Justice with the exclusive right to appoint the courts' authorities.

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44 Act of 12 July 2017 (date of entry into force: 12 August 2017).

45 It is particularly noteworthy that the amendment in this respect ignores the findings of the Constitutional Tribunal's judgment of 7 November 2013 (ref. K 31/12), according to which the provision regulating the status of the court director (Article 32b § 3 of the Act on common courts system) is unconstitutional since it does not specify the consequences of a court president's request to the Minister of Justice to dismiss a court director.

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Presidents may be dismissed by the Minister for discretionary reasons, *inter alia*, 'when the continuation of the function cannot be reconciled for other reasons with the good of the administration of justice' and when 'it is ascertained that the effectiveness of actions in terms of the administrative supervision exercised or the organization of work in the court or lower courts is particularly low'. The dismissal of a president takes place after obtaining the opinion of the board of the relevant court, but it is not binding; if the opinion is negative, the Minister of Justice ask the NCJ and only a negative opinion by the NCJ, adopted by a majority of at least two-thirds of the votes, does not allow the Minister to dismiss the president.

Additionally, transitional provisions contained a competence of the Minister of Justice to dismiss court presidents solely on the basis of a discretionary decision for six months after the entry of the Act into force. During this period, the Minister dismissed a total of 158 court presidents and vice-presidents, often by fax, email, or letter, without providing any justification. The dismissals affected around 21% of the presidents of Polish courts.[46]

As a result of these changes, the Minister has been given unique powers to arbitrarily appoint and remove judges responsible for the functioning of the courts on a scale unprecedented in Europe.[47] The strengthening of the Minister's supervisory measures over the courts has met with a strong reaction from EU[48] and Council of Europe bodies.[49] ECtHR in its judgment of 29 June 2021 in *Broda and Bojara v. Poland*,[50] considered the arbitrary dismissal of vice-presidents of courts from their posts before the expiry of their term of office to be a violation of Art. 6 of the Convention.

Nevertheless, the issue of the appointment and dismissal of presidents by the Minister should not overshadow another problem related to the management of the courts. Court directors, i.e. those in charge of the economic and organizational matters of a court, are direct subordinates of the Minister of Justice. This 'relieving judges of administrative duties' actually means that the presidents are deprived

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46 Report of the Council of Europe Commissioner for Human Rights following the visit to Poland in March 2019, CommDH (2019)17.

47 Opinion of the Venice Commission at its 113th Plenary Session (Venice, 8–9 December 2017), http://www.venice.coe.int/webforms/documents/?pdf=CDL--AD(2017)031 (access: 15.01.2024).

48 As was noted by the European Commission when initiating the procedure on 20 December 2017 under Article 7(1) of the Treaty on the Functioning of the European Union (paras. 152–153).

49 Parliamentary Assembly of the Council of Europe: resolution 'New Threats to the Rule of Law in Council of Europe Member States: Selected Examples' of 11 October 2017 (Resolution 2188 (2017)), decision of 28 January 2020 to initiate a procedure to monitor the functioning of democratic institutions and the rule of law against Poland, 'Functioning of Democratic Institutions in Poland' (Resolution 2316 (2020). In a subsequent resolution of 26 January 2021, 'Judges Must Remain Independent' (Resolution 2359 (2021)) The Assembly explicitly stated that the power of the Minister of Justice to appoint and dismiss court presidents remains excessive.

50 Applications Nos. 26691/18 and 27367/18.

of the competence to perform the tasks for which they are responsible: to actually manage their courts. The changes outlined here have led to a situation where judges have been stripped of their influence over the appointment of presidents of courts, and presidents have become largely incapacitated and completely dependent on the Minister of Justice. Their activities are not subjected to any evaluation carried out on the basis of previously known performance evaluation criteria. This negates the independence of these functions or even their real entrustment for a certain period and under certain conditions.

If the Minister has subordinated the organization and finances of the courts to himself, court presidents simply have nothing to be accountable for. Their sole concern is not to fall into the Minister's disfavour. This is not a relationship of real accountability in a system of entrustment and separation of powers, which presupposes independence in self-regulation and administration and must therefore be firmly and clearly separated from political power.

Conclusions

Reforms in Poland between 2015 and 2023 and the events that accompanied them lead us to the conclusion that, along with the reduction of judicial independence, there has also been a significant decrease in the accountability of courts and judges. Accountability is falling victim to the reforms, which is ironic given that the reforms were introduced under the slogan of implementing mechanisms for accountability.

In the Polish law discussed here, the Principal has been falsely positioned partially in the Minister of Justice and in the parliamentary majority electing neo-NCJ. For these political bodies to usurp so much influence over the enforcement of the accountability of judges and the appointment of their authorities is not only an assault on their independence, it is also a nullification of the relationship fundamental to accountability (i.e. the proper staffing of the Principal) and an annihilation of the Principal-Agent relationship.

Under such conditions, in turn, there can be no impartial accountability of entrusted power. Since this kind of accountability is carried out by nominees of political power, it has parallels with political accountability. The appointment of judges is carried out by a new council of the judiciary, formed by the parliamentary majority, what led to an unprecedented and destructive situation, in which some judges deny the newly-appointed judges the legitimacy to adjudicate and their judgments are stigmatized as invalid. Under such circumstances, no objective and impartial account of the authority vested in the judiciary or of the acts and omissions performed within their framework can be made. Extreme bias among judges has led to

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Supreme Court chambers issuing contradictory rulings on the same cases, and parties filing their complaints decide in practice what rulings they want – as happened in the case of the appeal against the expiration of the mandate of two deputies in January 2024.

Polish reforms regarding the process of appointing judges and disciplinary liability show that not only independence but also impartiality are necessary for proper judicial accountability. Judges are labelled as being biased; a division into 'our' judges and 'foreign' ones occurs, and confrontation replaces reporting on the entrusted authority. The regulation of the judge's independence test does not remove the bias – on the contrary, it deepens and perpetuates it.

Finally, the removal of real power from presidents of courts causes a diminishment of accountability for management; if there is no competence, there is nothing to be accounted for. The new System of the Courts Act, removing this responsibility, is also a cursory example of the arbitrariness of the decisions taken by the political authorities in this regard. The question naturally arises: how can these mistakes and their miserable outcomes be corrected. The answer is extremely difficult, but as we assume, the only method is a new way of appointment and verification of appointments – but made not as part of the adjudication and action of the judge, but only of the appointment process. For this, however, judges are responsible to a negligible extent. What was political must be fixed politically, while undermining the adjudication of judges is a path that nullifies not only independence but also the sense of holding a judge accountable for his or her actions on the bench.

However currently, the accountability of the judiciary, used as a slogan, has become a pretext for interfering in the sphere of judicial independence. Instruments of accountability were used to subordinate judges to the political majority. The resulting correlations show that the absence of the most essential element of accountability – reporting on the exercise of power entrusted – is strictly related to judicial independence.

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