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Quality of Democracy in Poland: The Doctrinal Legal Analysis of the Polish Law and Justice Reforms between 2015-2020

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Summary: This work explores, discusses, and analyzes controversial laws in Poland that were passed between 2015-2019 to understand how these laws may have impacted democratic quality. The method for such analysis is the Doctrinal Legal Research methodology which focuses on primary sources as research material with secondary sources a supplement. This methodology focuses on the letter of the law rather than the practicability of the law with the analysis of democratic quality being done through seven sub-attributes of democracy. These attributes will be important to codifying the ways in which democratic quality may have decreased within Poland.

Introduction

In recent years, the international debate on the political system of democracy involving what should a functioning democracy look like and how should a democratic state behave has become an increasing topic. This can be seen in the example Polish democracy and the controversies that have surrounding the PiS parties' assumption to political power. While democracy has significantly evolved from its original ancient Grecian form it is important to understand and analyze how we conceptualize democracy especially in matters of declaring a nation to have democratic backsliding. Part of this conceptualization is heavily rooted in reading and understanding the laws of a country, specifically laws that impact the way in which a country can govern itself and its citizens. This thesis aims to take a comprehensive sample of recent Polish laws, pertaining to government oversight, judicial power, and parliamentary powers, to analyze through a democratic quality index to determine whether or not the laws could have an impact on the quality of democracy in Poland. In order to gain a comprehensive view democratic quality in Poland we must first do a thorough but brief exploration of democracy as a concept. This is needed to get a clear picture of what core features of democracy are and what these features can include, many indexes often combine various features and concepts that have contradicting concepts while essentially equating good governance with democracy. This work will briefly describe a series of democratic quality indexes listing their strengths and weaknesses, with only one index selected for its criteria to be used in tandem with the methodology to gain a thorough understanding of Polish democracy and democratic quality within Poland.

The main issue that this research will focus on is how Polish laws passed between 2015 to 2019 may have impacted democratic quality. There is a need for further research into this topic as it much of the research that has been done is often highly focused on specific issues rather than discussing the broad changes in democratic quality throughout a number of years. While key issues can become highly influential towards democratic quality it is not valid to dismiss a state's democratic system as functional or non-functional based on a single issue. Rather it is much more ethical and responsible to focus on the cumulative effect that such laws have brought about. The research within this thesis will focus on this concept as it is an area in which popular academia has not fully discussed. Furthermore, this research will be using only primary sources as analysis

material, all secondary sources such as opinions by the EU Vienna commission or other researchers will only be used within a supporting role to provide context and underlining principles of specific legislation. Ultimately, there is a great need for this research as the cumulative effect of laws on democracy is an issue that should be taken seriously especially within academic circles concerned with understanding democratic quality and democratic backsliding. The use of the interdisciplinary methodology of doctrinal legal research will allow this research to answer the question of how did laws passed by Polish Sejm change the quality of democracy in Poland from 2015 -2019?

To answer this question, this paper **aims to use doctrinal legal analysis with democracy criteria to determine changes to democratic quality in Poland from 2015 – 2019.**

To achieve this goal, these four objectives have to be formulated:

1. To define and conceptualize the core features of democracy.
2. To review democratic backsliding events in Poland in order to understand context behind PiS party reforms.
3. To review various different indexes in order to improve accuracy of my democratic quality analysis,
4. To analyze the Polish PiS party reforms in the timespan of 2015 – 2020 to determine if the changes were made in terms of Polish democracy quality.

Hypothesis: Polish democratic quality has fallen overall, but since the initial drop in 2015 -early 2016 quality has improved.

Methodology: Doctrinal legal research methodology, also called "black letter" methodology, focuses on the letter of the law rather than the law in action. Using this method, a researcher composes a descriptive and detailed analysis of legal rules found in primary sources (cases, statutes, or regulations). This method aims to gather, organize, and describe the law; provide commentary on the sources used; then, identify and describe the underlying theme or system and how each source of law is connected. In tandem with this methodology, political science criteria for describing core democratic features will be used in order to determine if the laws enacted by the PiS party conform to core democracy features.

Methodological tools: legal documents analysis.

Limitation: the main limitation in analysis is the amounts of data that is present and my need for Polish language knowledge.

Structure: this work will first analyze different conceptualizations of democracy. Then index review will reveal us how scientists try practically evaluating democratic quality, and how we can build on existing knowledge, to better analyze Poland. Next democratic backsliding event shall be analyzed from scientific literature perspective to reveal context behind many reforms and in conjunction with index chapter show some trends. And lastly doctrinal legal analysis shall be done using legal documents analysis tool to show us how democracy changed in Poland.

1.1 What is a democracy and what does it mean to be a democratic state

In order to determine the quality of democracy in Poland, it is necessary to conceptualize what quality of democracy is and what it constitutes. One of the more complicated parts of the determining democratic quality arises from the question: what is democracy? One of the ways this question can be answered is by looking at the original translation from the ancient Greek meaning. In this definition democracy is 'the rule of the people', while another definition of democracy is a government of the people, by the people and for the people. [1] However, yet another view of democracy is that it is a set of procedures that allows citizens to select their leaders in a competitive process.[2]

A. Dahl in 1971 in the book "Polyarchy Participation and Opposition" explored democratization and what it means for the system to be fully democratic. For Dahl democracy is a system where one of the main characteristics is the quality of being completely or almost completely responsive to all its citizens.[3] For the system to satisfy this point, it must consider citizens as political equals, all citizens must have unimpaired opportunities:

1. to formulate their preferences;
2. to signify their preferences to their fellow citizens and the government through individual and collective action;
3. to have their preferences weighed equally in the conduct of the government, that is, weighted with no discrimination because of the content or source of the preference.

For A. Dahl, these 3 conditions are necessary for democracy, but that is only the start, and these conditions alone are not sufficient to qualify the system as a democracy. [4] There is also a need for these conditions to exist for a large number of people who comprise the nation. Additionally, state institutions must provide at least eight guarantees to their citizens: 1. Freedom

[1] Agnieszka Markowska, "State of Democracy in Poland versus Environmental Protection," *Central European Economic Journal* 8, no. 55 (January 2021): pp. 219-230, https://doi.org/10.2478/ceej-2021-0016, 222.
[2] Andrew Roberts, "Assessing the Quality of Democracy," *The Quality of Democracy in Eastern Europe*, 2009, pp. 21-48, https://doi.org/10.1017/cbo9780511757365.003 , 23.
[3] Robert Alan Dahl, *Polyarchy Participation and Opposition* (New Haven, Conn: Yale Univ. Pr, 1973), 2.
[4] Ibid

to form and join organizations; 2. Freedom of expression; 3. Right to vote; 4. Eligibility for public office; 5. Right of political leaders to compete for support; 5a. Right of political leaders to compete for votes; 6. Alternative sources of information; 7. Free and fair elections; 8. Institutions for making government policies depend on votes and other expressions of preference.[5]

A. Dahl states that depending on how many guarantees are made by the state to its citizens, the system can move in various directions from full dictatorships (referred to as closed hegemony) to what could be seen as democracy in the upper right corner of the scale. But Dahl states that no large system in the real world is fully democratized, and as such that part of the scale is called Polyarchies. He explains that these types of systems have been substantially popularized and liberalized, that is, highly inclusive and extensively open to public contestation. [6]Dahl states that while some researchers will resist the term polyarchy as an alternative to the word democracy, in his opinion, it is important to maintain the distinction between democracy as an ideal system and the institutional arrangements that have come to be regarded as a kind of imperfect approximation of an ideal. According to him when the same term is used for both, needless confusion and essentially irrelevant semantic arguments get in the way of the analysis.[7] Dahl also outlines that developing and maintaining a competitive political regime depends on the extent to which the country's society and economy:

(a) provide literacy, education, and communication;

(b) create a pluralistic rather than a centrally dominated social order;

(c) and prevent extreme inequalities.

Great inequality in wealth while at a time for some scholars would seem a sign of undemocratic behavior. While polyarchies have tolerated a good deal of inequality and does not imply that they should. Yet A. Dahl states that considerable inequality in the distribution of incomes, wealth, education, and other values can persist in polyarchies without stimulating enough opposition to bring about a change either in the governmental policies that permit these inequalities or in the regime itself. This means that while there might be a great deal of inequality if there isn't a large enough portion of the population demanding change, polyarchy will not act on inequality issues.[8] The issue arises not from economic inequality itself, but rather that extreme inequalities

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[5] R.A Dahl supra note, 3: 3
[6] Ibid 7-8
[7] Ibid 9
[8] Ibid 89

in the distribution of such key values as income, wealth, status, knowledge, and military prowess are equivalent to extreme inequalities in political resources. A country with extreme inequalities in political resources stands a very high chance of having extreme inequalities in the exercise of power, and hence a hegemonic regime.[9]

Andrew Roberts states that his proposed view of democracy is founded on two procedures. The first is free, fair, and regular elections for a country's most powerful policymakers, in which all adult citizens are allowed to participate on an equal basis, both as voters and as candidates. The second procedure is a broad set of civil rights that allow these citizens the right to produce and obtain the information they need to participate effectively in these elections.[10] In the article, "The quality of democracy," Diamond, L., & Morlino, L lists four key elements of democracy: 1 universal, adult suffrage; 2 recurring, free, competitive, and fair elections; 3 more than one serious political party; and 4 alternative sources of information.[11] There are certain patterns of principles that democracy encompasses, including citizens being given tools and necessary information to make informed decisions during elections. But this is just one of the ways democracies have been defined. At its core, it relies on democratic control and decision-making functions. These include institutions that make the government accountable to citizen preferences (through competitive elections), which make this process inclusive (for example, through universal suffrage and inclusive representation), and encourage broad participation. These are embedded in democratic rights and freedoms, as well as checks and balances, including assurances of free political debate, fundamental civil rights (personal liberty, freedom of expression and of information, freedom of religion, economic and social rights), the rule of law, limitations to the power of governments, provisions for transparent government procedures, and horizontal checks on government (parliamentary procedures, independent courts, bicameralism, federalism, central bank independence). A further indispensable function is provided by pluralist intermediaries between state and society, including the media, the public sphere, and civil society. Finally, to maximize the quality of democracy, governments should not be subject to extra-constitutional actors, such as the military, but should have the actual power to govern. [12]

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[9] R.A Dahl supra note, 3: 89

[10] Andrew Roberts supra note, 2: 30

[11] Larry Jay Diamond and Leonardo Morlino, "The Quality of Democracy," in In Search of Democracy (London, UK: Routledge Taylor & Francis Group, 2016), pp. 33-45, 34.

[12] Daniel Bochsler and Andreas Juon, "Authoritarian Footprints in Central and Eastern Europe," East European Politics 36, no. 2 (2019): pp. 167-187, https://doi.org/10.1080/21599165.2019.1698420, 4.

In a significant number of literature democracy is also defined as Liberal democracy. Ramona Coman & Clara Volintiru characterize Liberal democracy not only by its pluralism, free and fair elections but also by the rule of law, separation of powers, the protection of civil liberties and minority rights, the protection of basic liberties of speech, assembly, religion, and property.[13] To further characterize this definition, John Rawls describes liberal democracy as rooted on the one hand in the fundamental principles that specify the general structure of government and the political process: the powers of the legislature, executive and the judiciary; and on the other in the equal basic rights and liberties of citizenship that legislative majorities are to respect: such as the right to vote and to participate in politics, liberty of conscience, freedom of thought and association, as well as the protection of the rule of law.[14] While this might seem not that different from other democracy definitions there is an addition of liberalism ideology, which brings with it liberal ideas. These ideas would make conservatism, which is focused on respecting tradition and traditional norms, undemocratic. That violates another democratic principle of pluralism, especially in Poland, where conservative tradition is very deeply rooted. For western democracies like Germany and France, policies like limiting abortion are seen as a violation of women's rights, for conservative Poland, that is seen as protection of unborn children. Yet both can be democratic simply because the final decision rests with the electorate to elect their representatives to represent political ideologies. Thus, it is imperative that we detach any ideological light from democracy and view it from a set of procedures that make democracy.

As already noted earlier by some scholars, democracy is essentially a set of procedures which allows citizen to elect and control their government, while there are different definitions of democracy. Procedural definition of democracy allows us to see what core features of democracy are. Anna Gwiazda drawing from multiple scholars formulated four dimensions of democracy. The four dimensions are representation, participation, competition, and accountability. The author also provides a brief summary of the dimension of representation as it has come to be adopted as an essential element of modern democracy. Representation takes place when political actors symbolize different identities and preferences. In its descriptive form it requires that the representatives resemble and are in some way similar to those represented. Participation is vital

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[13] Ramona Coman and Clara Volintiru, "Anti-Liberal Ideas and Institutional Change in Central and Eastern Europe," European Politics and Society, 2021, pp. 1-17, https://doi.org/10.1080/23745118.2021.1956236, 4.
[14] John Rawls, Political Liberalism (New York u.a., NY: Columbia Univ. Press, 1996), 226.

for a government to be 'by the people'.[15] It requires that citizens participate in the process of choosing political leaders and shaping government policies. Competition provides for the democratic selection of elites. The stability of political parties and party systems is regarded as crucial for stable patterns of competition. Finally, accountability ensures that political elites are responsible for their actions. It requires the provision of information, explanation, and possible sanctions.[16] But laying out parts of what makes democracy, we encounter additional problems of defining the individual parts. Since we must know what each component of democracy represents. Gwiazda's ideas will be discussed in a later chapter. The last scholar whose ideas shall be presented are from R. Dhal's concept of polyocracy. While this is rather old literature a large number of modern scholars and indexes often cite and use his definition of democracy, making it classical one.

The A. Roberts article explains three (3) different approaches of assessing democratic quality: Quality as Procedures, Quality as Preconditions, and Quality as Societal Outcomes. The first approach begins with the procedural definition of democracy mentioned earlier, but it also stops there. It asks to what degree elections are free and fair and if civil rights are genuinely protected.[17] But as the author says, this approach only asks if democracy exists inside a nation but does not say how it exists or how well democratic institutions work, nor does it explain how the political system fits into the definition of democracy.[18] The second approach is described as follows "without certain preconditions, democratic procedures do not fulfill their promise. Their promise is construed in a variety of ways – for example, to maximize individual agency, equalize influence on policy, or promote human development".[19] G. O'Donnell argues that, unless a country has achieved a certain level of human development, citizens are not able to exercise the agency on which democratic procedures are based; therefore, human development is a part of democratic quality.[20] A. Roberts argues that while these conditions certainly affect how people rule and what policies are implemented they are not part of the democratic process itself.[21] For example,

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[15] Hanna Pitkin The concept of representation
[16] Anna Gwiazda, Democracy in Poland: Representation, Participation, Competition and Accountability since 1989 (New York, NY: Routledge, 2016), 2.
[17] Roberts, supra note, 2: 26
[18] Ibid 28
[19] Ibid
[20] Guillermo O'Donnell, "Human Development, Human Rights, and Democracy," in *The Quality of Democracy: Theory and Applications* (Notre Dame, IN, Indiana: University of Notre Dame Press, 2004), pp. 9-22, 9 -10.
[21] Roberts op. cit., 29

corruption can affect democracy, but it shouldn't be part of the democratic process. And the last one before discussing the main quality approach is Quality as Societal Outcomes. This approach focuses on the policies or societal outcomes that democracies produce, for example, evaluating the quality of democracy by its economic growth rate, the percentage of its citizens in prisons, or its level of corruption.[22] Democracy implies that a government is responsive to citizens while it leaves citizen preferences open. In such a case, economic growth in democracies might be lower than in dictatorships, but the quality of democracy is high because the government does what citizens prefer. [23]

In accordance to information gathered from the examined articles two distinct approaches to defining democracy, that is, procedural and substantive. First, procedural definitions of democracy focus on how political systems are organized to guarantee that democratic goals, such as representation, accountability, and legitimacy, are achieved through a competitive electoral process. But there is also a substantive understanding of democracy that focuses on human welfare, individual freedom, security, equity, and social rights. [24] This work will focus primarily on procedural approaches since the procedural/normative approach to democracy detaches itself from the ideology of liberalism. Will also discuss how ideas are allowed to compete fairly and thoroughly. This allows for unbiased review quality of democracy in Poland, especially on contentious issues.

1.2. Further exploration of components of democracy in the procedural sense

According to A. Gwiazda, there are four parts of democracy: representation, participation, competition, and accountability. But to formulate a comprehensive conceptualization of democracy, it is necessary to explore what these dimensions entail for democracy. The least complicated to conceptualize is representation since it occurs when political actors symbolize different identities and preferences and speak and act on behalf of others. Additionally, there are multiple forms of political representation, but Gwiazda defines it as procedure of electing

[22] Roberts, supra note, 2: 29
[23] Ibid 30
[24] Supra note Gwiazda, 16: 14

representatives in a manner guaranteeing a proportionate and descriptive reflection of the electorate.[25] It can be found two different forms of representation. The first form is descriptive representation characterized as standing for others, that is, the representatives should resemble and be in some way similar to those represented. It is simply a 'descriptive likenesses.[26] Substantive representation is 'acting in the interest of the represented, in a manner responsive to them'.[27] For the structural approach, usually, descriptive representation is being used because it deals with how well an electorate is being represented in parliament with political ideas. One of the indicators of political equality is the extent of representativeness of a political institution and in the extent to which they reflect the diversity and pluralism of society, not only in respect of social composition and identities but of political opinions.[28] In other words high quality of democracy represents all political opinions in society through politicians who come from various society background one of methods that delves in to this representation could be reasonable party model. the responsible party government model directs scholars' attention to the links between political parties and the electorate. In particular, it suggests that, to the extent that competing parties present divergent, stable policies and citizens use these policies as the basis for their voting decisions, parties provide effective vehicles for representing the electorate's political beliefs.[29] Which means that there should be a representative in parliament for every social or political group in parliament. When it comes to representing parts of society, we should remember that the majority cannot be held hostage by a fringe minority, so some exclusion is bound to happen and is acceptable.

Another important part of democracy is participation. While representation is the ability for political opinions to be represented in parliament and the decision-making process. Participation can be defined as 'the set of activities by citizens that are more or less directly aimed at influencing the selection of governmental officials and the actions they take.[30] A. Gwiazda explains participation further as citizens participating in the process of choosing political leaders and shaping government policies. [31] However, participation is similar to representation and has

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[25] Supra note Gwiazda, 16: 18
[26] Hanna Fenichel Pitkin, The Concept of Representation (Berkeley, CA, Califronia: Univ. of Calif. Press, 1967), 92.
[27] Ibid 209
[28] Op. cit, Gwiazda: 20
[29] James Adams, "Political Representation and Responsible Party Government," in *Party Competition and Responsible Party Government a Theory of Spatial Competition Based upon Insights from Behavioral Voting Research* (Ann Arbor, Michigan : University of Michigan Press, 2001), pp. 3-24, 8.
[30] Sidney Verba and Norman H. Nie, Participation in America: Political Democracy and Social Equality (Chicago, Illinois: The University of Chicago Press, 1991), 2.
[31] Op. cit, Gwiazda 20.

multiple dimensions. First, electoral participation or voter turnout and second non-electoral participation or participation in demonstrations and petitions.[32] Participation is essential to democratic processes not only because it gives citizens the chance to exercise some control over the decisions to which they are subject.[33] If democracy means government by the people, people should participate. Participation also fosters skills of cooperation and a sense of shared responsibility for collective endeavors, and as a result, social capital is accumulated. Social capital, which refers to 'trust, norms and networks', can improve the efficiency and stability of governments.[34] There are many more advantages of participation to democracy, but this work focuses on its relation to democratic quality. In high high-quality democracy, we can see that citizens make use of their formal rights of political participation – they vote, organize themselves, and influence the decision-making process. By contrast, if there is general political apathy, lack of informed knowledge about public affairs and very low turnout, it is likely that democracy is not very vibrant and is not of good quality.[35] The level of participation is assessed by voter turnout, membership in organizations and direct legislation.[36] Voter turnout can be seen as an excellent participation indicator since it indicates that citizens are not ignorant to how they are governed. Direct citizen legislation especially decisions made through referenda is the purest form of participation and democracy as citizens are given the right to choose policy themselves rather than acting through representatives.[37]

To ensure that democracy survives, and state does not fall into autocracy or single party state another necessary pillar is competition. For A. Dahl, the competition between representatives for the votes of the people made representatives responsive to electors. It is this competition that is the specifically democratic element in the method and gives a democratic system value over other political methods.[38] A. Gwiazda argues that if there is little competitiveness the major mechanism of electoral accountability is absent: that mechanism being the threat to vote for another credible party instead of the incumbent governing party.[39] the important part of this

[32] André Blais, "Political Participation," Comparing Democracies: Elections and Voting in the 21st Century, 2010, pp. 165-183, https://doi.org/10.4135/9781446288740.n8.
[33] Op. cit. Gwiazda: 22
[34] Robert D. Putnam, Robert Leonardi, and Rafaella Y. Nanetti, Making Democracy Work Civic Traditions in Modern Italy (Princeton, NJ, New Jersey: Princeton University Press, 2006), 167.
[35] Op. cit. Gwiazda: 22
[36] Ibid
[37] Supra note Gwiazda, 16: 22
[38] R.A Dahl supra note, 3: 2
[39] Op. cit. Gwiazda: 24

element is the political parties, which compete in political sense but political parties can fulfil many of their democratic functions satisfactorily only if they are cohesive and disciplined and if the configuration of parties and their interactions remains relatively stable.[40] What is particularly important for democracy is that political parties are well established and stable, that is, that they are institutionalized. Party discipline is an important indicator of party institutionalization.[41] In case of lack of stable patterns of competition, parties do not develop links with voters and organized groups, making competitive systems less of democracy and more anarchial. Electoral accountability is then limited as voters encounter problems with the retrospective evaluation of political parties and elites at elections because of the fluid party system. [42] Good quality democracy requires the institutionalization of parties and the party system political parties to fulfil their presumed democratic functions and making inter party competition meaningful rathe then just paralyzed parliament and unstable government. [43]

The last part to determining quality of democracy is accountability. As it ties in everything and becomes an ultimate sanction that the electorate can use against poor polices enacted by the government and politicians. But there are still some considerations on the accountability definition and other facets of it as A. Gwiazda distinguishes two types of political accountability: electoral and institutional.[44] Electoral accountability provides the electorate with the opportunity to hold politicians responsible for their performance in office by rewarding or punishing them at the ballot box.[45] But elections happen only once every few years, relying only on that accountability would foster behavior where politicians would only be on their best behavior during election session, thus electoral accountability might not be as effective.[46] To fill this deficiency there is also institutional accountability. For democracy institutional accountability means mutual controls and relates to the effective implementation of the checks and balances embedded in the constitutional design,

[40] Supra note Gwiazda, 16:24
[41] Gwiazda, Anna. "Poland's Quasi-Institutionalized Party System: The Importance of Elites and Institutions." Perspectives on European Politics and Society 10, no. 3 (2009): 350–76. https://doi.org/10.1080/15705850903105769.
[42] Op. cit. Gwiazda: 25
[43] Ibid: 25-26
[44] Ibid 27
[45] Adam Przeworski, Susan Carol Stokes, and Bernard Manin, Democracy, Accountability, and Representation (Cambridge, UK: Cambridge University Press, 2010).
[46] Andreas Schedler and Guillermo O'Donnell, "Horizontal Accountability in New Democracies," in The Self-Restraining State: Power and Accountability in New Democracies (Boulder, CO: Rienner, 1999), pp. 29-51.

making it more permanent accountability method. [47] Institutional accountability can be defined as government accountability, and it encompasses information, argumentation (explanation and justification) and enforcement (sanctions). Information and argumentation oblige members of government to provide information concerning their decisions and actions, explain these to their citizens and their representatives and demonstrate that they are exercising power that complies with constitutional rules. In the event that government oversteps its authority, sanctions are imposed as defined in the Constitution and other regulations. When correctly working all of this ensures transparency, prevents corruption and guarantees democratic procedures.[48]

This procedural approach has several advantages which make it fit to explore democracies. Firstly, it can be applied to any type of democracy. Having recognized that democracies are organized differently and that their performance varies, this is especially true when claims of democratic backsliding are explored. Since viewing conservative policies as undemocratic dismisses a large portion of the population and makes the system less legitimate, especially in more socially conservative regions. Second, the use of medium-level categorization of democracy with a balance of denotation and connotation has an advantage over high intention or extension. It offers conceptual precision and empirical applicability. Third, from a comparative perspective, evaluating democracies on the basis of representation, participation, competition, and accountability gives us endless possibilities for making synchronic and diachronic comparisons. Fourth, this approach presents a clear-cut approach to evaluating democracies. Democracies can be evaluated on procedural and substantive grounds and on objective and subjective grounds.[49] Perhaps the most important part is the objective nature of the procedural approach towards evaluation. This avoids emotional or ideological based evaluations done by scholars who hold one opinion in higher regard than another rather than looking at concrete democratic functions.

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[47] Leonardo Morlino, Changes for Democracy Actors, Structures, Processes (Oxford, UK: Oxford University Press, 2012).

[48] Supra note Gwiazda, 16: 28

[49] Ibid 31

1.3 Quality of democracy as linkages

A. Roberts argues that the quality of democracy is equivalent to the degree to which citizens control their rulers or alternatively the strength of linkages between citizens and policy makers.[50] Democratic rule is based on 3 linkages: Electoral Accountability, Mandate Responsiveness, and Policy Responsiveness.[51] When approaching from this angle election and rights becomes very important as they also give citizens: the power to sanction incumbents, the power to select new officials, and the power to petition the government in between elections. All three powers enable citizens to control policy makers.[52] A short description on how to interpret these linkages is also provided: “Sanctioning and selecting politicians (i.e., Electoral Accountability and Mandate Responsiveness) are two routes. Policy Responsiveness may be viewed as a necessary condition and in some sense equivalent to popular rule. However, insofar as policy responsiveness refers to the various ways that opinion can influence policy – through letter-writing, protests, or lobbying – it may be seen as constituting a set of additional routes.”[53] But a small description isn’t enough to explain the concept, as electoral accountability and mandate responsiveness might be harder to distinguish.

Electoral Accountability is more of a punishment tool for voters to make politicians do their bidding for example, voters decide whether to reelect incumbents or remove them from office. There is also a less common institution of recall where voters can vote to remove individual sitting politicians before general elections. A. Roberts divulges further in explaining that in electoral accountability functioning there is a direct relation between the actions of politicians and voters’ judgments at the polls; that is, incumbents suffer significantly at the polls when they perform poorly in office and do better when they perform well.[54] This linkage has two benefits on policy. The first is to rid the polity of incompetent and self-serving leaders who can be summarily removed from office and secondly is the threat of electoral accountability sets up incentives for rulers to do as the public wishes. [55] This linkage also has some drawbacks because of its harsh verdict

[50] Roberts, supra note, 2:31
[51] Ibid 34
[52] Ibid 32 -33
[53] Ibid 34
[54] Roberts, supra note, 2: 35
[55] Ibid 36

politicians sometimes overreach before elections. For example, political systems that emphasize accountability are more likely to have political business cycles: politicians try to pump up the economy before elections to ensure their reelection. The second drawback is that it gives politicians a free hand between elections.

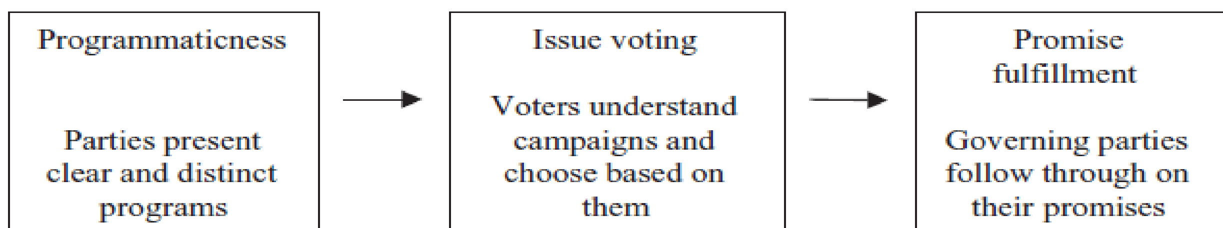

Fig. 1. Elements of mandate responsiveness. *The Quality of Democracy in Eastern Europe Public Preferences and Policy Reform, pp. 38* https://doi.org/10.1017/CBO9780511757365.003

Mandate Responsiveness has two linkages proposed by A. Roberts to determine democratic quality. Image one represents what makes up mandate's responsiveness. From that image we can see that mandates responsiveness is a politician or party mandate making clear campaign promises and fulfill these promises once in office.[56] These elections serve not only as punishment / reward mechanisms, but also selecting policy direction that nations must undertake. In the context of populism, it is possible that politicians are not fulfilling their campaign promises which might cause some of populism's rise. I suggest that populism isn't much of a cause of lower democratic quality but merely symptom of it. As A. Roberts states "It is a poor choice that voters make if promises apply only to campaigns also election choices are something more than shots in the dark only if parties do what they promise.[57] But if the system is working correctly voters can not only influence current policy, but they can also influence future policy by sending messages to politicians on what sort of policies are liked by the population. In essence, the difference between Mandate Responsiveness and Electoral Accountability, is that the accountability is voters punishing politicians for bad choices. Meanwhile, responsiveness is politicians providing policy choices and when elected fulfilling those promises.

[56] Roberts, supra note, 2: 37
[57] Ibid 37 - 38

The last part of democracy quality is Policy Responsiveness as A. Roberts begins "If democracy is the rule of the people, then public policies should follow the preferences of the people. If the majority of citizens want a particular policy, then the government should give it to them. This approach implies that governments both pay attention to issues the public cares about and do what the public wants with regard to those issues."[58] This is a very important linkage to keep politicians from being active to their votes on just election days, as citizens provide their daily opinion to politicians on specific policy issues. Additionally, if elections happen every 4 -5 years, it is highly improbable to predict all the necessary policies, be they economic crisis or pandemics. This linkage also ties in with the rights and freedoms necessary for democracy, as it is said in the article "basic freedoms such as speech and assembly are a part of the definition of democracy, because elections can hardly be free and fair without citizens being allowed to express their opinions and obtain information. These rights also apply to the periods between elections, when citizens are allowed to make their views known, form pressure groups, and lobby their government, all actions that should help to induce policy responsiveness."[59] But responsiveness also has some issues information, politicians might be more informed about situation over another. Even when having good information on the matter politicians might choose to act to better themselves rather than the public. Of course, public opinion might shift rapidly especially on developing situation or subjected to politicians framing a situation in different lights. It is a fairly well-known fact that populist politicians often use their rhetorical abilities to frame problems to their advantage.

[58] Roberts, supra note, 3: 39
[59] Ibid 40

2. Different approaches in measuring quality of democracy

Defining quality of democracy and reviewing the current situation isn't enough to create working methodological model to measure quality of democracy in Poland. The final piece is to look at various indexes and a few scholars to find methods used to measure democratic quality in a practical manner. In this chapter, we will begin by reviewing how various indexes using different democracy definitions attempt to measure Poland's democratic quality. This is necessary to improve our methodological understanding in order to construct comprehensive evaluation of democratic quality methodology. One of main issues from the theoretical conceptualization of democracy is a lack of practical criteria for evaluating policies and their impact on democratic quality. As such in this chapter authoritative indexes who evaluate democracies shall be reviewed to find core criteria for democratic quality.

First of all, parties who are called illiberal, entered government not only in Poland but also in Hungary, Serbia, Bulgaria, Slovakia, Czech Republic.[60] The Eastern European international and economic environment create particular good conditions to exploit the weakness of the media and judiciary to strengthen partisan control over the state. External actors – in particular the European Union – have been important for promoting democracy in the region in the past, they seem unable to guarantee the same incentives in the long run. In addition, the repercussions of the global financial crisis have weakened both democracy at home, as well as the capacity of external actors to implement their democracy agenda.[61] All of those seemingly spontaneous appearances of illiberal parties might create widespread public perception of a deep crisis of democracy.[62] Daniel Bochsler & Andreas Juon using Democracy Barometer dataset state that this perception of crisis may be exaggerated arguing that while improvements in the quality of democracy that started in the 1990s have indeed faltered this does not appear to constitute a general trend towards the deterioration of democratic quality across the region.[63] Although there are countries where concern

[60] Daniel Bochsler and Andreas Juon, "Authoritarian Footprints in Central and Eastern Europe," *East European Politics* 36, no. 2 (December 13, 2019): pp. 167-187, https://doi.org/10.1080/21599165.2019.1698420, 168.
[61] Ibid 169
[62] Ibid 170
[63] Ibid

seems appropriate about press freedom, transparency, competition, and the rule of law in Moldova, Bulgaria, the Czech Republic, Slovakia, Ukraine, and Hungary.[64]

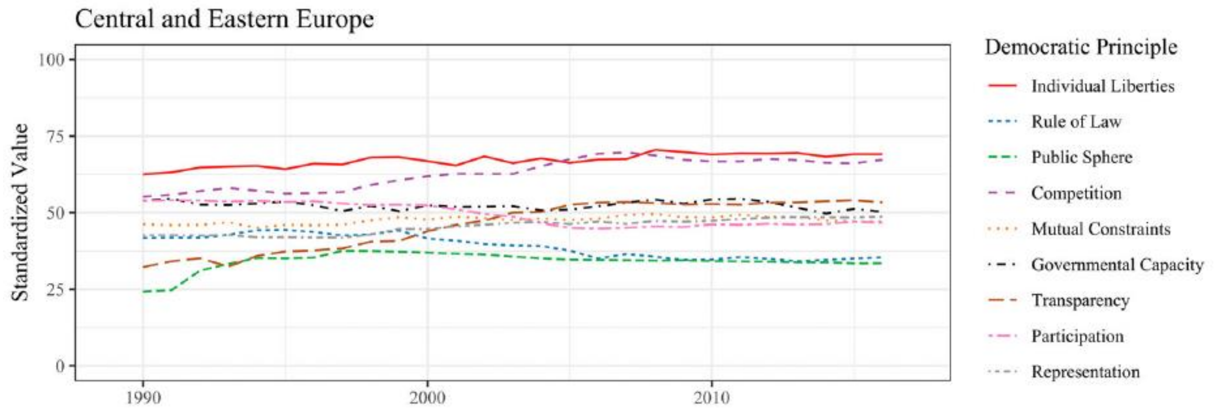

Fig. 2. The development of the quality of democracy by region (mean values). *Daniel Bochsler and Andreas Juon*, "Authoritarian Footprints in Central and Eastern Europe," *East European Politics* 36, no. 2 (December 13, 2019): pp. 167-187, https://doi.org/10.1080/21599165.2019.1698420

Fig. 2 plots the overall trends for democracy in Central and Eastern Europe by democratic function. There is a clear positive trend since the 1990s, with the region making advances with regards to competition, transparency, and the public sphere. However, this upwards trend has slowed down markedly since around 2000, with some democratic functions even appearing to show decreases.[65] When looking at individual tread regional average, the quality of democracy has remained stable or improved on most functions of democracy in most countries, in particular in two Baltic States (Latvia, Lithuania), in Poland, and in Slovenia – though in each of the countries have significant (enduring) weaknesses. [66] The underlying reasons for this are not only institutional changes, but also government infringements on the judiciary in practice, including replacements of members of the judiciary with party loyalists.[67] When summarizing data Daniel Bochsler & Andreas Juon find that there has not been an overall regional deterioration in the quality of democracy but the upward trend of the 1990s has certainly stopped with several specific countries

[64] Daniel Bochsler & Andreas Juon supra note, 59:170
[65] Ibid 175
[66] Ibid
[67] Bojan Bugarič and Tom Ginsburg, "The Assault on Postcommunist Courts," *Journal of Democracy* 27, no. 3 (July 2016): pp. 69-82, https://doi.org/10.1353/jod.2016.0047, 79 -80

in the region having a reverse direction.[68] In other parts of the region, the quality of democracy has even improved, although this process was usually similarly limited to some democratic functions rather than overall quality.[69]

One of the widely used indexes is Freedom house (FH) democratization and Freedom index. For Freedom in the World 2021, the methodology detailed how freedom house comes up with their rankings for nations. FH says that the report's methodology is derived in large measure from the Universal Declaration of Human Rights, adopted by the UN General Assembly in 1948. Freedom in the World is based on the premise that these standards apply to all countries and territories, irrespective of geographical location, ethnic or religious composition, or level of economic development. Freedom in the World operates from the assumption that freedom for all people is best achieved in liberal democratic societies.[70] Freedom House does not believe that legal guarantees of rights are sufficient for on-the-ground fulfillment of those rights. While both laws and actual practices are factored into scoring decisions, greater emphasis is placed on implementation[71]FH admits that while an element of subjectivity is unavoidable in such an enterprise the ratings process emphasizes methodological consistency, intellectual rigor, and balanced and unbiased judgments.[72] FH index on freedom works by awarding 0 to 4 points for each of 10 political rights indicators and 15 civil liberties indicators, which take the form of questions; a score of 0 represents the smallest degree of freedom and 4 the greatest degree of freedom.[73] The political rights questions are grouped into three subcategories: Electoral Process (3 questions), Political Pluralism and Participation (4 questions), and Functioning of Government (3 questions). The civil liberties questions are grouped into four subcategories: Freedom of Expression and Belief (4 questions), Associational and Organizational Rights (3 questions), Rule of Law (4 questions), and Personal Autonomy and Individual Rights (4 questions).[74] A score is typically changed only if there has been a real-world development during the year that warrants a decline or improvement (e.g., a crackdown on the media, the country's first free and fair elections),

[68]Daniel Bochsler & Andreas Juon op. cit, 176
[69] Ibid
[70] Freedom in the World 2021 Methodology https://freedomhouse.org/sites/default/files/2021-02/FreedomInTheWorld_2021_Methodology_Checklist_of_Questions.pdf
[71] Freedom in the World 2021 Methodology 1 https://freedomhouse.org/sites/default/files/2021-02/FreedomInTheWorld_2021_Methodology_Checklist_of_Questions.pdf
[72] Ibid
[73] Ibid
[74] Ibid 2

though gradual changes in conditions—in the absence of a signal event—are occasionally registered in the scores.[75] To determine how nations fares in those subcategories uses various questions, for example: A. Was the current head of government or other chief national authority elected through free and fair elections ? B. Is there a realistic opportunity for the opposition to increase its support or gain power through elections? C. Are safeguards against official corruption strong and effective?[76] Civil liberties category question tackle more of individual freedom question for example: Are there free and independent media? Is there freedom for nongovernmental organizations, particularly those that are engaged in human rights– and governance-related work?; Does due process prevail in civil and criminal matters? Do individuals enjoy personal social freedoms, including choice of marriage partner and size of family, protection from domestic violence, and control over appearance? [77]

Alternative to freedom ranking, FH also produces a democratization index. Before analyzing this index, it is important to understand that democratization is a continuous and complex process. FH claims to provide a numerical rating in seven categories that broadly represent the institutional underpinnings of a liberal democracy. These include elected state institutions (local and national governments), unelected state institutions (the judiciary and anticorruption authorities), and unelected nonstate institutions (the media and civil society). The ratings are based on a scale of 1 to 7, with 1 representing the lowest and 7 the highest level of democracy. The Democracy Score is a straight average of the seven indicators:[78]1. National Democratic Governance: This considers the democratic character of the governmental system including the independence, effectiveness, and accountability of the legislative and executive branches.[79] 2. Electoral Process: examines national executive and legislative elections, the electoral framework, the functioning of multiparty systems, and popular participation in the political process.[80] 3. Civil Society: assesses the organizational capacity and financial sustainability of the civic sector, the legal and political environment in which it operates, the

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[75] Freedom in the World 2021 Methodology 1 https://freedomhouse.org/sites/default/files/2021-02/FreedomInTheWorld_2021_Methodology_Checklist_of_Questions.pdf
[76] Ibid 5 -8
[77] Freedom in the World 2021 Methodology 8-15 https://freedomhouse.org/sites/default/files/2021-02/FreedomInTheWorld_2021_Methodology_Checklist_of_Questions.pdf
[78] Nations in Transit Methodology 2021 https://freedomhouse.org/reports/nations-transit/nations-transit-methodology
[79] Nations in Transit Methodology 2021 https://freedomhouse.org/reports/nations-transit/nations-transit-methodology
[80] Ibid

functioning of trade unions, interest group participation in the policy process, and the threat posed by antidemocratic extremist groups.[81] 4. Independent Media: examines the current state of press freedom, including libel laws, harassment of journalists, and editorial independence; the operation of a financially viable and independent private press, and the functioning of the public media.[82] 5. Local Democratic Governance: considers the decentralization of power including the responsibilities, election, and capacity of local governmental bodies; and the transparency and accountability of local authorities.[83] 6. Judicial Framework and Independence assesses constitutional and human rights protections, judicial independence, the status of ethnic minority rights, guarantees of equality before the law, treatment of suspects and prisoners, and compliance with judicial decisions.[84] 7. Corruption: this looks at public perceptions of corruption, the business interests of top policymakers, laws on financial disclosure and conflict of interest, and the efficacy of anticorruption initiatives.[85]

Another index is the Global State of Democracy (GSoD). The International IDEA's new Global State of Democracy indexes measure 29 aspects of democracy from the period of 1975 to 2020 in 166 countries across the world. The indices are divided into five main attributes of democracy, which contain a total of sixteen sub-attributes and eight sub-components, for a total of 29 aspects of democracy, of which 28 have a score from 0 to 1. The five attributes and sixteen sub-attributes include representative government, fundamental rights, check on government, impartial administration, and participatory engagement.[86] This list of attributes covers the features that are conventionally associated with democracy, primarily representative government. However, it also covers issues often neglected or consciously left out by other attempts to conceptualize democracy. The GSoDs' conceptual framework draws on the various understandings of democracy generally known as electoral democracy, liberal democracy, social democracy, and participatory democracy. It therefore demonstrates partial overlaps with the features emphasized by these different traditions of democratic thought.[87]

[81]Nations in Transit Methodology 2021 https://freedomhouse.org/reports/nations-transit/nations-transit-methodology
[82] Ibid
[83] Ibid
[84] Ibid.
[85] Ibid
[86] Svend-Erik Skaaning, "The Global State of Democracy Indices Methodology, Conceptualization and Measurement Framework, Version 5 (2021)," December 10, 2021, https://doi.org/10.31752/idea.2021.112, 14.
[87] Ibid

The GSoD details its five attributes in further detail beginning with representative government. In a representative government there must first be clean elections meaning that the elections for national offices are free from irregularities including flaws and biases involved in voter registration, campaign processes, voter intimidation and fraudulent counting. Along with this there must be inclusive suffrage meaning that adult citizen should have equal and universal passive and active voting rights. Representative government must also include the freedom of political parties, these parties must be free to form and campaign for political office. Finally, there must be an elected government meaning that national, representative government offices are filled through elections.[88] The second attribute is Fundamental Rights in which there must be access to justice meaning the legal system is fair with citizens having the ability to be under the jurisdiction of competent, independent, and impartial tribunals with the right to seek redress. The civil liberties and rights of citizens must also be respected with citizens being able to enjoy the freedoms of expression, association, religion, movement, and personal integrity and security. Finally, social rights and equality focuses on the basic welfare, political, and social equality between social groups and genders.[89]

The third attribute is checks on government which begins with an effective parliament or legislature that is capable of overseeing the executive. Along with this there must be judicial independence meaning that the courts are not subject to undue influence from the other branches of government, especially the executive. Media integrity is also mentioned as the media landscape offers diverse and critical coverage of political issues.[90] In addition, it is important to note that there is an ongoing debate about judicial review. One side of the argument claims that it is 'politically illegitimate, so far as democratic values are concerned: by privileging majority voting among a small number of unelected and unaccountable judges, it disenfranchises ordinary citizens and brushes aside cherished principles of representation and political equality.[91] However, the opposing argument claims that a strong judicial review can be justified on democratic grounds and

[88] Svend-Erik Skaaning supar note, 85: 16 -17
[89] Ibid
[90] Ibid
[91] Jeremy Waldron, "The Core of the Case against Judicial Review," The Yale Law Journal 115, no. 6 (January 2006): pp. 1346-1406, https://doi.org/10.2307/20455656, 1353.

is therefore compatible with democratic values.[92] The GSoDs' viewpoint on this issue is that the judicial independence should support the courts exercising weak judicial review.[93]

The fourth attribute is impartial administration which first focuses on the absence of corruption. This concept focuses on the abuse of office from the executive, and public administration. Along with this there is the concept of predictable enforcement which focuses on the executive and public officials enforcing laws in a predictable manner[94] Finally the fifth attribute is participatory engagement. The participation of civil society is important to the attribute as it focuses on which organized, voluntary, self-generating, and autonomous social life is dense and vibrant. In addition, there is electoral participation that focus on the extent to which citizens vote in national legislative and executive elections. In order to have good participatory engagement there must be direct democracy meaning that citizens can participate in direct popular decision-making. Finally, there must also be local democracy meaning citizens are able to participate in free elections for influential local governments.[95]

The next democracy overview / index that will be discussed is the V-dem Democracy Report of 2022 where the report presents the view of how liberal democracy is fairing throughout the world. V-dem views democracy the Liberal Democracy Index (LDI) which combines the electoral "core" institutions with liberal aspects – executive constraint by the legislature and high courts, and rule of law and individual rights. This index also includes a subcategory of The Regimes of the World gives a categorical measure classifying countries into four distinct regimes: the two forms of democracy (electoral and liberal) and two types of autocracies (electoral and closed). In this index, to be minimally democratic, i.e. an electoral democracy, a country must meet sufficiently high levels of free and fair elections as well as universal suffrage, freedom of expression and association. Countries in which liberal aspects (executive constraint by the legislature and high courts, rule of law and individual rights) are present are placed at the top of the requirements for an electoral democracy and are considered liberal democracies.[96] V-dem claims to typically gather data from five experts per country-year observation, using a pool of over

[92] Annabelle Lever, "Democracy and Judicial Review: Are They Really Incompatible?," Perspectives on Politics 7, no. 4 (December 1, 2009): pp. 805-822, https://doi.org/10.1017/s1537592709991812. 820 - 822
[93] Svend-Erik Skaaning op. cit, 18
[94] Ibid 17
[95] Svend-Erik Skaaning supar note, 85: 20
[96] Nazifa Alizada, *Autocratization Changing Nature?* (Gothenburg, , Sweden: V-dem institute, 2022) https://v-dem.net/media/publications/dr_2022.pdf, 13.

3,700 country experts who provide judgment on different concepts and cases. Experts hail from almost every country in the world, allowing us to leverage diverse opinions.[97]

The V-Dem Liberal Democracy Index (LDI) captures both liberal and electoral aspects of democracy based on the 71 indicators included in the Liberal Component Index (LCI) and the Electoral Democracy Index (EDI). The EDI reflects a relatively ambitious idea of electoral democracy where a number of institutional features guarantee free and fair elections such as freedom of association and freedom of expression. The LCI goes further and captures the limits placed on governments in terms of two key aspects: the protection of individual liberties and the checks and balances between institutions.[98] The V-Dem explains the Electoral Democracy Index (EDI) further by claiming that it reveals not only the extent to which regimes hold clean, free and fair elections, but also their actual freedom of expression, alternative sources of information and association, as well as male and female suffrage and the degree to which government policy is vested in elected political officials.[99] The liberal principle of democracy, according to V-dem, embodies the importance of protecting individual and minority rights against both the tyranny of the state and the tyranny of the majority. V-dem states that it also captures the "horizontal" methods of accountability between more or less equally standing institutions that ensure the effective checks and balances between institutions and limit the exercise of executive power. This is achieved by a strong rule of law and constitutionally protected civil liberties, independent judiciary and a strong parliament that are able to hold the executive accountable and limit its powers.[100]

The last index that is more democratically aligned is the Participatory Component Index. The V-Dem Participatory Component Index (PCI) considers four important aspects of citizen participation including civil society organizations, mechanisms of direct democracy, and participation and representation through local and regional governments.[101] There are also two more indexes used by V-dem being the Egalitarian Component Index and the Deliberative Component Index. The reason these two indexes unique due to them containing items which could be consequences of democracy but are not the contributing factors towards democracy. The items

[97] Ibid 48
[98] Ibid 50
[99] Ibid 51
[100] Ibid 52
[101] Nazifa Alizada supra notes, 96: 54

can include educational equality and health equality as these are not always determined by democracy. A. Roberts makes a compelling argument against the use of social factors in democratic quality indexes stating: “A stronger reason for rejecting this approach is that democracy does not imply particular kinds of policy. It does imply a government that is responsive to citizens, but it leaves citizen preferences open”.[102] This also includes arguments of the distribution of power via gender at most power is distributed by socioeconomic position and is not part of the quality of democracy in a nation if the distribution is achieved throughout legal obrutions. Democracy as system is good one as it gives everyone an opportunity to participate in the process, but by nature not everyone will win based on their skills and resources. People with access to greater wealth will be able to have greater influence on the political system simply by being able to advertise themselves. Similarly, just because voters choose more male candidates does not mean there is an undemocratic system, it means that voter preferences are being respected.

When looking at the V-dem application of their system on the world we can see a large number of figures and graphs, but there is a lack of explanation toward the reasoning behind nation rankings. For example, V-Dem claims that the data shows substantial deteriorations in government censorship of the media and harassment of journalists in 21 autocratizing countries. For instance, increased media censorship took place in Mauritius, Poland, and Slovenia.[103] But this does not provide an example of how this was calibrated as from an earlier analysis there was no indication of a substantial increase of media censorship in Poland. The examples given in the article while worthy of investigation, seem to be amounting toward the central government increasing its own control over publicly owned media channels not private ones. In Europe, Greece and Poland registered substantial and significant decline in the legislature’s propensity to investigate the executive over the last decade is another claim that is left unexplained by V-dem.[104] The lack of explanations and reasoning does give an impression of inaccuracy toward the V-dem index. Therefore, this index has the need for significant improvement and perhaps narrowing of the definition of democracy to ensure more accurate results.

The final index that will be discussed is the Sustainable Governance indicators Quality of democracy. To begin this discussion, index focus on the key finding for the Polish case, SGI

[102] Andrew Roberts supra note, 2: 14
[103] Nazifa Alizada op. cit, 22
[104] Ibid 23

provides this description: “A change in composition of the main election oversight panels has increased government influence over these bodies. Government influence over public media reporting has strongly increased, with efforts to control private media also evident. Efforts to redistrict access to government information have in part been blocked by the courts. The government’s control over the judiciary, along with its xenophobic, discriminatory, and offensive rhetoric against minorities, women activists, and other opponents, has diminished respect for civil rights. NGOs that try to defend civil rights are increasingly confronted with hate speech, criticism, and lawsuits. Public positions tend to be filled on the basis of political loyalty. Legal certainty has strongly declined, with many new initiatives needing revision. The government has strongly undermined judicial independence. A new disciplinary chamber in the Supreme Court has the power to penalize judges based on the content of their decisions, further increasing legal uncertainty. Clientelistic networks have emerged, with some high-ranking politicians convicted of abuse of office.”[105] This description shows several aspects that do not fit into the previous descriptions of democratic quality that we have so far discussed. The GSI assessment of democracy focuses on five indicator categories being candidacy procedures, media access, voting and registration rights, party financing and popular decision-making. The lowest scores for Poland are in media access with SGI stating that legally, parties and candidates have equal access to public and private media. In the nationwide candidate lists, the election code requires public TV and radio stations to reserve time for the free broadcasting of campaign materials and for televised candidate debates. SGI claims that while political influence on the media has always been a problem, public media reporting now has a clear partisan bias and media access is more difficult for opposition parties.[106]

The second indicator is access to information. This indicator encompasses media freedom, media pluralism, and access to government information. In the context of Poland, SGI ranks Poland in low status while giving an explanation behind the decision. In media freedom, the SGI states that the PiS government does not respect the independence of the media with The Council of National Media, being established in June 2016, appointing the management boards of public TV and radio, and the Polish Press Agency (PAP).[107] SGI also claims that the council is dominated

[105] Bertelsmann Stiftung, ed., “Poland,” SGI 2020 | Poland | Quality of Democracy, 2020, https://www.sgi-network.org/2020/Poland/Quality_of_Democracy.
[106] Ibid
[107] Ibid

by the PiS taking instructions directly from Jarosław Kaczyński.[108] The SGI has also stated that the cases of politically motivated appointments and dismissals at TVP, Poland's public TV broadcaster, and the public Polskie Radio are numerous. According to estimates, at least 250 journalists either lost their jobs or resigned from their positions for political reasons in 2016. TVPs selectivity in framing and priming has gone so far as to manipulate the news in social, cultural, and artistic matters.[109] SGI also provides an example of foreign interference to Polish domestic policy on media by stating that after pressure from abroad, most notably from the United States, the PiS government dropped its original plans to "re-Polonize" the media by limiting the maximum foreign ownership stake allowed in Polish media companies to between 15% and 20%.[110] Poland's media market is one of the largest in Europe, SGI concluded that it has a diverse mix of public and private media organizations and is reflecting a broad spectrum of political opinions. While the public TV station TVP and its four channels claim a large share of the market, and local authorities often publish newspapers and magazines, most Polish print media and radio are privately owned.[111]

The third indicator is the civil rights and political liberties encompassed three parts: civil rights, political liberties and non-discrimination. In the area of civil rights the SGI rates Poland 4/10 due to the governments control on the judiciary and frequent attacks on the Commissioner for Human Rights, compounded by the xenophobic, discriminatory and offensive rhetoric used by prominent members of government against minorities, women activists and other people who do not fit into their worldview.[112] SGI claims these issues are frequent infringements of civil rights. SGI claims the National Freedom Institute and the Center for the Development of Civil Society is responsible for the public funding of NGOs has denied funds for NGOs that focus on women's rights, domestic violence, and asylum-seekers' and refugees' issues.[113] In regards to political liberties SGI has two complaints. First, the Law on Public Assembly has been made more restrictive by privileging state-organized and regular public events over one-off demonstrations organized by social actors. According to the new rules passed by the Sejm in December 2016, assemblies of citizens cannot be held at the same time and place as gatherings organized by the

108 Ibid
109 Ibid
110 Ibid
111 Bertelsmann Stiftung, ed., "Poland," SGI 2020 | Poland | Quality of Democracy, 2020, https://www.sgi-network.org/2020/Poland/Quality_of_Democracy.
112 Ibid
113 Ibid

public authorities or churches. This means that counter-demonstrations to periodic assemblies, typically devoted to patriotic, religious, and historic events, are forbidden, which prioritizes governmental or government-supported assemblies. A second reason for concern is that the treatment of demonstrators by the police has worsened, as evidenced by an increasing number of interrogations and arrests, and growing police violence.[114] The last part is nondiscrimination, SGI states that an anti-discrimination policy has not featured prominently on the agenda of the PiS government. Quite to the contrary, many public positions are not filled according to any anti-discrimination regulations, but according to political loyalty.[115]

The final indicator of quality of democracy is rule of law consisting of legal certainty, judicial review, appointment of justices, and corruption prevention. The SGI claims that some of the government's legal initiatives have been so half-baked that they had to be amended or suspended.[116] On several occasions, high-ranking PiS politicians have shown their disrespect for the law. The protracted conflicts between the government and the important parts of the judiciary have meant that justices and citizens have had to deal with opposing interpretations of the legal status quo.[117] The area of appointment of justices has received a low score of 2/10 with SGI explaining this by stating: "The appointment of justices to the Constitutional Tribunal has been a major political issue since PiS came to power in 2015. The PiS government questioned the appointment of the five justices elected in the final session of the old parliament. Conversely, the sitting justices did not accept the justices appointed by the new parliament. The resulting stalemate took until December 2016 when the term of Constitutional Tribunal President Andrzej Rzepliński expired, and the government succeeded in installing Julia Przyłębska as his successor by legally dubious means. In November 2019, the Sejm elected two highly controversial justices."[118] Both of whom are former PiS members of parliament, were initially considered too old and have previously shown disrespect for civil rights. The main problem for SGI is that all the judges are appointed exclusively by a single body irrespective of other institutions.[119]

[114] Ibid
[115] Ibid
[116] Ibid
[117] Bertelsmann Stiftung, ed., "Poland," SGI 2020 | Poland | Quality of Democracy, 2020, https://www.sgi-network.org/2020/Poland/Quality_of_Democracy.
[118] Ibid
[119] Ibid

In conclusion of these indexes, have been observed to make consistent misrepresentation of the Polish PiS party reforms, an overly inclusive definition of quality of democracy, including Liberalism as an integral part of democracy. The inclusion of liberal ideology in democratic quality evaluation transforms indexes from evaluating the issue of a nations governing procedures being in compliance with core democratic features (elections and check on government), to a nations public policy being close to substantive democracy and liberalism. The consequences of this approach can cause certain public policies to be deemed undemocratic even if they are not changing the overall political system or unjustly restricting civil liberties .and in the FH case we can see a historical bias and subsequent allegations of bias by the heritage foundation. One way to solve these issues is to adopt an objective conceptualization of the quality of democracy and review the laws which have already been passed rather than being concerned with rhetoric or social policy.

3. Democratic backsliding in Poland

In 2015, Poland underwent a radical political shift. Civic Platform (*Platforma Obywatelska* (PO)) party with the Polish People's Party (*Polskie Stronnictwo Ludowe* (PSL)) lost the elections to the Law and Justice (*Prawo i Sprawiedliwość* (PiS)) party. PiS victory in the elections gave them and out-right majority in both the Polish Sejm (Lower parliament house) and the senate (Upper parliament house). The BBC reported "Exit polls suggested Law and Justice would have a small majority – making it the first time a single party has won enough seats to govern alone since democracy was restored in 1989".[120] But despite the electoral success PiS would soon find itself within a constitutional crisis over the control of the nations' highest constitutional court. W. Sadurski mentions that the break down in the Polish political system started with a fight over the constitutional tribunal when the PiS president refused to take oaths from the PO appointed judges and with the newly elected PiS majority parliament invalidated the PO judges' elections.[121] While strictly speaking, this statement is true the constitutional system was starting to break down but it does seem that the author lays more blame of the entire situation on the PiS party rather than the PO. The PO president signed this election during his last days in office and W. Sadurski mentions that this was an incredibly dishonest move.[122] The moves by the PO indicate that the PiS might not be solely responsible for democratic backsliding in Poland, as in the later ruling the constitutional tribunal did determine that the August law caused the election of the October judges to be unconstitutional. Sava Jankovic in the article titled "Polish Democracy under Threat? An Issue of Mere Politics or a Real Danger?" summarizes the whole fight with this take: "The issue of the appointment of Constitutional Tribunal judges was a consequence of mistakes by the Civic Platform Party, including its willingness to elect two judges that should have been elected during the term of the next Sejm. This was exacerbated by a lack of clarity in respect of the law in relation to the period during which the President has to take oath from the elected judges." [123]

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[120] BBC News, "Poland Elections: Conservatives Secure Decisive Win," BBC News (BBC News, October 26, 2015), https://web.archive.org/web/20220428123507/https://www.bbc.com/news/world-europe-34631826.
[121] Wojciech Sadurski, "Dismantling Checks and Balances (i): The Remaking of the Constitutional Tribunal," *Poland's Constitutional Breakdown*, 2019, pp. 58-95, https://doi.org/10.1093/oso/9780198840503.003.0003, 62 - 63.
[122] Ibid 62
[123] Sava Jankovic, "Polish Democracy under Threat? an Issue of Mere Politics or a Real Danger?," *Baltic Journal of Law & Politics* 9, no. 1 (January 2016): pp. 49-68, https://doi.org/10.1515/bjlp-2016-0003 , 63.

Another contributing factor caused by the PiS party in relation to the quality of Polish democracy can be found in Wrobel's writings. According to S. Wrobel the decline is due to political corruption in the so called 'Srebrna affair' or a scandal of the 'two towers' where the PiS party president Jarosław Kaczynski allegedly bribed Fr. Rafał Sawicz to sign a resolution allowing the building of skyscrapers.[124] The prosecutor's office refused to start an investigation stating " that Lech Kaczy´nski Institute Foundation, which is the owner of the main investor—Srebrna Company, whose council is Jarosław Kaczy´nski, does not conduct any economic activity. Only a person who performs a managerial function in an entity carrying out economic activity may be the subject of a crime'—we read, in the justification. Secondly, according to the prosecutor's office, the priest is only a member of the collective body, which takes resolutions, statements, and other decisions by a simple majority of votes. According to the prosecutor, the dispute between the parties is purely civil law and may be resolved through civil proceedings.[125] To properly determine if this is case of corruption and possibly prosecutorial misconduct, we need to analyze the Polish criminal law code to determine if this dispute is civil law and or criminal law. Additionally, corruption does lower democratic quality but only by its scale and frequency. For this to occur we need to view democracy as a set of procedures that allows citizens to select their leaders in a competitive process.[126] Corruption, which greatly lowers a nations democracy quality, is one that is either so widespread that it impedes government work, or it obstructs the electoral process. On of main reasons why corruption alone should be considered indicator of low democratic quality is that democracy alone does not cure societal ills according to Andrew Roberts.[127]

Asides from legal fights, there are also what Ramona Coman & Clara Volintiru call "anti-liberal" ideas present in the Polish PiS party agenda since 2015. In the authors opinion the Law and Justice Party has dramatically eroded liberal democracy. [128] Anti-liberal ideas include new and old conservative ideas about abortion, minority rights and gender issues; most of their promoters are anti-immigrants, they tend to be patriotic and religious.[129] Communication of such ideas according to the author could be utilized to maximize electoral support by creating stronger and

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[124] Szymon Wróbel, "Populism as an Implementation of National Biopolitics: The Case of Poland," The Palgrave Handbook of Populism, 2021, pp. 545-562, https://doi.org/10.1007/978-3-030-80803-7_34, 554
[125] Wróbel, supra note,130: 554.
[126] Roberts, supra note, 2:23
[127] Ibid
[128] Ramona Coman and Clara Volintiru, "Anti-Liberal Ideas and Institutional Change in Central and Eastern Europe," European Politics and Society, 2021, pp. 1-17, https://doi.org/10.1080/23745118.2021.1956236, 12.
[129] Ibid 4

more threatening demarcation lines against non-partisan social groups.[130] One of ways Ramona Coman & Clara Volintiru argues "anti-liberal" parties reach power are through strategies to (de)legitimize opposition and civil society through media campaigns which are under the control of influential political actors.[131] Polarization is also central, that is the division lines between 'us' and 'them', mainly enemies (e.g. migrants, immigrants, elites), motivated by the credo that Christianism and Western civilization is superior and based on the rejection of multiculturalism on the grounds that mixing cultures engenders identity which leads to a 'carnival of hate'.[132] To alter the foundations of the liberal order, some CEE governments use or abuse both constitutional and unconstitutional means. P. Blokker claims that legality has been invoked to legitimize controversial changes in which the law has become a vector of change to support 'legalistic revolutions', 'counter-revolution by law' or 'counter-constitutionalism.[133]

Another takes on democratic backsliding is viewed through Caesarean politics. A brief understanding of Caesarean politics is the plebiscitary character of elections, disdain for parliament, the non-toleration of autonomous powers within the government and a failure to attract or suffer independent political minds.[134] Robert Sata & Ireneusz Pawel Karolewski begin with outlining Caesarean politics as a regime that rests on three pillars that systematically interact and reinforce each other: (1) patronalism and (2) state capture that are justified with (3) exclusionary identity politics.[135]

The first key aspect of Caesarean politics is patronalism, a system, in which political authority centers on a single patron controlling an elaborate system of rewards and punishments.[136] As Henry E. Hale notes in these patron client networks, informal understandings dominate over formal rules and personal connections are paramount. Since personal access to the patron is essential for political survival and enrichment.[137] This undermines democratic rules of the game,

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[130] Ibid 5
[131] Ibid 9
[132] Yascha Mounk, The People vs Democracy: Why Our Freedom Is in Danger and How to Save It (Cambridge,, MA: Harvard University Press, 2019), 31.
[133] Paul Blokker, "Populism as a Constitutional Project," International Journal of Constitutional Law 17, no. 2 (2019): pp. 536-553, https://doi.org/10.1093/icon/moz028, 540.
[134] Gerhard Casper, "Caesarism in Democratic Politics: Reflections on Max Weber," SSRN Electronic Journal, 2007, https://doi.org/10.2139/ssrn.1032647.
[135] Robert Sata and Ireneusz Pawel Karolewski, "Caesarean Politics in Hungary and Poland," East European Politics 36, no. 2 (2019): pp. 206-225, https://doi.org/10.1080/21599165.2019.1703694, 207.
[136] Ibid 207-208
[137] Henry E. Hale, "Russian Patronal Politics beyond Putin," Daedalus 146, no. 2 (2017): pp. 30-40, https://doi.org/10.1162/daed_a_00432, 32.

making those at top being elected not by people but rather by an enclosed system of patronalism. Additionally, these types of systems where elections still happen media control is extremely important as political success, in particular in political regimes allowing free elections, can depend on media coverage, outreach and impact. [138] In other words, those who control the media control the outcome of elections due to information presented to citizens which can be crafted to support certain parties in a patronalism system.

The second key aspect of Caesarean politics is state capture.[139] State capture is not just widespread corruption, but its essence lies in networks of corrupt actors that act collectively to pursue private interest at the expense of the public good.[140] In Eastern Europe (sometimes called Central Eastern Europe) are two distinct state captures on display. First, the party state capture (political monopoly of a party taking control over key state institutions, including courts and enterprises) and second the corporate state capture where public power is exercised mainly for private gain.[141] Examples of corporate state capture can be seen in Czech Republic, Slovakia, Romania, and Bulgaria. While Hungary and Poland stand for party state capture. [142] Robert Sata & Ireneusz Pawel Karolewski stresses that understanding the difference between party and corporate state captures are important since corporate capture aims to weaken or disable policies (i.e. state activity) while party state capture strengthens policy implementation and responsiveness because party preferences are immediately turned into policies.[143]Another important difference is that a corporate (or cartel) state capture is less likely to be interested in changing the ideological core of policies but rather seek institutional and policy stability, reflecting static corporate demands.[144]

The last aspect of Cesarean politics concerns exclusionary identity politics that are constructed to legitimize regime change. Since the primacy of the leader is the cornerstone of politics, identity discourses are employed to establish the leader/patron as the spearhead of the homogenous community, surrounded by dangerous "others".[145] Usually target groups of exclusion

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[138] Op Ci Sata 208
[139] Ibid
[140] Mihály Fazekas and István János Tóth, "From Corruption to State Capture," Political Research Quarterly 69, no. 2 (2016): pp. 320-334, https://doi.org/10.1177/1065912916639137.
[141] Abby Innes, "The Political Economy of State Capture in Central Europe," *JCMS: Journal of Common Market Studies* 52, no. 1 (2013): pp. 88-104, https://doi.org/10.1111/jcms.12079, 88.
[142] Op Ci Robert Sata & Ireneusz Pawel Karolewski 208.
[143] Robert Sata & Ireneusz Pawel Karolewski supra note, 66:208
[144] Robert Sata & Ireneusz Pawel Karolewski supra note, 134:208
[145] Ibid

are migrants and minorities. [146] In Eastern Europe, liberals from opposition parties, in league with international organisations, or any critic of the regime can easily find themselves presented as internal and external enemies.[147] This can be observed with the continuous friction between the PiS and the European Union, in the 2015 and the 2019 election program the PiS singled out the EU as one of the aggressive powers seeking to interfere with the Polish system. Robert Sata & Ireneusz Pawel Karolewski see Caesarean identity politics functioning as legitimizing the expansion of the power of the ruler/party at the expense of both popular will and political opposition through self-serving reforms of state institutions, restrictive laws or denial of liberties and rights.[148]

With an understanding of cesarean politics, it is important to understand that there was a gradual build up toward these kind of politics in Poland. In Poland in the mid-1990s, the social-democratic SLD (Alliance of the Democratic Left) established a "royal court" system of privileged businessmen, media moguls and clergy representatives. Additionally, the extreme polarization between left-liberal and conservative-right parties not only led to a general distrust of society towards public institutions but parties on both side of the ideological spectrum engaged in mutual enemy construction, demonizing each other, thus laying grounds for exclusionary identity politics.[149] Trust towards the government in Poland in 2013 was low, around only 14%.[150] This laid the groundwork for the PiS party to take hold and begin their reforms. As to prove PiS words about the PO-PSL being power-clinging cynics, only eroding state institutions serving public interest there was a leak of secret recordings detailing ruling politicians to have seemed to have played a role in ousting them from government. Thus left-liberal elites have discredited themselves allowing corruption to flourish while doing little to ease the social transition to liberal capitalism in growing globalization.[151] While this doesn't excuse further PiS actions, my position is that Poland was not a perfect democracy before PiS took over.

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[146] William Walters, "Deportation, Expulsion, and the International Police of Aliens," *Citizenship Studies* 6, no. 3 (2002): pp. 265-292, https://doi.org/10.1080/1362102022000011612.
[147] Op cit Robert Sata & Ireneusz Pawel Karolewski 211
[148] Ibid 211-212
[149] Ibid 213-214
[150] Eurobarometer. 2019. European Commission (1974–2019). https://ec.europa.eu/commfrontoffice/publicopinion/index.cfm
[151] Op cit Robert Sata & Ireneusz Pawel Karolewski 214

In 2015 PiS didn't win a supermajority in the parliament allowing the enactment of constitutional changes forcing a "bending" law.[152] PiS had to use ordinary legislation to subvert constitutional controls.[153] There are some examples of PiS using public institutions as weapons against the opposition to limit political competition. The PiS-appointed head of KNF, Chrzanowski was arrested on corruption charges in November 2018. As political retaliation, PiS Justice Minister Ziobro ordered the arrest of the former head of KNF, PO (Civic Platform) appointee Jakubiak in December 2018 but had to release him for lack of evidence.[154] However, this could be an example of political conflict between the two parties, while not conducive to democratic quality it doesn't lay sole blame upon the PiS party. As claimed earlier the groundwork for patronalism was made not by the PiS party but rather by the SLD. In this case PiS fault is not trying to move away from established rules of game, leaving us with questions can they act in other way and fulfil wishes or their voters

Another point of contention for democracy is the media reforms initiated by the PiS also aimed at replacing leading personnel in public radio and TV station outlets. The timeline for such change with such an aim is claimed to have been in December 2015, the government passed controversial laws enabling the Minister of Treasury to directly appoint the heads of public TV and radio. In 2016, PiS established the Council of National Media to appoint the head of the Polish Television, the Polish Radio, and the Polish Press Agency. At the same time, the constitutional organ – the National Broadcasting Council – has been rendered powerless and eventually taken over entirely by PiS.[155] Control over media was allegedly expanded using PiS party patronal network in control of the regulatory authorities. One such instance was involved one of the largest private broadcasters, TVN was fined by the PiS-occupied National Broadcasting Council for its allegedly one-sided reporting of the 2016 protests against the PiS reforms of the court system.[156] However, the fine was withdrawn after pressures from the US as TVN was bought by the American Discovery Corporation in 2015.[157] While on the surface this might be government over-reach and the withdrawal of the fine as an admission of fault, there is also foreign interest interference in

[152] Andrea L. Pirro and Ben Stanley, "Forging, Bending, and Breaking: Enacting the 'Illiberal Playbook' in Hungary and Poland," Perspectives on Politics 20, no. 1 (2021): pp. 86-101, https://doi.org/10.1017/s1537592721001924, 98.
[153] Ibid 98
[154] Robert Sata & Ireneusz Pawel Karolewski supra note, 134:220
[155] Ibid 213
[156] Ibid 214
[157] Izabela Trzaska, "Gigantyczna Kara Dla TVN. Krrit Cofa Decyzję Z Grudnia," www.money.pl, January 10, 2018, https://www.money.pl/gospodarka/wiadomosci/artykul/kara-tvn-krrit,132,0,2396036.html.

Polish domestic politics issues by foreign powers like US. There might have been some merit behind the National Broadcasting Councils' decision to issue the fine but if TVN was able to broadcast one-sided news and still remain operational that shows that the Polish government hasn't engaged in overt censorship. This warrants further investigation to find out If claims of the PiS government limiting access to officials without a valid reason and threatening reporters with legal action baselessly are real then we can observe poor of democratic quality in Poland. This can be evaluated by looking at arguments formed by the government and seeing if they have merit or was this a failed attempt to engage in censorship.

The main focal point of contention for democratic backsliding, why it has been often associated with rule of law issues, is the fight for control of the constitutional tribunal and the PiS legal system reforms. Contention began when the PO and PSL interfered with the set-up of the Constitutional Court, fearing electoral loss to PiS. The PO-PSL parliamentary majority elected a number of "their" judges to the Constitutional Court months before the official retirement of the judges to be replaced.[158] W. Sadurski mentions that the break down in the Polish political system started with the fight over the constitutional tribunal when the PiS president refused to take oaths from PO appointed judges and later newly elected PiS majority parliament invalidated PO judges' elections.[159] While strictly speaking this statement is true the constitutional system was starting to break down, seems that the author lays more blame on PiS party than the PO. The PO president signed this law during his last days in office and Sadurski mentions that this was an incredibly dishonest move. [160] Robert Sata & Ireneusz Pawel Karolewski concur while it was a rather transparent attempt to rig the Constitutional Court in favor of PO and PSL, it also politicized the Court, weakened its legitimacy, and prompted its eventual destruction by PiS, equipped with the argument that the Court is not impartial anymore. This way, the PO-PSL government opened the way for the "winner takes it all" practice, in which all institutions, including the courts, are "up for grabs," once a party wins election.[161] As mentioned earlier, this entire fight wasn't the first round of democratic backsliding, but it was started by a desire for the previous government to retain some sort of political power and influence even after they lose elections.

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[158] Robert Sata & Ireneusz Pawel Karolewski supra note, 134:212

[159] Wojciech Sadurski, "Dismantling Checks and Balances (i): The Remaking of the Constitutional Tribunal," *Poland's Constitutional Breakdown*, 2019, pp. 58-95, https://doi.org/10.1093/oso/9780198840503.003.0003, 62 - 63.

[160] Ibid 62.

[161] Op cit Robert Sata & Ireneusz Pawel Karolewski op. cit, 216

Robert Sata & Ireneusz Pawel Karolewski also conclude that law demanding higher majorities between judges to come to valid decisions, a higher number of judges, as well as a chronological order of deciding on the constitutional complaints.[162] The PO-PSL attempt to rig court is often downplayed by scholars as seen in the examples of Andrea L. P. Pirro and Ben Stanley views on the fight for the constitutional court "The first step in the paralyzing of the Tribunal was the refusal by PiS-aligned President Andrzej Duda to administer the oaths of office to three lawfully elected Tribunal judges." This implies that PiS are ones attacking Polish judicial institutions, but as later authors admit that: "anticipating an electoral defeat, the outgoing coalition government of the conservative-liberal Civic Platform and the agrarian-conservative Polish People's Party had appointed five new judges to the Constitutional Tribunal. This attempt at court-packing was rebuffed by the Tribunal, which ruled that the outgoing parliament only had the right to appoint three new judges to the Tribunal, as the other two vacancies fell during the term of the new parliament".[163] As such, it is true that the crisis is evidence of democratic backsliding, but it isn't fair to lay the blame solely on the PiS party actions since during the first PiS term in government the court obstructed PiS's previous attempts at reforms.[164]

What is certainly a clearer example of PiS being instigators of the offensive against the judicial institutions are the attempts to purge and replace members of the Supreme Court by lowering the retirement age for judges.[165] This resulted in 27 of 72 judges of the Supreme Court having been forced to retire, including the First President of the Supreme Court, Malgorzata Gersdorf. Additionally, the President of Poland was given the power to extend judges' tenure, although there was no such constitutional provision.[166] In response, the EU interfered and threatened Poland with financial punishments. It should also be noted that the rule of law has been often incorrectly analyzed in the case of the National Council for the Judiciary (KRS), the body that appoints and disciplines judges. It is often said that the PiS established this council, but that is incorrect since Article 187.1 of the 1997 Constitution sets out the composition and mode of appointment of the KRS. The Constitution does not specify who chooses the KRS judges, but in accordance with an established norm they had previously been chosen by the judiciary. Amending

[162] Ibid
[163] Andrea L. Pirro and Ben Stanley supra notes, 151: 98
[164] Ibid
[165] Andrea L. Pirro and Ben Stanley supra notes, 151: 98
[166] Robert Sata & Ireneusz Pawel Karolewski supra note, 134:217

the law on the KRS in December 2017, PiS instead granted the parliament the right to appoint judges, meaning that of the twenty-five members of the institution, twenty-three were now to be appointed by the legislature, increasing legislative power over the judiciary. [167]

In the discussion of backsliding is important to note the PiS governments' attitude toward NGOs. According to A.L.P. Pirro and Ben Stanley the PiS has consistently evinced a mistrust for organizations that operate outside the state's sphere of influence, seeing an independent and pluralistic civil society as a Trojan horse for foreign interests. Accordingly, the government used instruments of funding and oversight to enact a shift away from liberal initiatives. To achieve this, it created two institutions, the Public Benefit Committee, and the National Institute of Freedom–Centre for the Development of Civil Society, to centralize the coordination and monitoring of the cooperation between the state administration and civil society organizations.[168] Agnieszka Markowska expanded further on NGO regulations concerning funding. The main point the author argues is that the more democratic a nation is the more environment protections there are.[169]. It points out, "In August 2020, the Polish Minister of Justice during a press conference organized together with the Minister of Environment announced a new proposal for a legal act on transparency of financing of NGOs. According to the draft act, NGOs whose incomes originate in at least 10% from foreign sources would be obliged, before making any use of the foreign financial resources, to apply for registration at the Ministry of Justice."[170] Strictly speaking, this is a way of controlling NGOs as they are now required by law to register their financial sources; NGOs would also be obliged to inform the public about their status as 'an organization financed from foreign financial sources' – this information would have to be included in the heading of the NGOs websites.[171]Similar laws mandating NGO to disclose their funding to public exist in other democratic nations. Although not all NGOs are distrusted by PiS as in Poland, for example, some NGOs were among the first to oppose the ratification of the Council of Europe's Istanbul convention on violence against women, as early as 2012.[172] The PiS party also supports the influence of the church over politics and policies, promoting a 'new moral order', and subsequently

[167] Andrea L. P. Pirro and Ben Stanley op. cit, 96
[168] Ibid 97
[169] Agnieszka Markowska supra note, 1:220.
[170] Ibid 227
[171] Ibid
[172] Paul Stubbs and Noémi Lendvai-Bainton, "Authoritarian Neoliberalism, Radical Conservatism and Social Policy within the European Union: Croatia, Hungary and Poland," Development and Change 51, no. 2 (2019): pp. 540-560, https://doi.org/10.1111/dech.12565, 553.

putting forth a variety of policies aimed at blocking abortion, LGBT rights, and even in-vitro fertilizations, such NGOs are highly beneficial.[173]

To conclude this section, it can be noticed developments in Poland haven't been out of the ordinary in the region. Reforms which were done by the PiS party do have points of contention especially within reforms towards the judicial system. We can see that the PO-PSL coalition, in anticipation of electoral defeat, tried to select judges to the constitutional court in an attempt tmaintain some semblance of power. This action would be an indication that the parties do not trust the system. Therefore, it can be seen that the collateral damage of this conflict has been the rule of law in Poland seemingly decreasing. The PiS attempts to extend their control over the media is concerning but most media are made up of government owned firms and private media is free and extensive in Poland thus offering a counterbalance to government owned channels. Lastly, NGO restrictions seem to be largely concerning requirements to disclose funding sources to public in event source in foreign. All of these events can be seen as contributing factors toward democratic backsliding within Poland.

[173] Alina Bârgăoanu et al., "Mainstreaming Nationalism? The Case of the Law and Justice Party (PiS)," in Why Europe?: Narratives and Counter-Narratives of European Integration, ed. Loredana Radu (Frankfurt am Main, Germany: Peter Lang GmbH, Internationaler Verlag der Wissenschaften, 2017), pp. 225-244. 227

4. Polish Law and Justice party reforms in 2015 – 2019

4.1 Methodology in use

The evaluation of Polish democratic quality shall be done in two stages. Stage one will focus on the election program with the second focusing on the laws passed. Within the scope of this work, we will be using the premises of procedural democracy. Within this concept the main premise is that democracy is upheld by procedures that allow voters to elect their government in free and fair elections and keep their governments in check i.e., the laws that are passed by the government should not infringe on the right of the people to check the government. In order to analyze laws with the intend of discovering if they impact democratic quality was use two of the five core attributes of democracy as outlined by the Global State of Democracy Indices. Within this work was limit ourselves to two of the five core features: 1. Representative Government (free and equal access to political power); 2. Checks on Government (effective control of executive power). These attributes are common among all conceptualizations of democracy. Thus they can be considered a core feature of democracy. Furthermore, focusing on the core features of democracy allows us to check if the PiS party's promised reforms were dangerous to democratic quality and how democratic backsliding has happened.

Within these two core features of democracy, seven sub-attributes will be used for analysis and categorization of the Polish laws that may impact democratic quality. First and foremost, it must determine if Poland can still be considered a representative government. To resolve this, was use the sub-attributes of GSOD under the representative government attribute:

1. Inclusive Suffrage denotes the extent to which adult citizens have equal and universal passive and active voting rights;
2. Free Political Parties denotes the extent to which political parties are free to form and campaign for political office.
3. Elected Government denotes the extent to which national, representative government offices are filled through elections.

While there is a sub-attribute known as clean elections, focusing on how free and fair the elections within a country can be, the sub-attribute shall be excluded from the primary source

analysis because the check of this attribute requires looking at how the law in Poland is used in a practical sense, rather than what laws are actually in place. While laws dictate how contesting election results are resolved, it wouldn't fully explain if elections are clean because the resolution of any irregularities is usually denoted to the judicial branch. Consequently, evaluating how independent the Polish judicial system is will answer how clean an election can be. From this, we can move on to 2nd attribute of democracy that covers Checks on Government:

- The first check is parliament. This check will be used to analyze to what extent the legislature is capable of overseeing the executive.
- The second check is judicial independence. This check will be used to analyze to what extent the courts are not subject to undue influence from the other branches of government, especially the executive.
- The third check is media integrity. This check will be used to analyze to what extent the media landscape offers diverse and critical coverage of political issues.

Within the 2nd stage of the evaluation of democratic quality in Poland, it shall perform basic doctrinal legal research where shall focus on the letter of the law rather than the law in action. Main target to find laws that would hamper the effective control of the executive power or limit free and equal access to political power.[174] The analysis of the primary sources of information (laws/bills themselves) will be supplemented with a secondary source of information from the Venice Commission reports, which will shed further light on how the PiS party has changed the Polish political system. The preliminary analysis based on the literature review has shown that there are three main areas where the Polish PiS party reforms have caused most of the controversy: The Supreme and Constitutional tribunal reforms, the prosecutor office reforms, and telecommunication law reforms which hamper media freedom. This research will focus on these areas as they have the most controversy attached to them and can be seen as impactful toward the democratic quality in Poland.

It is important to note that a single law can nullify a check completely. As such, it was track changes that negatively or positively impact checks on the government. When possible, the Venice Commission's opinion will be used as a secondary source for authoritative opinion on how specific laws could change judicial independence or other impactful areas. The final product from this will

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[174] Research Methodology https://law.indiana.libguides.com/dissertationguide

be charted below, showing which laws and their particular lines that change checks on the government.

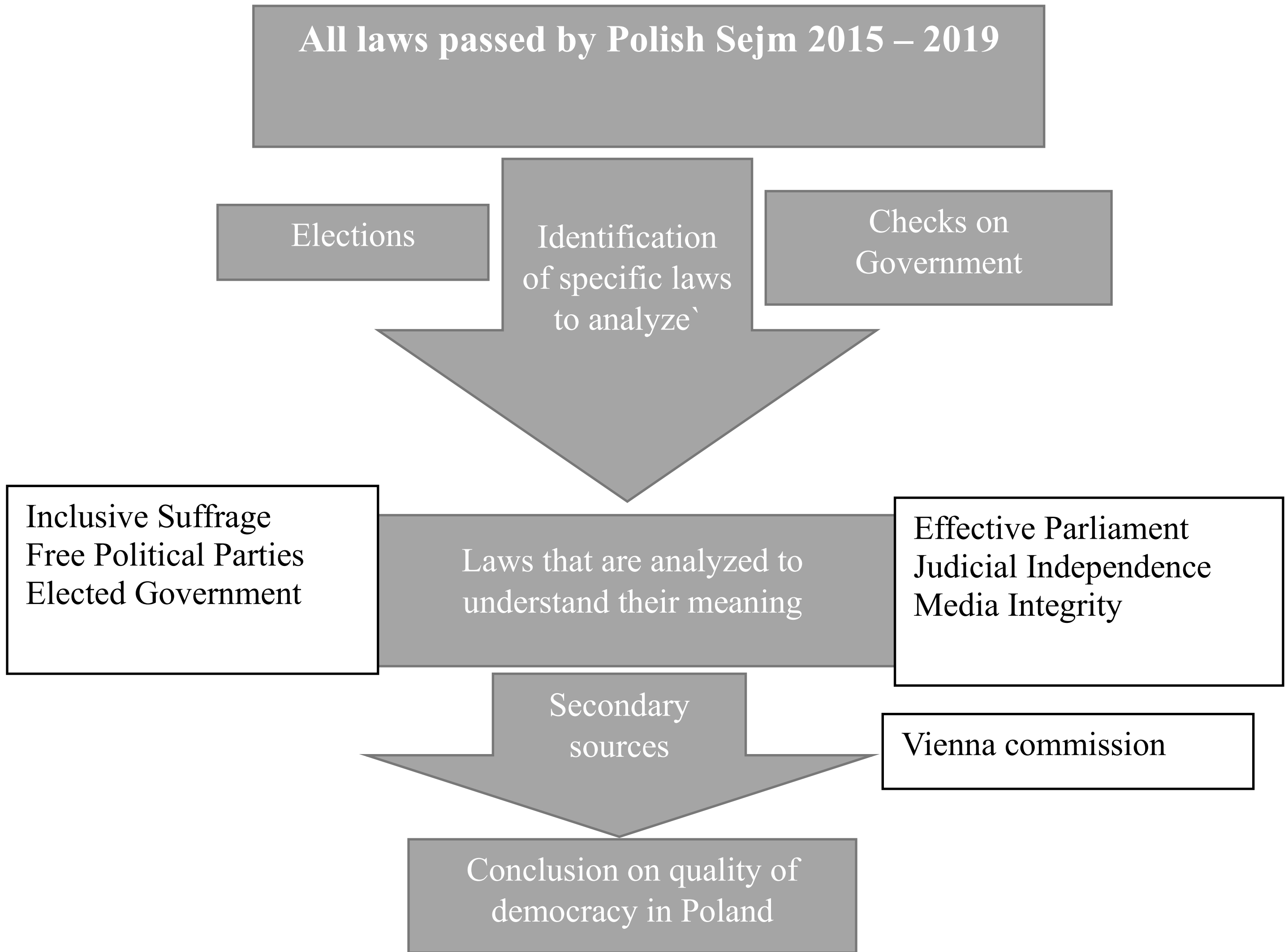

Fig. 3. Methodological scheme for doctrinal legal analysis of bills passed by Polish Sejm. Made by author of paper

To determine democratic quality, all polish laws passed between 2015 and 2019 are analyzed with skimming method for reading to determine if they effect checks on government power or elections in Poland (Fig. 3.) . After that is done remaining laws are analyzed in depth to determine if they can affect one of several sub-attributes of democratic quality. After that is done Vienna commission is used to determine context around laws passed. That is because the Vienna commission's opinion also contains Polish government understanding of laws and their intentions.

Then combining opinions of Vienna commission and content of laws which were selected to be analyzed in depth, because they effected democratic quality in meaningful way. Conclusion is provided firstly on year by year bases and then finally total big picture understanding how democratic quality has changed in Poland.

4.2. Doctrinal research of Bills passed by PiS controlled parliament 2015-2019

The judicial reforms by the PiS government had been great friction between Poland and the EU, but one might wonder if PiS reforms came out of nowhere or if PiS alluded to them in their program. The first signs that PiS will reform the Polish judicial system in their image can be seen in their diagnosis of the Polish judicial system as deficient, quote: “The judiciary is often guided by relativism, and even shows abolitionist tendencies towards people associated with the current government. At the same time, we have to deal with a completely different face of the judiciary when it punishes football fans for inscriptions in stadiums that are not favorable to Tusk. The authorities use compact police squads to pacify politically peaceful speeches by this community, while there is no reaction from the judiciary to hooligan antics.” [175] The PiS party paints a picture of Poland where the judicial system is allegedly used against citizens to crush dissent, while corruption and politicians of PO-PSL are protected.

Additionally, PiS characterizes the Polish judicial system as a state within a state, meaning that judges are not accountable and, if their rulings are found to be wrong, face no repercussions. PiS set out to reform the judicial system to its image: “First, the judiciary cannot be a "state within a state." While preserving the basic constitutional guarantees of independence and independence, citizens must not be deprived of influence over the functioning of the "third power." It is supposed to serve society, the people, and not itself. There must be effective control mechanisms to counteract the detachment of the links of the judiciary from its servant role to society, and to correct mistakes”.[176] PiS claims to want to remove nepotism from the judiciary claiming that it will bring about the elimination of nepotism in the judiciary. We will prevent the emergence of family clans in the courts, as well as clans based on the exercise of the professions of judge, prosecutor, lawyer, or legal adviser by persons linked by close family ties. [177]One of the ways PiS sets achievements this is by changing how judges to the national council of the judiciary are selected, PiS’s idea is this “The revised composition of the Council should ensure a balance between the judicial factor

[175] Program PiS 2014 41
[176] Program PiS 2014 80
[177] Program PiS 2014 88

and representatives of the legislative and executive branches of government, as well as those circles from which candidates for judicial positions will be recruited, including the scientific community."[178] Lastly, PiS also promises to merge the general prosecutor's office with the minister of justice claiming that: "A return to a model in which the Minister of Justice is also the General Prosecutor would be in line with the legal tradition of the Republic".[179] While there are more reforms that PiS promised to the judiciary, but there is a clear line of promise to expand the executive government's power over courts. Additionally, we can notice calls to have some sort of mechanism to punish judges who fall out of the government policy lines. But it there is also promised to restore the district court; expand court fee concessions and the possibility of obtaining ex officio legal aid, supporting the expansion of the legal aid network. [180]

4.2.1. Legal analysis of bills passed by Polish Sejm Year 2015

In 2015 alone, the Polish Sejm passed twenty-eight laws, from which three were selected to discuss democratic attributes. These four laws do have the potential to impact one of the sub-attributes of democracy. Therefore, these laws are fundamental to understanding the quality of democracy within Poland. These laws were selected based on their effect of curbing the ability of checks within the government, with one of them affecting media activity. In contrast, the other two affect the judicial independence of Poland. These laws best illustrate the proceedings within this period that affected the democratic quality within Poland.

Act of 19 November 2015: Amending the Act on the Constitutional

The first bill to be discussed is The Act of 19 November 2015, amending the Act on the Constitutional Tribunal (Journal of Laws, item 1928)[181], the first bill passed by the incoming Polish Sejm. This amendment was about a page long, differing from the previous Act of 25 June 2015 on the Constitutional Tribunal (Journal of Laws, item 1064), in which changes were made that are highly relevant to this thesis. Within this section, there shall be an expanded outline of those points

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[178] Program PiS 2014 90
[179] Program PiS 2014 87
[180] Program PiS 2014 90
[181] Ustawa z dnia 19 listopada 2015 r. o zmianie ustawy o Trybunale Konstytucyjnym https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20150001928

most relevant to the research and the analysis regarding the democratic attributes that this amendment may have impacted.

To begin, in Article twelve of the amendment, there was a change within paragraphs one and two leading to the following statement. "The President of the Tribunal shall be appointed by the President of the Republic of Poland from among at least three candidates presented by the General Assembly for a period of three years. One may be appointed to the position of President of the Court twice." The main issue with this article is the increased number of candidates that the President of Poland can choose from, including those who may not be as qualified but hold party sympathies being considered. This aid in the generation of a situation where future presidents of the constitutional tribunal could have a decreased amount of support within the court, thus resulting in the reduction of trust in the leadership. Therefore, we can see that this article affects the independence of the judicial courts as the Polish president will be able to replace judges based on his own party preference and can be seen as an encroachment of power from the executive branch.

Within Article 2, there was a change to the terms limit of the heads of the Constitutional Tribunal, with the law stating, "The term of office of the current President and Vice President of the Constitutional Tribunal shall expire three months after the date of entry into force of this Act" Therefore, we can see that both the President and Vice President of this tribunal are to be ousted clearing the way for other judges to take their places. This article could be seen as an attempt by PiS to replace exiting judges with those more sympathetic to the PiS party. By forcing the president of the court to retire and be replaced by a judge who possibly supports the PiS agenda, it gives the PiS an advantage within the courts. This affects judicial independence as the parliament would be able to force uncooperative judges out of office while being able to replace those judges. Therefore, this Article can be seen as a direct encroachment of parliament on the judicial system.

This law grants the President of Poland additional powers and influence over the constitutional court president. At the same time, it allows the parliament to further encroach upon the independence of the judiciary. This can be seen as the first attempt by PiS to expand the executive government's power over one of the top judicial authorities in Poland. While the constitutional tribunal does retain the ability to select candidates for the position of court president, there has still been a slight increase in judicial independence due to this law. Therefore, it can be shown that this law negatively impacts democratic quality in Poland.

Act of 22 December 2015 amending the Act on the Constitutional Tribunal

In this period (from November 2015 to March 2016), the PiS-controlled Sejm engaged in a reasonably fierce fight with the Constitutional Tribunal. This involved the Polish prime minister's office only publishing the Constitutional Tribunal ruling if they had followed the amendments previously passed by the Polish Parliament. In response to the lack of cooperation the parliament decided to retaliate by reducing the Tribunal's budget by about 10 % in the 2016 State Budget Bill. This law shows another way for the parliament to encroach upon the independence of the judiciary while simultaneously paralyzing the court. Therefore, this section will analyze the law known as the Act of 22 of December 2015 amending the Act on the Constitutional Tribunal (Journal of laws, item 2217). Known as the Act of 25 June 2015 on the Constitutional Court. (Journal of Laws, item 1064, as amended)[182] Within this section there shall be both an expanded outline of those points that are most relevant towards this research as well as the analysis in regards toward the democratic attributes that may have been impacted upon by this amendment

First of all, it should be analysed the decision of the court to amend Article 10 of the original law with it now reading "The General Assembly shall adopt resolutions by a two-thirds majority in the presence of at least 13 judges of the Court, including the President or Vice President of the Court, unless otherwise provided by law". According to the Venice Commission the change to the court in regard to the high number of judges to rule in full composition (13) and the 2/3rd rule for the ruling would severely hamper the effectiveness of the Constitutional Tribunal:" This is due to the fact that within Europe a decision quorum of two-thirds is not the general rule for plenary or chamber decisions in constitutional courts. Such a very strict requirement carries the risk of blocking the decision-making process of the Tribunal and of rendering the Constitutional Tribunal ineffective, making it impossible for the Tribunal to carry out its crucial task of ensuring the constitutionality of legislation."[183] Moreover, the Venice Commission continues with "the attendance quorum within a constitutional court should be higher than half of the judges of the court, 13 out of 15 judges is unusually high, especially if there is no system of substitute judges like in Austria or the European Court of Human Rights. The reason that such a high quorum cannot be found in other European countries is obvious. Moreover, this very strict requirement carries the

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[182] Ustawa z dnia 22 grudnia 2015 r. o zmianie ustawy o Trybunale Konstytucyjnym https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20150002217

[183] Opinion on amendments to the act of June 25, 2015, on the Constitutional Tribunal of Poland Opinion no. 833/2015 https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e 14

risk of blocking the court's decision-making process and rendering it ineffective, making it impossible for the court to carry out its key task of ensuring the constitutionality of legislation”. [184]

This law complicates a lot of legality surrounding the Constitutional Tribunal ruling in 2015. This is because Article 2 part 1 mandates that all hearing cases in constitutional tribunal, which have yet to receive hearing, must be done in compliance of rules the set in this law. More specifically, a point of contention in both the literature and for the court itself was article 1 of the bill part 3 which reads as” The General Assembly shall adopt resolutions by a two-thirds majority in the presence of at least 13 judges of the Court”. This rule has dual consequences, the first is that court decisions are much harder to be done in full panel, but the second is that the decision will have to be done as a compromise between judges rather than opinion of the majority, that can be seen as strengthening the legitimacy of the court by the inclusion of more votes in the decisions. That is also important to discuss due to the general assembly’s’ power to submit a petition to the Sejm for the removal of a judge from the court. It is also worth noting that this law doesn’t strengthen the executive branch of government, rather it gives the parliament more power to control the court but also gives the court power to control itself. This can be seen in the President of the Court being granted the power to refuse initiating disciplinary proceedings over judges. While some would say court was paralyzed by this law, this analysis has shown that there are some positives that can be found within this law.

The following articles outline the way in which disciplinary proceeding are to begin, First, Article 28a states.” Disciplinary proceedings may also be initiated at the request of the President of the Republic of Poland or the Minister of Justice within 21 days of receipt of the request unless the President of the Court deems the request as unjustified. A decision refusing to initiate disciplinary proceedings with a statement of reasons shall be delivered to the applicant within 7 days from the date of the decision.”. Furthermore, Article 31a.states “In particularly blatant cases, the General Assembly shall submit a motion to the Diet for removal from office of a judge of the Court. The General Assembly may also adopt a resolution or make a motion in the case referred to in this circumstance, also at the motion of the President of the Republic of Poland or the Minister of Justice within 21 days from the date of receipt of the request.” However, the aspect that is most

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[184] Opinion on amendments to the act of June 25, 2015, on the Constitutional Tribunal of Poland Opinion no. 833/2015 https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)001-e 13

worrying for the Venice Commission is the ability of the Sejm to remove a judge from court after a requestion of the general council This action of the General Assembly could be caused by an application by the President of the Republic or the Minister of Justice (Article 31a(2)), although the Constitutional Tribunal remains free to decide. Moreover, the final decision will be taken by the Sejm. These new provisions are highly questionable, because a judge's mandate can now be terminated by Parliament which by its very nature also decides based on political considerations."[185]

Article 44: paragraphs 1 to 3 shall be replaced by the following:

1. The Court shall rule:

1) in full composition, unless otherwise provided by law;

2) in a panel of 7 judges of the Court in cases:

(a) initiated by a constitutional complaint or a legal question;

(b) the compatibility of laws with international agreements whose ratification required prior consent expressed by law;

3) with 3 judges of the Court in cases:

(a) granting further course or refusing to grant further course to a constitutional complaint and a motion of an entity referred to in Article 191 paragraph 1 points 3-5 of the Constitution,

(b) exclusion of a judge.

2. If the case referred to in paragraph (1) items 2 and 3 is particularly intricate or of particular importance, it is possible to it may be referred to the full Court for decision. The President of the Court shall decide on the referral, including at the motion of the adjudicating panel.

The Vienna commission summarizes their opinion of the 2015 November 19 and December 22 amendments with this paragraph: "While each of the procedural changes examined above is problematic on its own, their combined effect would seriously hamper the effectiveness of the Constitutional Tribunal by rendering decision-making extremely difficult and slowing down the proceedings of the Tribunal. This will make the Tribunal ineffective as a guarantor of the

[185] Ibid 17

Constitution. Furthermore, the requirement of a two-thirds majority, combined with a high quorum of presence and the sequence rule of dealing with cases, have severe consequences on the proper functioning of the Constitutional Tribunal."

Act of 30 December 2015 amending the Broadcasting Act

3rd Law to look at is Act of 30 December 2015 amending the Broadcasting Act (journal of law, Item 25) relevant parts are these*:*

Article 1: (b) paragraphs 3 and 4 shall be replaced by the following:
"3. Members of the Board of Directors, including the President of the Board of Directors, shall be appointed, and dismissed by the Minister responsible for the Treasury State.
(4) Members of the board shall be appointed from among persons who are competent in the field of broadcasting and television, and who have not been convicted by a final judgment of an intentional crime prosecuted by public indictment or a fiscal crime".

Article 2: (1) On the date of entry into force of this Act, the terms of office shall be shortened and the terms of office of the existing members of the management and supervisory boards of the companies "Telewizja Polska - Spółka Akcyjna" and "Polskie Radio - Spółka Akcyjna Joint Stock Company", subject to paragraph 2.

(2) The management board of the company referred to in paragraph (1) shall act in its current composition until the appointment of the management board of the company under the on the basis of the provisions of the Act amended in Article 1 in the wording enacted by this Act, but may not, without the consent of the minister responsible for the State Treasury, perform actions exceeding the scope of ordinary management or actions within the scope of labor law, which would result in new obligations for the company".[186]

This law potentially expands the power of Minister of the State Treasury. This has been done by allowing the minister to restructure the upper management of state owned media. The law allows the minister to do this at his own initiative. Another interesting part of this law is the shortening (firing) time management of state media companies. This indicates a potential signal that PiS intends to replace potentially PO aligned management with PiS loyal ones in all state

[186] Ustawa z dnia 30 grudnia 2015 r. o zmianie ustawy o radiofonii i telewizji https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20160000025

controlled enterprises. From the perspective of democracy this has a negative impact on media integrity, as there is no direct editorial guidelines, but there is essentially politization of management positions of state media companies.

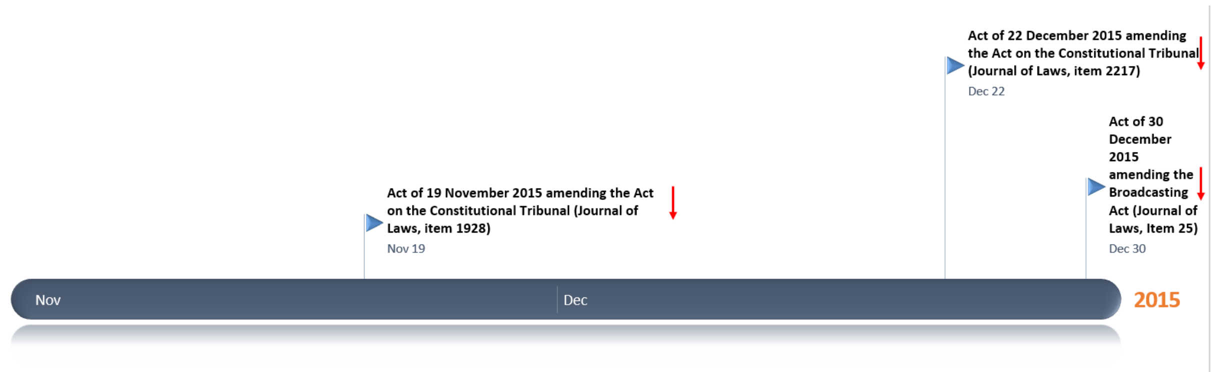

Fig. 4. Timeline of democratic quality affecting laws in 2015

As a summary of this section, it can be seen that in 2015 the PiS party began by attempting to take over the constitutional tribunal and with legislative action diminish the judicial independence of the Polish constitutional tribunal (Fig. 4). Additionally, the PiS act of December 30th on broadcasting restructured state owned media, damaging media integrity. But it is worth to note, after evaluating contextual dates from the Vienna Commission, that when PiS passed the act of December 22 on the constitutional tribunal the 13 judges participation requirement for the court to rule in full composition, had been a calculated number rather than a random number. This was a ploy for control as for the court to achieve such participation it would have to accept the PiS selected judges in ruling. PiS could easily leverage their minority of judges in the tribunal to freeze rulings and paralyze the court. These acts, while damaging for democratic quality, were done as callous political fight tactic rather than planned policy. This can be observed by legislation attempting to dismiss the tribunal president and paralyzing rulings, acting as stopping maneuvers. There is little remedy for this legislation, with both being already repealed and their intention being as a stop gap measure rather than a permanent solution.

4.2.2 Legal analysis of bills passed by Sejm Year 2016

In 2016, there were in total two hundred and fifteen laws passed by the Polish Sejm, out of those thirty one were selected for initial analysis. Initial analysis has shown that only seven of these laws contain changes that could possibly affect quality of democracy based on at least one out seven sub-attributes of democracy.

Act of 15 January 2016 amending the Act on the Police and certain other acts

We begin in 2016 with the Act of 15 January 2016 amending the Act on the Police and certain other acts (journal of law, Item 147)[187] this law has several key words attached to it in the journal of laws: electronic information carriers, telecommunication, common courts classified information, computerization, military courts, fiscal control, internal security agency, Police, Military Police, The customs service, Central Anti-Corruption Bureau, Military Counterintelligence Service, border guards, Military Intelligence Service. This shows us that law will in large part will be concerned with information gathering by government:

Article 1: The Law of April 6, 1990 on the Police (Journal of Laws of 2015, item 355, as amended) shall be amended as follows:
(b) paragraph 6 shall be replaced by the following:

Operational control is conducted secretly and consists in:

1) obtaining and recording the content of conversations conducted with the use of technical means, including by means of telecommunications networks;
2) obtaining and recording the image or sound of persons from premises, means of transportation or places other than public places;
3) obtaining and recording the content of correspondence, including correspondence conducted by means of electronic communication;
4) obtaining and recording data contained in computerized data carriers' data carriers, telecommunications terminal equipment, information and data communications systems;
5) obtaining access to and control of the contents of mail.

[187] Ustawa z dnia 15 stycznia 2016 r. o zmianie ustawy o Policji oraz niektórych innych ustaw https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20160000147

Part 12 goes on to state “telecommunications entrepreneur, postal operator and service provider providing electronic services shall be obliged to provide at their own expense technical and organizational conditions enabling the Police to conduct operational control”.

Article 20c. (1) For the purpose of preventing or detecting crimes or in order to save human life or health or to support search and rescue operations or rescue operations, the Police may obtain data not constituting the content of, respectively, a telecommunication transmission, a postal consignment or a transmission within the framework of a service provided electronically.

On the surface this law is focused on potential violations of fundamental human rights. With the primary concern being about privacy protection and the prevention of the government spying on its opposition. But in the law it is stated that the courts are one who decided if *operational control* is allowed to be performed. As we have seen from changes to the constitutional court, the polish law and justice party is fundamentally reforming the Polish judicial system. With those reforms, the polish court has the potential to be biased towards the PiS party. An additional point of interest within this law is that service providers are not allowed to refuse to assist police in operational control. Also, they will have to cover the cost of this enabling. As there are currently not enough safeguards within the capacity to use operational control, this law can be seen as negatively impacting the quality of democracy in Poland.

28 January 2016. Law on the Public Prosecutor's Office

The next law that be discussed into is the rather infamous 28 of January 2016: Law on the Public Prosecutor's Office (journal of laws, item 177)[188]. The changes that occurred under this law were announced in the 2014 PiS party election program. This law now allowed the merging of the minister of justice and prosecutor general office. However, the implementation of this has been slightly different from what most scientists have described.

First, to find out how the merger of the positions of the Minister of Justice and the Prosecutor General was analyze the sections of the law that pertain to the merger of the minister of justice and the prosecutor general’s office. The merger reads as follows “§ The Prosecutor

[188] Ustawa z dnia 28 stycznia 2016 r. Prawo o prokuraturze
https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20160000177

General shall be the chief authority of the prosecutor's office. The Minister of Justice shall hold the office of the Prosecutor General." The law goes on to describe what condition the prosecutor general should adhere to as outlined in Article 75 §1 points 1-3 and 8."I want to point out that within this law the general prosecutor's office hasn't been eliminated. Instead, the minister of justice is now considered to be the head of the office. This becomes important when we examine the composition of the prosecutor's office. The law detail such piece: "Article 1 § 1 The public prosecutor's office shall be composed of the Public Prosecutor General, the National Public Prosecutor, other Deputy Public Prosecutors General and public prosecutors of common organizational units of the public prosecutor's office and public prosecutors of the Institute of National Remembrance - Commission for the Prosecution of Crimes against the Polish Nation, from now on referred to as "the Institute of National Remembrance." As we can see, there is mention of the national public prosecutor as well as other deputy public prosecutors. This hints further that we shouldn't say that minister of justice and the general prosecutor's office were merged in a literal sense. What has been done is giving the minister of justice the ability to head the general prosecutors' office rather than eliminating of general prosecutors' officers entirely. This can also be shown within another article of the law. As Article 13 § 1 states, "The Prosecutor General shall direct the activities of the prosecutor's office in person or through the National Prosecutor and other Deputy Prosecutors General by issuing orders, guidelines and instructions."

It is also an assumption to say the minister of justice will always take the opportunity to head the prosecutor general's office. Article 13 also states within the fourth part "§ If the office of the Prosecutor General is vacant or if he is temporarily unable to perform his duties, the Prosecutor General shall be replaced by the National Prosecutor." These lines reveal to us that the minister of justice can dedicate all the prosecutorial duties to the national prosecutor. This is necessary to understand because the minister of justice, through other laws, gains many duties and might not be able to efficiently do them all. Therefore, it is important to add a stipulation that the minister of justice can defer duties to another office if it is necessary.

In fact, it is revealed that the minister of justice has more of a managerial role according to article 35 and article 36 of prosecutorial law for example Art. 35 § 1. "The Minister of Justice shall, by way of regulation, establish and abolish local divisions of the Department for Organized Crime and Corruption of the National Public Prosecutor's Office, regional, district, and regional prosecutor's offices and determine their seats and areas of jurisdiction, with a view to effectively

combating crime and ensuring efficiency of proceedings. § (3) The Minister of Justice may define, by way of an ordinance, the jurisdiction of common organizational units of the public prosecutor's office in cases of particular types of crimes regardless of the place where they have been committed and in civil cases, administrative cases, misdemeanor cases as well as in other proceedings conducted pursuant to statutes regardless of the general jurisdiction of common organizational units of the public prosecutor's office, with a view to effectively combating crime and ensuring efficiency of proceedings Art. 36 §1 The Minister of Justice shall establish, by way of an ordinance, the rules of internal office of common organizational units of the prosecutor's office specifying: 1) internal organizational structure and tasks of the organizational units: a) National Prosecutor's Office, b) of the Department for Organized Crime and Corruption of the National Public Prosecutor's Office and regional prosecutor's offices, c) other common organizational units of the prosecutor's office <…> etc.

In the opinion of the Venice commission (Opinion 892 / 2017) analyzing public prosecutor's law changes with the main focus of trying to answer how this merger changes the dynamic of the prosecutorial system. In the Venice commission's opinion, the merger does not have any resonance in any other European judicial system:" The merger does not only go against the European trend but goes much deeper than the mere subordination of the prosecution system to the Minister of Justice. Even if there are a few systems where the Minister of Justice can give instructions, the Polish system stands out because of the competence of the public prosecutor General to act personally in each individual case of prosecution. The Venice Commission is of the opinion that the above-mentioned problems are a direct result of the amalgamation of both offices, which are of a fundamentally different character, political and prosecutorial."[189] But that isn't the only issue Venice commission in their conclusion also comments on that prosecutor general office gains a lot of new power which have not been part old pre PO reforms law on public prosecutor:" 94. Moreover, although the merger of offices by the 2016 Act appears to follow a tradition in Poland (with the exception of the period of 2010-2016), the merger in 2016 was accompanied by an important increase in the competences of the Public Prosecutor General (i.e. the Minister of Justice) to give instructions in individual cases compared to the system which was in force before

[189] CDL-AD(2017)028-e Poland - Opinion on the Act on the Public Prosecutor's office, as amended, adopted by the Venice Commission at its 113th Plenary Session (Venice, 8-9 December 2017). https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)028-e

2009. The claim that the 2016 Act is merely a return to the system in force before 2009 cannot be sustained." All of this points that PiS party didn't just bring old system back, but they have increased powers of prosecutor general considerably. Additionally, where prosecutor general power's end, minister of justice powers begins, essentially giving minister of just complete control over prosecutorial system of Poland.

This more of managerial role of the minister of justice seem to be more prominent rather than the prosecutorial duties. In relation of checks on the government, this defiantly increases the power of the executive over the judicial system. As we have seen the ministry of justice has been granted a lot of power to reform the entire prosecutorial system of Poland as they see fit. The law does provide guides on the organization prosecutor offices around nation, but it lets the ministry of justice carry out its own execution. Another important part of this law is the emergence of national prosecutor office, which indicates that PiS party has not intended for minister to preform prosecutions himself, but rather act through his deputies. In conclusion, it would appear that PiS has established theoretical possibility for ministry of justice to head prosecutor general office, but due to amount of task given to prosecutors' general office and ministry of justice it is unlikely for the minister of justice to make use full range of general prosecutor's power.

Introductory provisions of the Act - Law on Public Prosecutor's Office act of 2016 January 28th

One of promises by the PiS party was the ability for the Ministry of Justice to file a cassation against the judgment of judges of the court. For example, in the introductory provisions of the Act - Law on Public Prosecutor's Office act of 2016 January 28th (Journal of law, item 178)[190].

"§ 1. The Minister of Justice - Prosecutor General, as well as the Ombudsman may file a cassation appeal against any final decision of the of the court ending the proceedings".

As well as in amending the Act - the Code of Criminal Procedure and some other acts 2016 March 11 (Journal of law, item 437):

[190] Ustawa z dnia 28 stycznia 2016 r. Przepisy wprowadzające ustawę - Prawo o prokuraturze https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20160000178

"§ 1a. In cases of crimes, the Minister of Justice - Public Prosecutor General may file a cassation solely on the grounds of incommensurability of punishment penalty".

This can be seen as the PiS attempting to expanding the executive governments' control in decisions of the judiciary, as with changes to prosecutorial system, prosecutors have become part of executive government. Therefore, we can see that this act degrades the judicial independence by trivializing decisions of courts. Since government (minister of justice is heading prosecutor general office) will be able to file appeal against criminal court decision they don't approve of. This reduces power of judiciary and their independence.

June 10, 2016. Act on amending the Act - the Code of Criminal Procedure, the Act on the professions of physician and dentist, and the Act on patient rights and the Ombudsman for Patient Rights

On June 10, 2016, the Act on amending the Act - the Code of Criminal Procedure, the Act on the professions of physician and dentist, and the Act on patient rights and the Ombudsman for Patient Rights (Journal of laws, item 1070)[191] was passed. This law had brought some positive changes to the polish judicial system through the incorporation of social organizations into the judicial system:

Article. 90. § 1. In court proceedings, participation in the proceedings may be report a social organization, if there is a need to protect the interest of the social or individual interest, covered by the statutory tasks of this organization, in particular, the protection of freedoms and human rights.

§ 3. The court shall allow the representative of the social organization to appear in the case if at least one of the parties agrees. A party may at withdraw its consent at any time. In the absence of consent of even one of the parties to allow a representative of a social organization to appear in the case, the court shall exclude this representative from participation in the case, unless his participation is in the interests of justice

The positive part of this law is that it allows for NGOs to be in court whenever one of the parties feels like there might be an issue with the protection of freedoms and human rights. The

[191] Ustawa z dnia 10 czerwca 2016 r. o zmianie ustawy - Kodeks postępowania karnego, ustawy o zawodach lekarza i lekarza dentysty oraz ustawy o prawach pacjenta i Rzeczniku Praw Pacjenta https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20160001070

establishment of this system expands media checks on the government since it gives media and NGOs potential access to court sessions. This allows for media especially private one to try to keep judges from issuing biased judgements for fear of scandal happening. Therefore, this act allows for greater media freedom as well as greater judicial credence towards NGOs.

Act of National Media Council of June 22, 2016

The next law that will be focused on is founding of the national council of media with the bill on the National Media Council of June 22, 2016 (Journal of law, item 929)[192]. Relevant parts are these:

Article. 2. 1. The Council is the competent body in matters of appointing and dismissing the personal composition of the bodies of public radio and television broadcasting units and the Polish Press Agency, hereinafter referred to as the "Council", and Press Agency, hereinafter referred to as "companies", and in other matters specified in the Act. Law.

Article 3 The Council shall consist of five members, three of whom shall be shall be elected by the Sejm, and two members shall be appointed by the President of the Republic of Poland.

Article 6. 1. The President of the Republic of Poland shall appoint members of the Council from among the candidates submitted by parliamentary or parliamentary clubs formed by groupings whose representatives are not members of the Council of Ministers (opposition clubs opposition clubs), taking into account the principles set forth in paragraphs 2-7.

Article 12 The Council shall be entitled to inspect the affairs of the company. In this respect, the Council shall have the powers that the law and the Articles of Incorporation grant to the Supervisory Board.

The adoption of this bill allows for the parliament to appoint a member to the council which is in charge of changing the composition of public media companies. Even though this law allows for the president to select two members of council, it is parliament parties who make up the opposition that create the list of candidates of potential candidate for the president. Essentially this makes the council bipartisan as both government and opposition parties are allowed to have their members in this council. Democratic quality increase democratic quality because parliament is

[192] Ustawa z dnia 22 czerwca 2016 r. o Radzie Mediów Narodowych
https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20160000929

more effective in controlling government institutions. Additionally, Opposition makes list of candidates that will be members of national media council. Creates situation where council can provide oversight for state media companies taking account parliament opposition party opinion more.

Act of 22 July 2016 on the Constitutional Tribunal

In 2016, there was another important act passed Act of 22 July 2016 on the Constitutional Tribunal (journal of laws, Item 1157)[193]. This law became important due to it repealing earlier acts of: (Journal of laws item 2217) The Act of 22 December 2015 amending the Act on the Constitutional Tribunal; (Journal of laws item 1928) the Act of 19 November 2015 amending the Act on the Constitutional Tribunal;(Journal of laws item 1064) and the Act of 25 June 2015 on the Constitutional Tribunal. These laws have the cumulative effect of the Law and Justice Party to be denounced and the Venice Commission to issue an opinion. As such, when reforms to the Polish constitutional tribunal are mentioned in citations of PiS party action in 2015 while concerning, those laws are considered repealed. This law shows the indecisiveness of the PiS party towards reforming and repealing acts pertaining to the constitutional tribunal.

Article 6 explains how judges are selected for the court. (1) The Court shall consist of fifteen Judges of the Court. 2. The judge of the Tribunal is elected by the Sejm for nine years. 3. A judge of the Court may be a person who possesses the qualifications required to hold the position of a judge of the Supreme Court or the Supreme Administrative Court. 4. Candidates for the post of Judge of the Tribunal are put forward by at least fifty Members of the Parliament or by the Presidium of the Sejm. A resolution of the Sejm concerning election of a judge of the Tribunal is adopted by an absolute majority of votes in the presence of at least half of the total number of Deputies." As we can see, the terms of judges are nine years and Sejm is given the right to elect judges with use of a resolution. Additionally, candidates to the court must be able to contribute to other supreme court and have the backing of fifty parliament members. This election process gives the parliament member groups the power to select the constitutional tribunal judges. That creates the ability for oppositions parties and coalitions to have selected candidates.

Next, we have the infamous creation of disciplinary chamber in this law: "Article 9: A judge of the Tribunal shall be liable to disciplinary action for violation of the provisions of law,

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[193] Ustawa z dnia 22 lipca 2016 r. o Trybunale Konstytucyjnym
https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20160001157

for failure to preserve the dignity of his office or for other unethical conduct likely to undermine confidence in his person. Article 10 (1) In disciplinary proceedings, the Tribunal shall adjudicate: 1) at first instance, sitting with five Judges of the Court; 2) at second instance, sitting with seven judges of the Court. (2) The judges of the panels and of the Disciplinary Commissioner shall be determined by the General Assembly by drawing lots. Judges of the Court who have ruled on the case at the first instance shall not participate in the drawing of lots for the second instance panel." This tells us that the initiation of disciplinary actions against judges can only be started by the court itself rather than an external actor. This can be observed as an improvement to democratic quality by increasing judicial independence of the top court in Poland.

(2) Consideration of a case by a full panel shall require the participation of at least eleven judges of the Court. The hearing shall be presided over by the President or Vice President Court, and in the event that these persons are prevented from presiding - the oldest judge of the Court by age. With this part of the article, we can see clearly how lowering the requirement for quadrium for rulings on full composition. This improves checks on government from judicial independence sub-attribute of democracy by making tribunal be able to rule on law in 2016 because the tribunal was not in full composition due to constitutional tribunal refusal to adopt many changes to it made by the PiS controlled parliament.

As in an earlier law, there are provisions on election of the president of court by the president of the polish republic from the candidates proposed by the court. But perhaps the most interesting part of this law, was the elimination of the rule to vote in the full composition of the court with a 2/3rds majority. This can be seen on page 25 of the law: "Article 69 (1) A decision shall be made by a simple majority of votes." This is a very important change as in the previous iteration of this law the major issue was this exact voting mechanism with the Venice Commission arguing that it could paralyze the court.

There is still a mechanism that is similar to the 2/3rds voting: "5. In the deliberations of the full court, at least four Judges may dissent from the proposed decision if they consider that the question is of particular importance in terms of the Constitution or public policy, and they do not agree with the way in which the decision should be taken. 6. If an objection referred to in paragraph 5 is made, the deliberation shall be adjourned for three months, and the Judges who made the objection shall present a joint proposal for a decision at the next deliberation convened after the expiry of that period. 7. If at the second deliberation referred to in paragraph 6 at least four Judges

again raise an objection, the deliberation shall be postponed for a further three months. At the expiry of that period another deliberation and a vote shall be taken." This shows that the court decision can be delayed two times by the dissent of at least four judges of the court when in full composition. But the delay may not be indefinite as when the vote is taken a second time it can be a simple majority of votes. The ability to delay the court's decision negatively impacts the democratic quality sub-attribute of judicial independence by forcing the court to take an unnecessary long time on a case due to the presence of the minority dissenting judges.

The Venice Commission is happy about the positive changes and summarizes them as follows:

"122. The draft Act contains some improvements, partly due to amendments introduced in the Senate, as compared to the Amendments of December 22, 2015. These concerns notably:

1. lowering the quorum requirement from 13 to 11 judges (out of 15). This quorum is still relatively high but does not raise the same objections (Article 26).

2. the reduction of the majority vote for a judgment from two-thirds to a simple majority (Article 69).

3. The introduction of additional exceptions to the sequence rule (Article 38) and elimination of the power of the President of Poland to request exceptions to the sequence rule that had been included in the draft adopted in the second reading.

4. The absence of provisions on the initiation of disciplinary proceedings against judges by the President of Poland and the Minister of Justice.

5. The absence of a provision on the dismissal of judges by the Sejm upon the motion of the Assembly of the Constitutional Tribunal and avoiding interference by the President of Poland in the dismissal of judges (Article 12).

6. The reduction of the period between the notification of the parties and the hearing from six months to 30 days (Article 61). "[194]

However, the commission states that these changes have been too little and do not change the overall work of the court which will still be impeded, making the court ineffective: "123. However, the effect of these improvements is minimal since numerous other provisions of the adopted act would considerably delay and obstruct the work of the Tribunal and make its work

[194] Poland's opinion on the act on the constitutional tribunal Opinion 860/2016 https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)026-e 23

ineffective, as well as undermine its independence by exercising excessive legislative and executive control over its functioning".[195] The commission's opinion exceptions to sequencing rulings are significant where the commission explains "46. The act also still does not provide for an exception for preliminary requests to the Court of Justice of the European Union, as was recommended in the opinion."[196] It can be reasonably assumed that the main complaint by the commission, to the scope of exception, is that the Polish PiS party does not let the Court of Justice of the European Union request a case to be processed faster. The law has offered broad power and exceptions for the President of the Court when deciding the order of rulings by the court, which is an improvement, but an exception for the European court of justice requestion is not an issue. That is because it deals with interactions between national courts and international courts. For the commission to label this as the main issue (in listing defects of amendments commission puts this "lack" of flexibility and exception as first in line) might suggest an intention for the commission to declare Poland compliant with the rule of law principle only when the European court of justice can intervene. While some correct issues need to be clarified, for example, the absence of a prosecutor general be used as justification to delay a hearing[197] nevertheless, a conclusion that changes the voting mechanism and lowing the quorum requirement should be a reason to say that the Tribunal effectively protects constitutional order.

November 30, 2016, act on the organization and procedure before the Constitutional Court

As mentioned previously, the July law on the constitutional law was amended later and is technically repealed. First, we can see the law was changed by the November 30, 2016, On the organization and procedure before the Constitutional Court (journal of laws, Item 2072).[198] Technically, the journal of laws tells us that the Act of 13 December 2016 with regulations being introduced in both the act on the organization and procedure of proceedings before the Constitutional Tribunal and the act on the status of judges of the Constitutional Tribunal item

[195]Poland's opinion on the act on the constitutional tribunal Opinion 860/2016 https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2016)026-e.23
[196] Ibid 12
[197] Ustawa z dnia 22 lipca 2016 r. o Trybunale Konstytucyjnym https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20160001157
[198] Ustawa z dnia 30 listopada 2016 r. o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20160002072

(journal of laws, 2074)[199] has repealed July law on constitutional law. But that is most likely due to this line on November 30th law:

"Article 4 A separate law shall specify:

1) the manner of establishment, scope and rules for termination of the official relationship of a judge of the Court;

2) the rights and duties of a judge of the Court;

3) matters of personal immunity and inviolability, and rules of disciplinary responsibility of a judge of the Court;

4) rights and duties of a retired judge of the Court".

This indicated that PiS intends to change constitutional tribunal in 2 separate laws. But we shall first look at this law how it is different from July one. Interesting change is statement that General Assembly adopts resolutions by an absolute majority of votes, in the presence of at least 2/3 of the total number of judges of the Court: "Article 8 (1) The General Assembly adopts resolutions by an absolute majority of votes, in the presence of at least 2/3 of the total number of judges of the Court, unless the law provides otherwise." It is observe that rule concerns about paralyzing court are slowly addressed. This shows us that during their time in parliament have walked back some of the changes that were seen as problematic by various. EU institutions and research analyzing Polish system. This allows us to mark improvements in checks on government. This elimination of 2/3rds vote rule is stated in page 31of November 30th law with this paragraph:

Article 106 (1) A decision shall be made by a majority of votes.

3. A member of the formation of the court who does not agree with the majority of the votes may, before giving judgment, submit a dissenting opinion stating the reasons for the dissenting opinion in writing which shall be stated in the judgment. The dissenting opinion may also relate to the reasoning itself.

As we can see decisions of court are made by majority votes. This indicated improvements of rule of law situation and judicial independence in Poland. Additionally, there is also addressing concern that minority of judge can make proceedings unnecessary long by dissenting and forcing court to be less effective in keeping government in check by allowing unconstitutional actions (for

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[199] Ustawa z dnia 13 grudnia 2016 r. - Przepisy wprowadzające ustawę o organizacji i trybie postępowania przed Trybunałem Konstytucyjnym oraz ustawę o statusie sędziów Trybunału Konstytucyjnego https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20160002074

example executive government abuse of power) to be done for long periods of time if government is able to convince or potentially bribe four judges. But that issue had been addressed in November 30th law thus improving judicial independence check on government sub-attribute, which contributes to improvement in democratic quality.

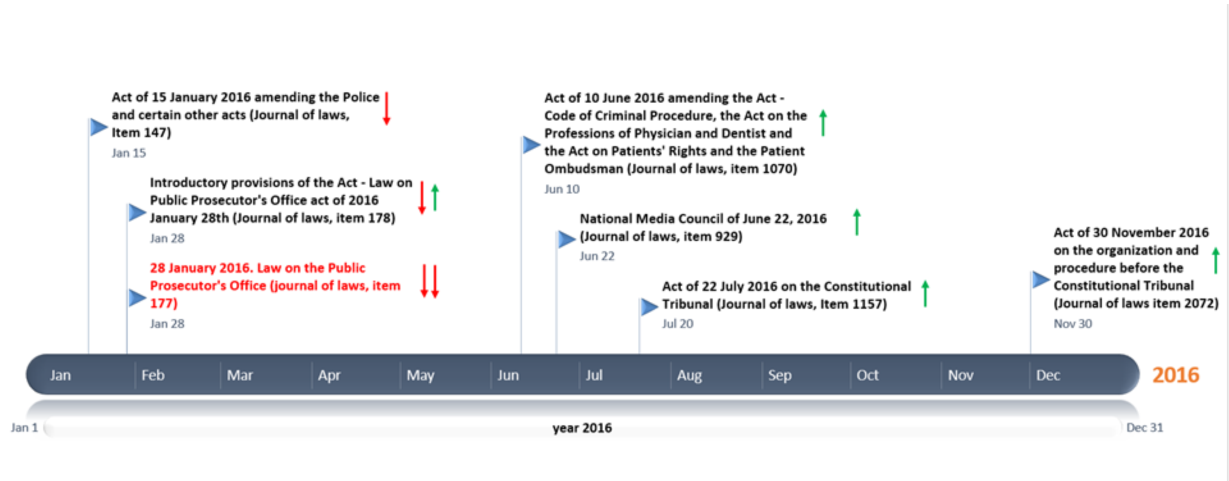

Fig. 5. Timeline of democratic quality affecting laws in 2016

The year of 2016 could be best described as a year of action for democracy in Poland. The constitutional tribunal, supreme court, and supreme administrative court united in their rejection of PiS party passed legislations and conflicted against constitutional tribunal (Fig. 5). While PiS decided to start the year with overhaling the entire prosecutorial system by granting the minister of justice the powers to essentially do as he pleases with the entire prosecutorial system. The minister of justice could be general prosecutor and preforms the task of prosecutor, or he could keep the title of prosecutor but use his deputies to do most of work. In addition, the minister could make one of his deputy's general prosecutors and manage the prosecutorial system through the ministers' regulations. From the democratic quality perspective this change to the public prosecutor's office issue is not the minister of justice assuming office of general prosecutor, but rather the minister being given great control over the system with little to no meaningful oversight. In tandem, there is as mentioned conflict between the PiS party and the polish top courts providing an extra layer of complexity of the issue. In another turn of complexity, it was revealed that the

prime minister's office refused to publish the constitutional tribunal rulings that PiS had deemed illegal and one PiS elected judge, being excluded from participation in the court, began criminal proceedings against the president of the court. It can be argued that due to fear of repercussions from the EU or open revolt of the opposition the party began making concession that eventually improved democratic quality. This improvement was due to the removal of controversial voting rules and giving the president of the court more powers when deciding which cases should be ruled on. This has been improvement to democratic quality and demonstrates that PiS is willing to listen to criticism. Another improvement in 2016, was the creation of the national council of media, where the opposition was given the power to draft a list of candidates for President of Poland. Due to the composition and voting rules of the council candidates potentially blocking rulings if they thought a PiS member of council was trying to expand party power. This can be seen as both media integrity improvement and parliament oversight efficiency improvement.

4.2.3. Legal analysis of bills passed by Sejm Year 2017

In 2017, there were in total two hundred and six of laws passed by the Polish Sejm, out of those twenty one were selected for initial analysis. Initial analysis has shown that only five of laws contain changes that could possibly affect quality of democracy based on one out seven sub-attributes. In terms of checks on government the first check is focused on parliament. In this we look to which extent the legislature is capable of overseeing the executive. The second check is judicial independence focusing on the extent to which the courts are not subjected to undue influence from the other branches of government, especially the executive. The final check is media Integrity which focuses on the extent to which the media landscape offers diverse and critical coverage of political issues. Within this section the laws that are outlined pertain to these specific sub-attributes of democratic quality.

Act of 23 March 2017 amending the Act - Law on the Common Courts Organization

The first law that will be discussed is focused on amending the Act of 23 March 2017 amending the Law on the Common Courts Organization (journal of law, item 803)[200]. According to this amendment the minister of justice is pronounced as the superior of court directors and has the right to appoint and dismiss these directors at will. This law has an issue of judicial independence as according to this amendment the minister of justice does not have to consult with other authorities in order to execute his duties provided by the amendment. In terms of judicial independence this does allow for the minister of justice to create a packed court scenario with the majority of officials being either loyal to or sympathetic to the PiS party agenda.

In Article 21a. it states the stipulations of the minister of justice becoming the superior authority within the court system as well as the scope of his duties therein. "§ 1. A court director may be appointed in a district court if this is justified by organizational considerations, in particular the size of the court as measured by the number of positions of judges, assessors and registrars, as well as the staff employed therein its employees or the distance from the district court. In a district court in which a court director is not appointed, the tasks of the court director are performed by the director of the superior district court, who also takes over the conduct of the financial management of that court. § 2. The Minister of Justice shall be the official superior of the court director of the court. § 3. The president of the court performs with respect to the court director activities within scope of labor law, except for activities reserved for the Minister of Justice." This section clearly outlines the PiS parties continued efforts to expand its own power and influence with the use of the ministry of justice. In addition to this amendment, some law in the preceding years have given the ministry of justice expanded control over most of the prosecutorial system. Within this expansion it has been seen that the PiS party is expanding the minister of justice's power over courts in addition to the expansion of power over the prosecutorial system. These actions have reduced judicial independence as a reliable check on government, an important democratic sub-attribute, which can be seen as a contribution to a decrease in democratic quality throughout the judicial system.

In addition to this amendment there also came into effect a law that would allow the minister of justice to become head of the National School which is responsible for training new

[200] Ustawa z dnia 23 marca 2017 r. o zmianie ustawy - Prawo o ustroju sądów powszechnych https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20170000803

prosecutors. This would essentially give the minister of justice the ability to directly commission training and other forms of in-service training and professional development, not included in the schedule which could allow trainings focused around PiS party agendas. This would allow the PiS party to influence future and existing judicial system members with the goal of maintaining power within the judicial system. This can also contribute to the reduction of democratic quality as it could create long lasting effects that would decrease governmental checks. That is because if future judges or prosecutors are made to interpret law in the way the executive government wants them to it would become an abuse of power by the government.

Polish president veto of Act on the National Council of the Judiciary and some other acts, dated July 12, 2017

The next law that had the potential to affect quality of democracy in Poland would have been "on amendments to the Act on the National Council of the Judiciary and some other acts, dated July 12, 2017. However, this law was vetoed by the Polish president on July 31, 2017 (print number 1792) [201]His reasoning is shown below.

"As President of the Republic of Poland, I absolutely do not question the idea of transferring this important competence to the Sejm. However, I take the position that new procedure for the Sejm's selection of judges for the National Council of the of the judiciary requires the introduction of the condition that the selection be made by a qualified majority of 3/5 votes. Such a selection guarantees that the members of the of the body guarding the independence of the courts and the independence of judges will be selected not only by a parliamentary majority, but their selection will represent a will be an expression of consensus among the various groupings sitting in parliament. The representativeness of the National Council of the Judiciary and its social acceptance are properties that ensure, among other elements, the realization of one of the most important human rights guaranteed by the Constitution Republic of Poland, which is the right to a court of law, realized by an impartial, independent, and fair court. The election of members of the National Council of the Judiciary by a majority of 3/5 of the votes will promote the guarantee

[201] Druk nr 1792 Wniosek Prezydenta RP o ponowne rozpatrzenie ustawy z dnia 12 lipca 2017 r. o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw
https://orka.sejm.gov.pl/Druki8ka.nsf/0/DB68E664E1215734C1258191003FCBFB/$File/1792.pdf

greater representativeness of the elected judges-members of the Council and will give them stronger legitimacy to exercise their functions in the Council. Being an expression of the consensus of the various groupings sitting in the Sejm, it will also free judges-members of the Council from the attribution of the "mono-partisan" nature of their election, and thus, identifying them with a particular political grouping."

This quoted argument reveals that when it comes to checks on government the President of Poland shouldn't be viewed strictly as the executive government representative. In this situation, the President has recognized the potential issues and danger that could be created with changes to the national council of the judiciary being considered illegitimate in conjunction with the PiS parties attempts to increase their control over the Polish judiciary. From the perspective of weakening the judiciary's power to keep executive government in check, we could observe this veto as improvement of the quality of democracy.

Act of 12 July 2017 amending the Act - Law on the Common Courts Organization and certain other acts

Despite the Polish President vetoing acts that would decrease the ability of the judiciary the PiS party continued to expand into the judiciary through the Act of 12 July 2017 amending the Act - Law on the Common Courts Organization and certain other acts. (Journal of law, item 1452)[202] Outlined within this Act it becomes clear that the Minister of justice gains immense power to control the appointments of court presidents. This is an obvious attack on the independence of the judiciary as once again the minister of justice is given the right to control the appointment of judicial authorities which can be seen to take away the independent nature that should be upheld within the court system. This can be seen through several sections of this law which are outlined within this section of research.

Article. 23. § 1. The president of the court of appeal is appointed by the Minister of Justice from among the judges of the court of appeal or the regional court. After the president of the court of appeal is appointed, the Minister of Justice presents him to the competent general assembly of appeal judges. § 2. The vice president of the court of appeal is appointed by the Minister of Justice

[202] Ustawa z dnia 12 lipca 2017 r. o zmianie ustawy - Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20170001452

from among the judges of the court of appeal or the regional court, at the request of the president of that court.

Article. 24. § 1. The president of the regional court is appointed by the Minister of Justice from among the judges of the court of appeal, regional court, or district court. After the president of the regional court is appointed, the Minister of Justice presents him to the competent general assembly of judges of the circuit. § 2. The vice president of the regional court is appointed by the Minister of Justice from among the judges of the court of appeal, regional court, or district court, at the request of the president of that court.

Article. 25. § 1. The president of a district court is appointed by the Minister of Justice from among judges of a regional court or a district court. After the president of the district court is appointed, the Minister of Justice or the president of the superior court of appeal or the regional court presents him to the meeting of judges of the given district court. §2. The vice-president of a district court is appointed by the Minister of Justice from among judges of a regional court or a district court, at the request of the president of that court."

This law grants essentially grants the minister of justice the ability to appoint presidents of judges from the judiciary to positions of president of the court. The issue with this is that presidents of court have a lot of power in managing the court. In essence this law gives the minister of justice the power to appoint presidents of court and in turn it gives the minster the power to select certain presidents who share the minsters view of the law. There is perhaps only a theoretical possibility for the judiciary to reject the minister of justice appointments as outlined within this section of the law: "§ 1a. The president of the regional court draws up annual information on the activities of the courts operating in the area of the district, within the scope of the tasks entrusted to him, which, after being approved by the general assembly of circuit judges, he submits to the president of the court of appeal no later than by the end of February each year." This part of the law obliges the presenting of the regional court to prepare annual information of court activities. But there is also a section dedicated to the approval of other judges: "after being approved by the general assembly of circuit judges". From this we can summarize that it is theoretically possible for the general assembly to reject the Minister's appointment of president. This uncertainty comes because the law fails to explicitly state the power of the generally assembly of judges in appointments of this nature.

The minister of justice is also given the power to initiate procedures to dismiss the president and vice president of the court: “Article. 27. § 1. The president and vice president of the court may be dismissed by the Minister of Justice during their term of office in the event of: 1) gross or persistent failure to perform official duties; 2) when further performance of the function cannot be reconciled with the interests of the justice system for other reasons; 3) identifying particularly low effectiveness of activities in the field of administrative supervision or work organization in the court or lower courts;” If minster of justice had unanimous power to do so that would be grow violation of judicial independence sub attribute of democratic quality But Minister has to consult with National Council of the Judiciary: “§ 2. The dismissal of the president or vice president of the court takes place after consulting the National Council of the Judiciary. The intention to appeal, together with a written justification, is presented by the Minister of Justice to the National Council of the Judiciary for an opinion; § 3. When applying for an opinion to the National Council of the Judiciary, the Minister of Justice may suspend the president or vice president of the court in the performance of their duties; § 4. A negative opinion of the National Council of the Judiciary concerning the dismissal of the president of the court is binding on the Minister of Justice if the resolution in this matter was adopted by a two-thirds majority of votes.” As we can observe, the national council of the judiciary can reject the minister of justice’s application for dismissal of president or vice president of any court however it has yet to be placed into practice and is therefore theoretical.

This law makes the national council of judiciary very important. As such, earlier the President of Poland vetoed a law amending how a member of the national council of the judiciary is elected is even more significant. This is due to the fact that if the council of judiciary is free of partisanship there is a check on the minister of justice’s power. Even if that ability is more of consultation as mandate by this paragraph: "§ 1a. The Minister of Justice, after consulting the National Council of the Judiciary and the relevant general assembly of appeal judges, the general assembly of circuit judges or the meeting of district court judges, may determine, by way of an ordinance, within the scope referred to in § 1, the internal rules of operation of common courts containing regulations different from those contained in the executive regulations issued on the basis of § 1, applied for a definite period not longer than two years, in no more than two district courts or two court districts, or in the area of no more than two appeals courts, taking into account the need to verify the practical operation of these regulation.”. This paragraph exemplifies the

importance of the national council of the judiciary. This is due to the minister of justice being mandated consult the NCJ before making changes to the internal rules of the courts. But this offers only minimal effect due to that consultation being a non-binding opinion to the minister of justice. Thus, the expansion of the minister of justice's power has led to a reduction of judicial independence in Poland and democratic quality in Poland

The Venice Commission opinion on this act could be summarized in total by this paragraph: "96. The Act on Ordinary Courts (hereinafter - the Act) was signed by the President and entered into force. Some of its provisions are now being implemented. The Act increases the powers of the Minister of Justice (the MoJ) related to the internal organization of the courts, to the appointment and dismissal of the presidents and deputy presidents of the courts and extends competencies of the MoJ in the areas of promotion and discipline. Again, the Act is a very lengthy and complex document; the Venice Commission will only analyze the most problematic parts of it." Venice commission lays out all the powers that the minister of justice has gained.(until 2017):"• assigns new posts of judges to individual courts (Article 20a § 1 of the Act), • establishes and abolishes divisions, branch divisions and branch units of courts (Article 19), • establishes and abolishes courts and determines their local competency areas (Article 20), • controls administrative performance of the presidents of the courts of appeal and establishes guidelines for them (Article 37g § 1 (2) and (3)), • imposes financial sanctions on court presidents (Article 37ga),77 • determines the rules of procedure for common courts (Article 41 § 1), • establishes a detailed procedure and manner of evaluating the qualifications of a candidate for a vacant post of a judge (Article 57i § 4),• appoints deputy judges and allocates them to courts (Article 106i §§ 1 and 2), • may request the opening of disciplinary proceedings against a judge (Article 114 § 1), • may lodge an appeal against decisions of a disciplinary court (Article 121 § 1)"

The power of the minister of justice over common courts is great and with the conjunction of the minister of justice becoming the general prosecutor and thus sometimes having to participate in court proceedings (when he/she is not handing down general prosecutor duties to national prosecutor). The power granted to the minister of justice creates an unfair system for citizens to try to defend against prosecutors especially if the minister of justice has political or personal interest in case. This almost completely erases judicial independence in common courts and is great loss of democratic quality.

President of republic veto law of July 20, 2017 - on the Supreme Court

From the democratic quality perspective, polish judiciary while weakened still retains some power to be independent and Polish president isn't totally complicit in the weakening of the polish judiciary. In his veto, he outlined the importance of preserving the judicial independence. But this wasn't the only veto. On July 31, Polish President vetoed law of July 20, 2017 - on the Supreme Court, the Presidents justifications (Print No. 1789)[203] for the veto are as follows:

"Thus, there can be no doubt that allowing a law whose internal provisions are obviously contradictory to come into force would harm the authority of the state and justify a loss of public confidence in the lawmaking process. Provisions of universally binding law should conform to universally recognized rules of legislative procedure (they should be properly structured, contain clear and understandable content, should be placed in the appropriate place in the normative act, and should be non-contradictory)

The parliamentary bill on the Supreme Court (parliamentary print no. 1727) was submitted to the Marshal's staff on July 12, 2017, and after only eight days, it was passed by the Sejm. The Senate, approving the provisions of the bill, did not file amendments to its text. The adoption of the law was not preceded by dissemination of the bill's text and consultations. It is obvious that decisive changes, in such an important sphere for the functioning of the state as the is the administration of justice, will not receive the approval of all interested circles and may meet with strong opposition

I ask the High Chamber to assess whether the functioning of the Supreme Court, which is equipped with such extensive and significant powers, should be subject to the discretionary powers of a government administrative body, such as the Minister of Justice, who is also the Prosecutor General? General? There is no doubt that if the provisions of the law of July 20, 2017, on the Supreme Court had entered into force, the influence of the Minister of Justice -Prosecutor General on the activities of the Supreme Court would be enormous, and it is legitimate to fear a threat to the independence of this court and its authority in society."

We can disseminate that the President of Poland raised the important point of the growth of power for the Minister of justice over Polish supreme court as one of the main issues to veto the law. Additionally, the President calls for the Sejm to be more prudent in debating changes to

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[203] Druk nr 1789 Wniosek Prezydenta RP o ponowne rozpatrzenie ustawy z dnia 20 lipca 2017 r. o Sądzie Najwyższym. https://orka.sejm.gov.pl/Druki8ka.nsf/0/C62F3C799EFE5A3DC1258191003FCC06/$File/1789.pdf

important parts of the judiciary and rush through the adoption of a law. This highlights contradictions within the law which should have been cleared up by a more careful legislative process. It can be shown that the President of Poland is resisting the PiS party attempts to completely negate the judicial check on power of government, which perhaps shows that despite President Duda being a member of the PiS party he does try to preserve judicial independence of Polish courts.

Act of 8 December 2017 on the Supreme Court

After 4 months of work in the Sejm a new law on the amendments to the supreme court had been passed and later signed by the President of Poland on December 20, 2017. This time it appears that the minister of justices' role in the supreme court had been reduced to that of a participant, while the President of the republic had been granted new power. However, those powers where still being kept in check by the Senate of Poland National council of judiciary. First we begin the analysis in the Act of the 8th of December 2017 on the Supreme Court (Journal of law Item 5)[204] focusing on the functions of the court and how it is divided.

After this organizational information we get a first look at the new power granted to the President of Poland: "**Article. 4.** The President of the Republic of Poland, after obtaining an opinion of the Supreme Court's Collegium, shall determine, by means of an ordinance, the Supreme Court Rules, in which he shall fix the number of posts of Supreme Court judges not less than 120, including their number in particular chambers, the internal organization of the Supreme Court, the rules of internal procedure and the detailed scope and manner of performance of duties by assistant judges, taking into account the necessity to ensure efficient functioning of the Supreme Court, its chambers and bodies, the specific nature of proceedings conducted before the Supreme Court, including disciplinary proceedings, as well as the number and type of cases heard." As we can see, this article allows for the President of Poland to set a fix on the number of judge posts within the chamber of the Supreme Court. Additionally, the President of Poland is allowed to set rules such as the rules of internal procedure and the detailed scope and manner of the performance of duties by assistant judges. Rules on the specific nature of proceedings conducted before the

[204] Ustawa z dnia 8 grudnia 2017 r. o Sądzie Najwyższym
https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20180000005

Supreme Court, including disciplinary proceedings, as well as the number and type of cases heard. But while that is a broad expansion of the Presidents managerial powers, the President is bound by the opinion of the Court Collegium and consideration set by the law. In theory the President could disregard those considerations. It is highly likely that the Court could challenge the President's decision with the Constitutional tribunal or the court itself. The President of Poland also gained the power to appoint The First President of the Supreme Court from among five candidates selected by the General Assembly of Judges of the Supreme Court.

Article. 12 § 1 The First President of the Supreme Court shall be appointed by the President of the Republic of Poland for a six-year term of office from among 5 candidates selected by the General Assembly of Judges of the Supreme Court and may be reappointed only once. The person appointed to the office of the First President of the Supreme Court may hold that office only until retirement, retirement, or termination of service as a judge of the Supreme Court.

Additionally Chief Justice of the Supreme Court from among 3 candidates presented by the Assembly of Judges of the Supreme Court Chamber:

Article. 15 § 1 The Chief Justice of the Supreme Court shall direct the work of the Chamber concerned.

§ (2) The Chief Justice of the Supreme Court shall be appointed by the President of the Republic of Poland, after consultation with the First Chief Justice of the Supreme Court, for a three-year term of office from among 3 candidates presented by the Assembly of Judges of the Supreme Court Chamber and may be reappointed only twice. A person appointed to the position of Chief Justice of the Supreme Court may hold that position only until he or she retires, is retired or his or her employment as a judge of the Supreme Court expires.

As mentioned, the National Council of the Judiciary keeps the presidents' power in check when it comes to appointments: "**Article. 29** The President of the Republic of Poland, on the motion of the National Council of the Judiciary, shall appoint a judge of the Supreme Court § (2) Any person who meets the qualifications for the position of a judge of the Supreme Court may submit his candidacy to the National Council of the Judiciary within one month of the date of the announcement referred to in § 1." As we can see from these articles, the President of the republic can appoint a person to the Supreme Court. However, this option is only available after a motion by the National Council of the Judiciary. As such, the National Council of the Judiciary can control who becomes a judge in the Supreme Court, with the president serving a ceremonial role in the

appointment process. It is also worth mentioning that anyone who meets the criteria set in law can submit their application to the National Council of the Judiciary.

Next, we will review the two chambers of the supreme court: The extraordinary Control and Public Affairs Chamber and the more controversial Disciplinary Board of the Supreme Court. These chambers gained controversy due to the creation of a court within a court, with the chambers having more power over the other chambers of the Supreme Court. As such, it is necessary to examine first the competency of the Extraordinary Control and Public Affairs Chamber: "Article 26 The competence of the Extraordinary Control and Public Affairs Chamber shall include consideration of extraordinary complaints, examination of election protests and protests against the validity of a nationwide referendum and constitutional referendum, and ascertainment of the validity of elections and referendum, other public law cases, including cases in the area of competition protection, energy regulation, telecommunications and rail transport, as well as cases in which an appeal has been lodged against a decision of the Chairman of the National Broadcasting Council, and complaints concerning the lengthiness of proceedings before common and military courts and the Supreme Court". The Extraordinary Control and Public Affairs Chamber is actually the most powerful chamber and is concerned with how public law is being enacted and the validity of referendums as well as the investigation of election challenges and extraordinary appeals. The Venice Commission explains the issue with the extraordinary appeals is the ability to overrule the other chambers of the Supreme Court and any previous judgment by other courts:" Moreover, their powers will extend even back in time, since the "extraordinary control" powers will give the Extraordinary Chamber the possibility to revive any old cases decided up to twenty years ago."

Next, is the Disciplinary Chamber of the Supreme Court. Its infamy was gained by having the ability to be used as a tool to suppress dissenting judges of the court. But its organization is most intriguing: § 3. The First Division shall consider, in particular, cases: 1) Supreme Court judges; 2) judges and prosecutors concerning disciplinary offences that fulfil the prerequisites of intentional crimes prosecuted by public indictment and the offences indicated in the motion referred to in art. 97 § 3. § 4 The Second Division shall consider, in particular: 1) Appeals against rulings of disciplinary courts of first instance in cases of judges and prosecutors, as well as decisions and orders closing the way to judgment; 2) cassations against disciplinary rulings; 3) appeals against resolutions of the National Council of the Judiciary." The second division has been

granted power to rule over the National Council of the Judiciary resolutions. The importance comes from the fact that the Disciplinary Chamber will be able to strike down the NCJ resolutions with the law being unable to enforce limitations to this power. As such, the Supreme Court can be used to strike down unfavorable resolutions of the NCJ.

However, it is important to note, that the primary role of the disciplinary board is focused on disciplinary rulings concerning judges of the Supreme Court and other court judges' and prosecutors concerning disciplinary offences in criminal law. As such, to ensure that there are ways of preventing the executive government from using the board to prosecute dissenting judges we have to review process by which a judge of the Supreme Court can be brought against the disciplinary board. Firstly, the board does not have the authority to hold a hearing, they are only being briefed on the case:

Article. 76 § 1 The Disciplinary Ombudsman of the Supreme Court shall undertake explanatory actions at the request of the First President of the Supreme Court, the President of the Supreme Court who directs the work of the Disciplinary Chamber, the Supreme Court Collegium, the Prosecutor General, the State Prosecutor, or on his own initiative, after the preliminary clarification of the circumstances necessary to establish the elements of the misconduct, as well as the submission of explanations by the judge, unless the submission of such explanations is impossible. The explanations should be conducted within 30 days of the date of the first action taken by the Disciplinary Advocate of the Supreme Court.

§ (2) Following the investigation, if there are grounds for instituting disciplinary proceedings, the Disciplinary Ombudsman of the Supreme Court shall initiate disciplinary proceedings and present charges in writing to the judge. Following the presentation of the charges, the defendant, within 14 days, may submit explanations and motions to present evidence.

§ (4) If the Disciplinary Ombudsman of the Supreme Court finds no grounds to institute disciplinary proceedings at the request of an authorized body, he shall issue a decision refusing to do so.

§ (5) If the Disciplinary Ombudsman of the Supreme Court finds no grounds for submitting a motion to hear a disciplinary case, he shall issue a decision to discontinue disciplinary proceedings

Paragraph above show that, it is the Disciplinary Ombudsman of the Supreme Court who can initiate disciplinary proceedings and preform the investigation needed to determine if there are grounds to have a hearing. It is important to note that the court elects the Ombudsman as such no

other part of government can interfere and appoint him/her. However, the President of the Republic of Poland can appoint the Extraordinary Disciplinary Ombudsman in special cases:
"§ 8 The President of the Republic of Poland may appoint from among the judges of the Supreme Court, common court judges or military court judges an Extraordinary Disciplinary Ombudsman to conduct a particular case concerning a judge of the Supreme Court. In the case of disciplinary offences constituting the elements of intentional offences prosecuted by public indictment or intentional fiscal offences, the President of the Republic of Poland may also appoint an Extraordinary Disciplinary Ombudsman from among prosecutors of the National Prosecutor's Office indicated by the National Public Prosecutor. "

Paragraph above show that the appointment of the Extraordinary Disciplinary Ombudsman is possible when a judge has committed an offense which a regular person could receive an indictment for or if the judge is committing financial crimes like money laundering. There have also been mentions of a juror in these proceedings, the criteria for jury involvement are these:

Article 59 § 1. In the hearing of extraordinary complaints, cases referred to in Article 27 § 1 item 1, and in other disciplinary proceedings in which the Supreme Court has jurisdiction under the provisions of separate laws, jurors of the Supreme Court shall participate

Article 61 § 1 The number of Supreme Court jurors shall be determined by the Supreme Court College.
§ (2) Supreme Court jurors shall be selected by the Senate by secret ballot.

Article 73 § 1 The disciplinary courts in disciplinary cases of Supreme Court judges are:
1) at first instance - the Supreme Court, composed of 2 judges of the Disciplinary Chamber and 1 Supreme Court juror;
2) in the second instance - the Supreme Court, composed of 3 judges of the Disciplinary Chamber and 2 Supreme Court jurors.
§ 2. The jurors of the Supreme Court to judge in disciplinary cases shall be appointed by the First President of the Supreme Court on a case-by-case basis

It has been argued, within the scientific community, that the presence of jurors improves democratic quality. As such, we can see that PiS allows for partial jury trials in special cases in the supreme court where respected members of the public could contribute with their views on certain cases. Lastly, can be see that the minister of justice is given some limited powers within the Supreme Court:

Article 40 § 1 On motion of the First President of the Supreme Court, the Minister of Justice may delegate, for a specified period of time, not exceeding 2 years, a judge with at least ten years of experience as a judge, with his consent, to perform judicial duties in the Supreme Court.

§ 3 The number of judges delegated to perform judicial functions in the Supreme Court shall not exceed 30% of the number of positions of Supreme Court judges.

§ (4) At the request of the First President of the Supreme Court, the Minister of Justice may delegate, for an indefinite period of time, a judge, with his or her consent, to act as an assistant judge of the Supreme Court and to perform other duties in the Supreme Court.

With adoption of this law the minister of justice can appoint judges to the Supreme Court but only when the president of court requests it, additionally these appointed judges cannot achieve ruling majority.

From the perspective of democratic quality and judicial independence, this law is fairly good while there are some issues like the two chambers having too much power over other parts of court and judiciary but there are a number of positives with the court largely being responsible for much of control of the system by itself or the NCJ. The President of Poland is granted power, but it is kept in check by court's general assembly. The National Council of Judiciary is allowed to select people who can become judges of court, while the President, in theory is the one who appoints them, his power seems to be more ceremonial when looking at it in a practical light. While the existence of the disciplinary board might call into question the independence of court, but it is the court which selects the person who can initiate disciplinary proceedings. While in exceptional cases the judge who has committed the offences for which judge could be indited, President of Poland still has to select Ombudsman from judiciary. This law lowers judicial independence by reducing courts power. As newly created extraordinary chamber becomes most power chamber that can rule over other chamber decisions. But with regards to selecting judges for court, judicial independence isn't reduced, due to NCJ being one who truly selects candidates for court. Since President can appoint judges only on motion from NCJ.

Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts

At same time as the Act of 8 December 2017 on the Supreme Court had been adopted an equally controversial law was adopted called "Act of 8 December 2017 amending the Act on the National Council of the Judiciary and certain other acts" (journal of laws, item 3).[205] This law also has some controversy surrounding it because the Vienna Commission had criticized it's draft for changing procedure by giving the judicial branch insufficient impute when selecting members for the council which is needed to ensure judicial independence. The process for member election is detailed as follows: "art. 9a. 1. The Sejm shall elect fifteen members of the Council from among judges of the Supreme Court, common courts, administrative courts and military courts for a joint four-year term of office." As we can see, the members of council must be judges, as such PiS isn't given the right select non-judges to this council. There are more requirements that the Sejm must take into account when selecting members of national council of judiciary: "2. When making the choice referred to in para. 1, the Sejm, as far as possible, takes into account the need to represent judges of particular types and levels of courts in the Council." One of potential results of these requirements is forcing the National Council of the Judiciary to have representatives from all of the nation's courts.

It is important to note that that while the Sejm elects fifteen candidates to the National Council, not all of those candidates are from Parliament:"2. The entities entitled to propose a candidate for Council member shall be a group of at least: 1) two thousand citizens of the Republic of Poland who are at least eighteen years of age, have full capacity to perform legal acts and exercise full public rights; 2) twenty-five judges, excluding retired judges<……..>2. A parliamentary club shall nominate, from among the judges nominated in accordance with Rule 11a, a maximum of nine candidates for election to the Council". This indicates that at least six members of the National Council of the Judiciary are not candidates of parties inside the Sejm and those candidates will have the backing of either twenty five of their peers or two thousand Polish citizens. While this can be seen as adding more legitimacy to the members of the National Council

[205] Ustawa z dnia 8 grudnia 2017 r. o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20180000003

of the Judiciary by including the possibility of citizens to submit candidates this may not be the case. The Vienna Commission argues that:" Parliament is not obliged to select candidates supported by other judges and may choose candidates who have only minimal support amongst their colleagues. Thus, the opinion of the judicial community has insufficient weight in the process of election of members of the NCJ."[206]

The Commissions' main concern is that these changes will greatly politicize the selection of candidates to the National Council. But there is mechanism to try to alleviate that "4. The competent committee of the Sejm shall establish the list of candidates selecting, from among the candidates indicated in accordance with the procedure laid down in Paragraphs 2 and 3, fifteen candidates for Members of the Council, with the proviso that the list shall include at least one candidate indicated by each parliamentary club which has been active within sixty days of the date of the first sitting of the Sejm during the term." This law mandates that all political parties in Sejm would have at least one of their candidates included in the list of candidates. Additionally, approval of this list must be done by a qualified majority of votes in the parliament:" 5. The Sejm elects the Council's members for a joint four-year term of office at the nearest sitting of the Sejm by a 3/5 majority vote in the presence of at least half of the statutory number of Deputies, voting on the list of candidates referred to in section 4". The Venice Commission has consistently recommended that the members of a judicial council elected by Parliament should be elected by a qualified majority.[207] Additionally, voting for the list forces both government and opposition parties to cooperate. This is a positive aspect of the law and can possibly mitigate politization of candidate selection.

From a democratic quality perspective there are two effects on sub-attributes of democracy. First, the effective oversight from parliament is strengthened by gaining power to select candidates for the National Council of the Judiciary. But Judicial independence is decreased due to the judiciary continuing to have one party proposing candidates out of three (Citizens, judges, Parliament parties). However, candidates to the National Council of the Judiciary must still be judges themselves with the Sejm constructing the list and voting taking into account that all levels of the court system are represented in the council. Overall, there is a minor loss of democratic

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[206] Opinion on the draft act amending the act on the national council of the judiciary, on the draft act amending the act on the supreme court, proposed by the president of Poland, and on the act on the organization of ordinary courts Opinion No. 904 / 2017 https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2017)031-e
[207] Ibid

quality, because Sejm is having to select from members of judiciary, and they are bound by law to represent all levels of the court system of Poland.

It is important to mention some context of the President of Poland signing both Act of the Supreme Court and the act on the National Council of the Judiciary, despite issues raised by the Vienna Commission. The Polish President had decided to sign these bills after the EU decided to trigger Article 7 against Poland, attempting to suspect Poland's rights in the union.[208] On November 11, 2017, the Vienna Commission had noted that Poland was open to dialog:" The Venice Commission notes that the Polish authorities are open to dialogue, which is encouraging. It calls on the President of the Republic to withdraw his proposals and start a dialogue before the procedure of legislation continues. It also urges the Polish Parliament to reconsider the recent amendments to the Act on Ordinary Courts, along the lines indicated in the present opinion." This event indicates that Poland was willing to cooperate when drafting its laws, as mentioned earlier the PiS party did make changes that improved many of its laws (for example Supreme court law and Constitutional tribunal law). Still, the European Commission's actions correlates with the Polish president deciding to sign this bill regardless of the European Unions and the oppositions' opinion.

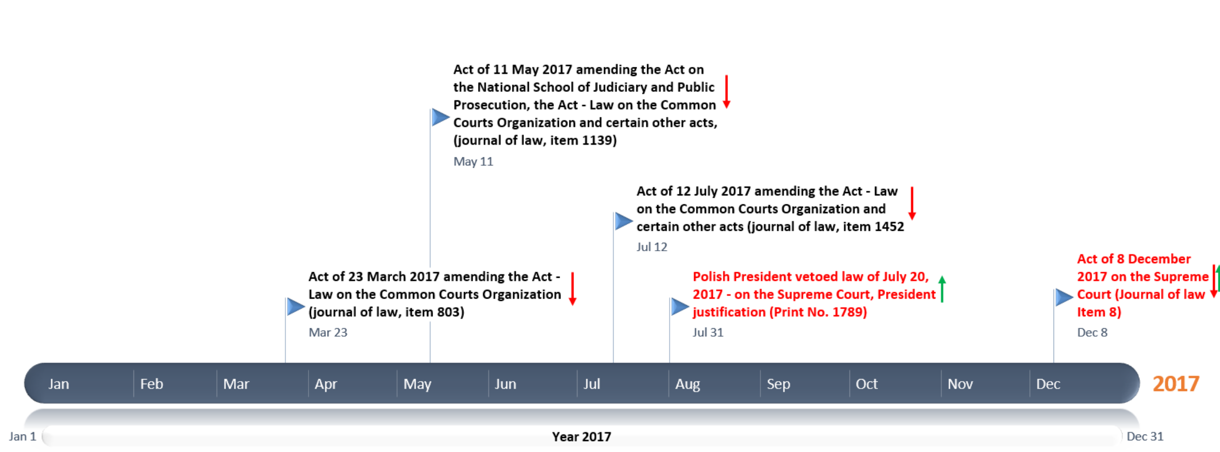

Fig. 6. Timeline of democratic quality affecting laws in 2017

[208] Polish president signs judicial overhaul bills into law https://www.reuters.com/article/us-eu-poland-commission-duda/polish-president-signs-judicial-overhaul-bills-into-law-idUSKBN1EE286

In 2017, Polish democratic quality had decreased due to further expansion of the minister of justice power over the common courts. This expansion has completed eliminated judicial independence in common courts, by allowing the minister to select presidents of courts, setting internal rules for courts and even being able to issue financial penalties to court presidents (Fig. 6). This expansion of minister's power has given an unfair advantage to any case that public prosecutors are involved. Only the supreme court of Poland still has an amount of judicial independence, while there have been changes to their laws, overall, the supreme court of Poland still retains power in governing itself. For example, the court decided that there is a need to initiate disciplinary proceedings against judge. The infamous change to the national council of the judiciary has had a dual effect on democracy in Poland. On one hand, there was a decrease due to the judiciary having a reduced role in selecting the members to the NCJ, but on the other hand, there was an increase in representation due to Sejm when drafting a list of candidates must include all active parties in Sejm and candidates who have the support of judges. While the Vienna Commission rates this as insufficient influence from members of the judiciary, the commission states that the 2/3rds majority of MP votes requirement strengthens the legitimacy of candidates. Overall, the changes to the national council of judiciary elections are a negative development to democracy, due to Parliament gaining more power, while the judiciary especially in tandem with other changes only losses independence.

4.2.4. Legal analysis of bills passed by Polish Sejm Year 2018

In 2018, there were a total of 272 laws passed by the Polish Sejm, out of those twenty eight were selected for initial analysis. Concluding the initial analysis only four laws contain changes that have the potential to affect the quality of democracy based on one out seven sub-attributes.

The Act of May 10, 2018, amending the Telecommunications Law and certain other acts

The first law that has changed democratic quality is “the Act of May 10, 2018, amending the Telecommunications Law and certain other acts” (Journal of laws, item 1118).[209] The first indication that this law could change the democratic quality was this line in law:

“1. The telecommunications entrepreneur shall be obliged to submit to the President of UKE, by March 31, data for the previous calendar year concerning the type and scope of the performed telecommunications activity and the volume of sales of telecommunications services.” That is because these are new obligations put on media companies and can be potentially used as a tool to supper opposing media companies due to pricing issues. This was followed by a lot of paragraphs concerning pricing changes and new contract signing rules for users of publicly available telecommunication companies: “7. The provider of publicly available telecommunications services shall be obliged to submit the price list to the President of UKE, at his every request, within the period specified by him”; “(5) The provider of a publicly available telecommunications service shall provide the subscriber, free of charge, with the determination of the amount threshold for premium rate services increased fee, for each billing period, and in the case of its absence, for each calendar month, and upon reaching the quota threshold, the provider of the publicly available telecommunications service telecommunications service is obliged to 1) immediately inform the subscriber of this fact; 2) block the possibility of making calls to numbers of services premium rate service numbers and receive calls from such numbers, unless they unless they will not result in an obligation to pay on the part of the subscriber”. In this law, there are a set of thresholds that users of telecommunication services can choose when a service provider cannot charge them more for premium services. This can be used to regulate media accessibility by public channels with the usage of premium services. Essentially this allows for the government to have independent analysis content in media but makes companies charge higher rates for those services.

Finally, the President of UKE is given inspectorial power to make sure telecommunication companies are not overcharging their costumer issuing warnings for non-compliance and violations: (a) paragraph 1 shall be replaced by the following: “1. If as a result of the inspection referred to in Article 199, paragraph 1, it is found that the entity subject to control, hereinafter referred to as "a controlled entity controlled", does not fulfill the obligations pertaining to it arising

[209] Ustawa z dnia 10 maja 2018 r. o zmianie ustawy - Prawo telekomunikacyjne oraz niektórych innych ustaw https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20180001118

from the provisions of law or a decision issued by the President of UKE. The President of UKE: 1) impose the penalty referred to in Article 209 in the event of finding the violations indicated in this provision, regardless of the ongoing post-control proceedings against that entity, or 2) issues post-inspection recommendations, in which it calls on the controlled entity to remove irregularities or provide explanations". At first glance, this law seems unconnected with democratic quality; instead, it is industrial regulations; however, it does grant access to information with the potential for cracking down on opponent companies. If these inspectorial powers are used positively, more people can access the internet and more information sources. Alternatively, they can be used to crack down on companies opposed to the government party under the guise of overcharging their customers or unlawfully limiting access to media.

Act of July 20, 2018, amending the Law - Press Law

On July 20, 2018. On amending the Law - Press Law (journal of laws, item 1570) [210] made some changes that could force exposing journalists to the public:

"1. A journalist shall be exempt from professional secrecy as referred to in Article 15, paragraph 2, if information, press material, a letter to the editorial board, or other material of this nature relates to a crime specified in Article 240 § 1 of the Penal Code, or the author or the person transmitting such material exclusively for the journalist's information consents to the disclosure of his name or this material".

In recent years so-called whistleblowers have gained increased prominence in revealing corruption. However, this article put journalists and whistleblowers in danger by opening ways to display their identities and thus possibly putting journalists at risk of retaliation.

[210] Ustawa z dnia 20 lipca 2018 r. o zmianie ustawy - Prawo prasowe https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20180001570

Act of 20 July 2018 amending the Broadcasting Act and the Act on Subscription Fees

The next law to analyze is the “Act of 20 July 2018 amending the Broadcasting Act and the Act on Subscription Fees” (journal of laws, Item 1717) [211] which detail what kind of duty charter must public media companies produce and what it must include. But to keep it short essentially this is what the duty charter is: “3. The duty charter also defines the general principles of conducting activities not resulting from the public mission referred to in Art. 21 sec. 1 and indicates the most important types of such activities.

The duty charter is determined by communications between National Council. and public radio and television broadcasting entity, but this determination can turn in to council dictating it, since accepting the duty charter hinged on National councils’ approval: 5. The charter of duties is determined by way of an agreement concluded between the public radio and television broadcasting entity and the Chairman of the National Council acting on the basis of a resolution of the National Council.

This issue arises with the National council having the authority in making a charter of duties on its ability to reject the charter of duties if the council disagrees with the decision: 8. The National Council shall conduct arrangements with the public radio and television broadcasting unit regarding the draft duty charter, under which it may submit comments to it. 9. Before adopting a resolution authorizing or refusing to conclude an agreement with a public radio and television broadcasting entity, the National Council shall evaluate the compliance of the draft duty charter with the principles of fulfilling the public mission referred to in Art. 21 sec. 1. The resolution of the National Council contains justification.”

It is important to understand that the charter of duties in the binding document that essentially governs public broadcasters is hard to change because it can only be done on a resolution where the national council of media agrees to it: “12. The Duty Charter may be amended by way of an agreement concluded between the public radio and television broadcasting entity and the Chairman of the National Council acting on the basis of a resolution of the National Council <…>” All of this increased government control over public broadcasters, which decreased media integrity and democratic quality in Poland.

[211] Ustawa z dnia 20 lipca 2018 r. o zmianie ustawy o radiofonii i telewizji oraz ustawy o opłatach abonamentowych https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20180001717

Act of 20 July 2018 amending the Act - Law on the Common Courts Organization and certain other acts

Next law that I shall look in to is Act of 20 July 2018 amending the Act - Law on the Common Courts Organization and certain other acts, (journal of laws, item 1443) [212] this law grants minister of justice some power to manage prosecutorial system:

"1. The Minister of Justice shall announce, by order, depending on the staffing needs of the courts and the prosecutor's office, recruitment for judicial apprenticeship and prosecutor's apprenticeship and judicial apprenticeship and prosecutor's apprenticeship conducted in the form of supplementary applications and, at the same time, determines the enrollment limits for these applications. When setting limits for admission to the prosecutor's application and the prosecutor's application prosecutorial application conducted in the form of a supplementary application, the Minister of Justice shall consult with the National Prosecutor".

(3) The Minister of Justice shall determine, by regulation, the manner of appointment of the competition commission to conduct the competition for the supplementary prosecutor's apprenticeship supplementary prosecutorial application, the manner of conducting the competition, as well as the scope and criteria for evaluating the results of the oral examination, taking into account the requirements related to ensuring objective evaluation of the competition participants and the efficiency of its conduct of the competition.

With this law minister of justice gain's ability to create rules on when recruitment and training of new prosecutors can begin. Control over rules on the creation competition commission to conduct the competition for the supplementary prosecutor's apprenticeship supplementary prosecutorial application. And the manner of conducting the competition, as well as the scope and criteria for evaluating the results of the oral examination. Essentially Minister of justice now can control on what kind of people will be able to become new prosecutors, thus possibly preventing a dissenting citizen from joining the judiciary.

[212] Ustawa z dnia 20 lipca 2018 r. o zmianie ustawy - Prawo o ustroju sądów powszechnych oraz niektórych innych ustaw https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20180001443

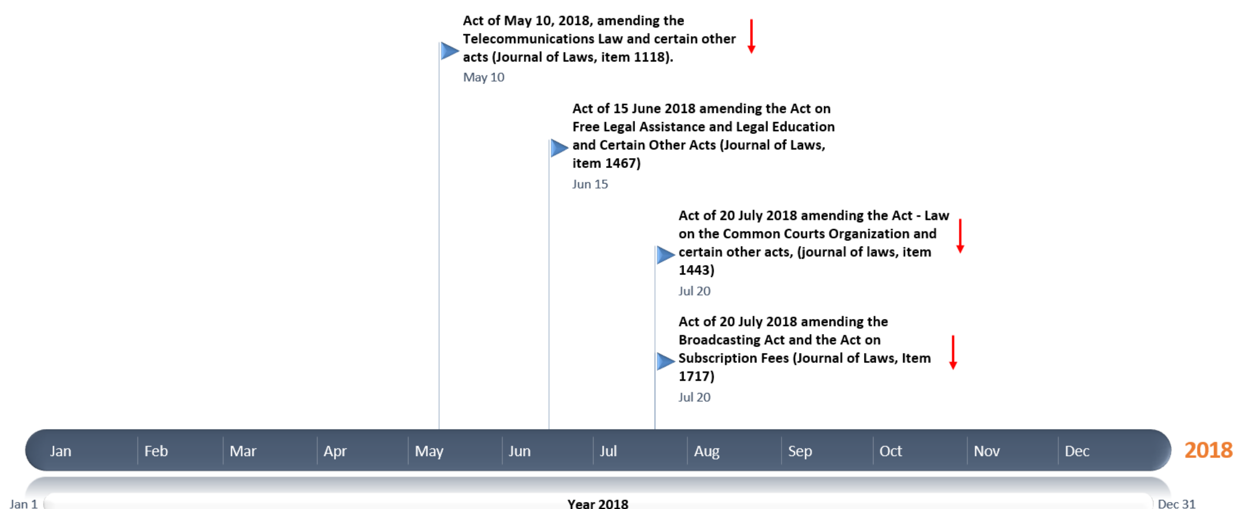

Fig. 7 timeline of democratic quality affecting laws in 2018

Fig 7 gives overview of democratic quality affecting laws that have been passed in 2018. It can be observed that although most of them have been negative. Main issue is with growing control public media companies by government institutions. This threatens media integrity. Additionally in 2018 minister of justice continues to gain more influence of polish judicial system. This time gaining indirect influence over hiring practices of new prosecutors. This reduces judicial independence and earlier mentioned development reduced media integrity.

4.2.5. Legal analysis of bills passed by Polish Sejm Year 2019

In the year 2019 there were in total 196 of laws passed by Polish Sejm, out of those 15 were selected for initial analysis. Initial analysis has shown that only 2 of laws contain changes that could possibly affect quality of democracy based on one out 7 sub-attributes.

First law that was analyzed in 2019 was Act of January 31, 2019, amending the Act - Electoral Code. (Journal of laws item, 273)[213] Relevant part are these:

[213] Ustawa z dnia 31 stycznia 2019 r. o zmianie ustawy - Kodeks wyborczy https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20190000273

"§ 5. The Chairman of the State Election Commission, in particularly justified cases justified cases, in urgent matters, on his own initiative or at the request of a member of the State Election Commission or the Secretary of the State Election Commission State Election Commission, may decide to adopt a resolution by the State Election Commission by circulation. For resolutions adopted by circulation, the provision of § 4 shall apply accordingly

(a) after § 1, § 1a is added, which reads:

"§ 1a. Each district election commission shall be composed of:

1) 7 persons in voting districts of up to 1,000 inhabitants;

2) 9 persons in voting districts of 1001 to 2000 inhabitants;

3) 11 persons in voting districts from 2001 to 3000 residents;

4) 13 persons in voting districts with more than 3,000 residents.",

b) § 2 is replaced by the following:

"§ 2. A district election commission shall be appointed from among candidates proposed by-election attorneys or persons authorized by them

§ (2) The person submitting the list shall have the right to appeal against the provisions referred to in § 1 to the State Party. shall have the right to appeal to the State Election Commission within 2 days from the date the decision is made public. The State Election Commission the State Election Commission shall consider the case and issue a decision, making it public immediately public and delivering it to the appellants and the district election commission.

§ 3. The decision of the State Election Commission shall be subject to the right to file a complaint to the Supreme Court within 2 days from the date of making this decision public. the decision to the public. The Supreme Court shall consider the complaint in the composition of 3 judges, in non-procedural proceedings, and shall issue a ruling on the complaint within 2 days. There shall be no remedy against the decision of the Supreme Court legal remedy. The ruling shall be delivered to the person submitting the list, the State Election Commission, and the district election commission.

As it was stated before it isn't much of an issue that election irregularities happen but rather how quickly and qualitatively can they be resolved. What is good about this law is that it allows for the supreme court to be used in resolutions for election-related challenges. This is good because it cuts the amount of time needed to work up the chain of court and because the supreme court must have the most competent judges. This means that court decisions are highly likely to be swift and well-argued after research into the irregularity of the cases. The next thing that should be point

out is that PiS seems to change the number of people in district election commissions. This can indicate the desire to possibly do some gerrymandering with election commissions. And that is negative to democratic quality.

Act of 31 July 2019 amending the Act - Electoral Code and the Act on the National Referendum

The last law that was selected for in-depth analysis is the Act of 31 July 2019 amending the Act - Electoral Code and the Act on the National Referendum (Journal of laws item 1504).[214] This law is more changes of already existing system where elections and referendums are confirmed by courts in Poland, this seems to be more changing in what compositions can courts determine the validity of referendums and elections (and their challenges):

"§ 1. The Supreme Court, on the basis of the election report presented by the State Election Commission and after considering the protests shall decide on the validity of the election of the President of the Republic.",

b) after § 1, § 1a shall be added in the following wording:

"§ 1a. In the case referred to in § 1, the Supreme Court shall adjudicate in the composition of the entire competent chamber.";

5) in Article 367 in § 2, the first sentence shall read:

"The Supreme Court shall consider the appeal referred to in § 1 and shall rule on the case within 7 days in non-trial proceedings.".

"Article 35 (1) The Supreme Court shall decide on the validity of the referendum by adopting a resolution thereon no later than on the 60th day from the day of announcement of the result of the referendum.

(2) In the case referred to in paragraph (1), the Supreme Court shall adjudicate in the composition of the entire competent chamber.

On its own, this could be observed as limiting the power of referendums and infringement on the core democratic value of people's choice. But now with supreme court elections becoming politicized, we can potentially see this as a larger issue. That is because if judges in courts are loyal

[214] Ustawa z dnia 31 lipca 2019 r. o zmianie ustawy - Kodeks wyborczy oraz ustawy o referendum ogólnokrajowym https://isap.sejm.gov.pl/isap.nsf/DocDetails.xsp?id=WDU20190001504

to the government they could strike down any election challenges against government candidates. And any referendum (or results) attempts that government does not approve, can also be struck down by courts

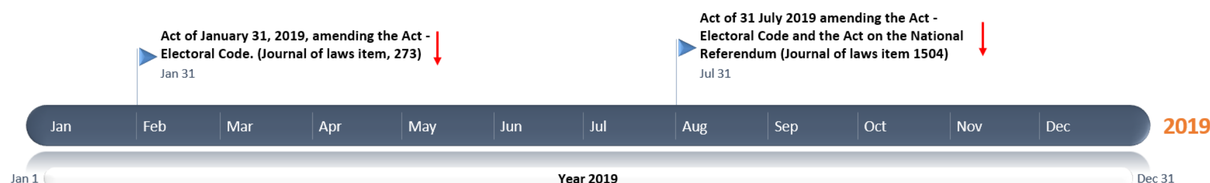

Fig. 8. Timeline of democratic quality affecting laws in 2019

4.3. Concluding Analysis of overall democratic quality in Poland

With all of laws laid out it isn't difficult to lose sight of bigger picture. While as stated in introduction idea of democratic back sliding in Poland (2015 -2019) is well known, what is rarer, is for political science research to analyze all laws that have contributed to this backsliding. As such here is review on how check on government power have been affected (Table 1).

Table 1. Summary of all bill analyzed that where passed 2015 – 2019

Time period	Total laws passed	Selected for in-depth analysis	Have changed democratic quality
2015 – 2019	921	109	22
2015	29	12	4
2016	216	35	7
2017	207	21	5
2018	272	26	4
2019	197	15	2

In 2015 Polish Law and justice party started with amendments to constitutional tribunal act of 2015 July 22. In that those amendments there was clear indication of PiS party desire to change leadership and later members of judiciary for those who they prefer. This resulted with Polish judiciary essentially revolting against PiS party with constitutional tribunal refusing to accept amendments and ruling with old rules, ironizing high quadrium requirements (court ruling in full composition had to be made up of 13 judges) and 2/3rds majority votes needed for rulings to be valid. Qualified majority vote rule combined with 13/15 judges needed for ruling paralyzed court not because of the theoretical possibility for the court being unable to rule on sensitive issues, but because in 2015-2016 part of so-called December judges (judge elected to the constitutional tribunal by PiS party) where not allowed to participate in constitution tribunal proceedings. This was the law and justice party's way to disable the court while they could draft a more permeant law that could replace the 2015 July 22nd law. This sort of fight between the Law and justice parliament and the constitutional tribunal had been very damaging to the Democratic quality in Poland because for until either leadership in the constitutional tribunal changed or PiS backed down there was essentially no constitutional check on the Polish government.

Eventually, PiS came up with a law, which was aimed to repair the worsening situation, and on July 19th, 2016 law a lot of improvements were made (according to the Vienna Commission). While the Vienna Commission would still declare that improvements were not enough and the court was this ineffective, Commission's bases for such an argument essentially is that law didn't provide the president of the court power to expedite the process on European court of justice requests. As such this law was a great improvement for a check on the government with a lot of problematic clauses fixed or amended based on Vienna commission recommendation, for example lowering quadrium from 13 to 11 in full composition ruling and removal of 2/3rd voting rule. Additionally, the Prime Minister of Poland agreed to publish a ruling by a constitutional tribunal that PiS saw as "illegal" or not following previous law's regulations. While some would like to attribute these broad concessions to opposition or European Union's pressure, that wouldn't be correct. While not explicitly stated, PiS conceded a lot of their constitutional tribunal reforms because the Polish Supreme court and the Supreme administrative court aligned themselves with the constitutional tribunal by ruling that PM had to publish rulings by the constitutional tribunal, regardless of if the PM thinks those rulings are illegal. In 2016 Poland was in a situation where

PiS had to choose, either concede to the judiciary or attempt a coup d'état with the arrest of rebellious judges of all high courts in Poland.

To support this, it can be seen at Venice commission reporting that one of December judges who was not allowed to participate in constitutional tribunal rulings initiated criminal proceedings against president of court: "18 August 2016 One of the December judges initiated criminal proceedings against the President of the Tribunal because the President was preventing the December judges from working as judges. The case was transferred to the Katowice prosecution service, reportedly because the competent Warsaw prosecution service was overloaded; on 31st of August 2016 the head of the PiS majority parliamentary group called for the removal from the Tribunal of judges who do not respect the 22 July 2016 Act on the Tribunal as adopted." A possible reason why PiS didn't go with forceful capture of the polish judiciary could have been fear of harsh retaliation from EU, Polish citizens. Eventually, the Polish PiS party choose to back down and reduce tension in Poland. Overall, this fight had caused Poland's democracy to suffer, but the passing of the July 22 law and later amendments in the 2016 November 30 law can be seen as improvements. Further improvements could be with the passage of constitutional amendment of voting rules and power of the President of the court. The constitutional amendment would make Law on constitutional tribunals less susceptible to political changes and more politically legitimate. Alternatively, any change to the constitutional tribunal should be made with a qualified majority in parliament, this would force government parties to cooperate with the opposition, rather than trying to force their vision of the court onto everyone.

The merging of the Prosecutor General office with the Minister of Justice has been widely denounced as a reduction in judicial impedance by scientists, but there hasn't been much explanation on why it is a bad thing. While such a direct assumption of the office isn't found in other prosecutorial systems of European countries, this kind of system existed in Poland prior to 2009, but only in regard to the minister of justice also heading the prosecutor general office. What is often missed by political scientists in public prosecutor law of 2016 is a sizable expansion of the power of the minister of justice and Prosecutor general when it comes to the management of the prosecutorial system. This expansion turns prosecutors into of executive branch, rather than the independent branch of the judiciary. The independence of the judiciary was further reduced with changes to the common court enacted through several laws in 2017 – 2019. In addition, the

Minister of Justice was allowed to appoint court directors and with minimal oversight from the judiciary appoint and dismiss presidents of common courts.

This sort of expansion to the Minister of Justice and Prosecutor general power creates an unfair advantage to any sort of legal question in Polish courts where any government entity is involved. The Minister of Justice in Poland is one who is part of legal proceedings and one who potentially can decide who is a judge in those proceedings. This is incompatible with democracy and severely undermines the independence of the judiciary, with the only defense against an unjust ruling by common courts being the supreme court or constitutional tribunal. This is in contrast to ideas shown in PiS 2014 electoral program where it was claimed that the judiciary will become more accessible to the common citizen. While the first solution could be the separation of the prosecutor general and minister of justice roles. There is the potential for the PiS party to not accept due to the amendments made to various laws to make them more compliant with the democratic principle of judicial independence of courts. There have not been similar moves on public prosecutor's law, this suggests PiS's unwillingness to decuple the Minister of Justice from the prosecutor general position. This first step should be scaling down the powers the Minister of Justice has over courts and rules that explicitly prevents the prosecutor general from participating in judicial proceedings unless he/she is the defendant personally. Additionally, there should be a ban on the prosecutor general's transmission of information from investigations to anyone not associated with the investigation. Lastly, the national council of prosecutors has to be appointed by the national council of the judiciary, and the national council of prosecutors has to have the power to overrule ministers of justice decisions on the prosecutorial system. These changes will improve the democratic quality of Poland, by the inclusion of more checks on the minister of justice.

It is important to note that over these changes a lot of judges, prosecutors, members of various government supervisory boards, and management at public media companies have had their terms in office terminated by various laws. First termination of terms in office question. For democratic quality, this had the effect of making various government institutions be filled by most likely loyalists from the PiS party, who possibly by individual judgments in areas of media control, judicial independence, or other issues, had backed the side that had PiS interests. Restoration of office for most of these individuals and review of all decisions that might have been made on the party line would take tremendous time and effort from Polish authorities. As such I would suggest

3 year period when a decision could be reviewed. This would cut down a number of decisions and various legal that would have to be inspected by a new commission specializing in this sort of work. Commission would have to be made from 3rd parties as impartial as possible individuals, to make it legitimate. It is possible for Polish Senate to be tasked with setting up this commission, seeing that in the current composition, the senate is fairly evenly split.

Lastly, there is also the so-called cumulative effect from all reforms that affect the quality of democracy in a negative way. For example, the expansion of power by the Minister of Justice within the court undermines protection against unjust usage of operation control on citizens. The reason is that even if the court has the final say when operational control can be used, the prosecutor general can have such rules in place that operation control will always be approved when convenient to the PiS party. This effect can only be remedied by adding an additional checks to government power in various laws (Table 2).

Table 2. Changes to democratic quality overall

Check on government	Negative developments	Positive developments
Parliament	0	1
Judiciary	13	5
Media	3	1

In conclusion during PiS party time in parliament, most severely affected check on government power has been judicial independence with next to follow media integrity being affected with reshuffling of top management of public media companies and national council of media. But there had been improvement over same period, with notably law on constitutional tribunal being prime example of PiS improving judicial independence. Main suggestion to further improve democratic quality in Poland in other aspects of democracy would be to refrain from harsh penalties to Poland and continue dialog without attempting to have PiS party surrender their ideas for judiciary. That is because harsh penalties have only pushed Polish PiS party further away from democratic quality as seen in the 2017 situation where the Polish president signed controversial laws amending the national council of judiciary and supreme court after the EU commission

decided to commence article 7 procedures. At end of 2019 European court of justice delivered a ruling where it declared the Polish judiciary no longer independent. PiS party from further making reforms that are detrimental to the Polish judiciary.[215] As the Vienna Commission calls PiS actions in December of 2019:" The amendments of December 2019, diminish judicial independence and put Polish judges into the impossible situation of having to face disciplinary proceedings for decisions required by the ECHR, the law of the European Union, and other international instruments. Thus, the Venice Commission recommends not to adopt those amendments."[216] The main takeaway from development in 2019 – 2020 is that after the European court of justice ruled Polish PiS party decided to move further away from democracy. This is similar to the already discussed 2017 situation where after the EU took action against Poland, the Polish president didn't veto laws that were controversial. While in 2016 when the EU choose dialog with Poland, the PiS party made improvements to controversial laws. But there should not be an assumption that the PiS party will do any positive changes unless they think it will benefit them. As it has been observed many of the PiS party actions were precise and not random. That being said Positive changes in Poland can only come if both sides of the conflict agree to end it.

[215] CDL-AD(2020)017-e
Poland - Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law (DGI) of the Council of Europe on amendments to the Law on the Common courts, the Law on the Supreme court and some other Laws, issued pursuant to Article 14a of the Venice Commission's Rules of Procedure on 16 January 2020, endorsed by the Venice Commission on 18 June by a written procedure replacing the 123rd Plenary Session https://www.venice.coe.int/webforms/documents/?pdf=CDL-AD(2020)017-e
[216] Ibid 15

Conclusions

1. There are two dominant conceptualizations of democracy: procedural and substantive. While there might be different definitions, most of them fit in to one or the other category. The main difference between them is as follows: the procedural democracy concept demands that the political system must ensure elections with universal suffrage are maintained and the executive government is kept in check by the other branches of government. With R. Dahl, procedural democracy conceptualization gained minimal human rights as a requirement for democracy. The substantive democracy concept assumes that the political system has already achieved elections, checks on government and minimal human rights guarantees. This concept demands that the political system ensures the highest possible human rights and social welfare within the state before it can be considered fully democratic. However, the substantive democracy concept is nebulous and often has a multitude of ideas and concepts attached to a substantive democracy. Democracies can also be evaluated on objective and subjective grounds. The most important is the objective nature of the procedural approach toward evaluation. This type of evaluation can give a holistic and objective approach to understanding democratic quality.

2. It has been shown that the analyzed indexes usually mix different democracy concepts in order to form one cohesive explanation of democracy. But in doing so these concepts have the tendency to divide attention and contradict one another rather than working together to gain the fullest picture of democracy. For example, democracy gives people the right to choose their own government, but that doesn't ensure the good governance that is needed to have a good welfare state, free market, and avoidance of economic or government collapse. Additionally, the national electorate can choose parties that could be illiberal but not undemocratic. The inclusion of liberal ideology in democratic quality evaluation transforms indexes from evaluating the issue of a nations governing procedures being in compliance with core democratic features (elections and check on government), to a nations public policy being close to substantive democracy and liberalism. The consequences of this approach can cause certain public policies to be deemed undemocratic even if they are not changing the overall political system or unjustly restricting civil liberties

3. In 2015, the Polish Law and Justice party and the Civic platform were engaged in a battle for control of the Polish political system. This fight forced both parties to use the legislative power

of parliament to pass legislation that where damaging to Polish democracy and are often cited in the literature as reasons for democratic backsliding. We can see that the PO-PSL coalition, in anticipation of electoral defeat, tried to select judges for the constitutional court in an attempt to maintain some semblance of power. This action would be an indication that the parties do not trust the system. The collateral damage of this conflict has been shown through the rule of law in Poland. While on the surface, developments in Poland haven't been out of the ordinary in the region. Poland has been the only one to have active political conflict, additionally, Poland also received the European commission's attention due to political system developments. Further research is needed to understand whether European action against Poland has been due to democratic backsliding or due to more complicated issues.

4. During the PiS party's time in parliament, the most severely affected check on government power has been judicial independence followed by media integrity being affected by the reshuffling of top the management of public media companies and the national council of media. However, there had been improvement within the same period with the law on constitutional tribunal being the prime example of PiS improving judicial independence. From 2015 – 2019 the nature of PiS party reforms also changed. In 2015, the PiS party was reactive to the opposition (Political and judicial) maneuvers, with legislation aimed at stopping the polish judiciary to mount an effective resistance to the PiS party. In 2016, major changes to the public prosecutor's office, with the Minister of Justice assuming the position of the prosecutor general, were passed. But that wasn't the main loss of judicial independence, rather it was the expansion of the minister's power over judicial and prosecutorial systems. The Minister of Justice in later 2017 changed the common court regulations gaining almost unrestrained power to reform the Polish judicial system. From the regional reorganizations of court and prosecutorial systems to the ability to punish court presidents, appoint court directors, and create internal rules for both prosecutor offices and common courts. This had erased judicial independence in common courts of both Poland and the public prosecutor's office.

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Summary

In recent years, there has been much discussion about democratic backsliding in Europe and around world. Indexes like Freedom House have declared a global trend of democracy being in decline, and in Europe many researchers look at the rise of illiberal parties as proof of the erosion of democracy. Within Eastern Europe, Poland has received much attention when discussing democratic quality. This attention has culminated in EU actions against Poland for undemocratic behavior. However, there is a need for further research into this topic as it much of the research that has been done is often highly focused on specific issues rather than discussing the broad changes in democratic quality throughout a number of years. While key issues can become highly influential towards democratic quality it is not valid to dismiss a state's democratic system as functional or non-functional based on a single issue. Rather, it is much more ethical and responsible to focus on the cumulative effect that such laws have brought about. As such it is important to reexamine laws passed by the PiS party to determine how controversial laws changed the democratic quality in Poland within a broad spectrum rather than sing issue laws.

For this analysis this paper utilizes the inter-disciplinary approach of doctrinal legal studies. Doctrinal legal research methodology focuses on how the law is written rather than how it is applied. Using this method, a researcher composes a descriptive and detailed analysis of legal rules found in primary sources. The primary sources in this paper shall be the laws passed during the 8th term of the Sejm (2015 – 2019), during this period most of the controversial laws were passed and the Polish Law and Justice party still had a strong opposition in the judicial system. By focusing on primary sources rather than secondary sources there can be clear evidence towards how the PiS reforms changed the polish political system, rather than rely on a well know point like "rule of law crisis in Poland".

The result of this analysis shows that it is correct to state that democratic quality has deteriorated in Poland. In 2015 – 2016 the main loss of democratic quality occurred due to the PiS party attempting to leverage legislative power in order to defeat the opposition in constitutional tribunal, but ultimately choosing to back down and cooperate with the judiciary. A further loss of democratic quality was followed by the Minister of Justice, in 2016 – 2018, gaining large amounts of power over the common courts and polish prosecutorial system. However, the polish supreme

court and constitutional tribunal have remained largely independent, but not to the same degree as before PiS. Overall democratic quality in Poland had dropped due two main reasons: legislative government attempts to govern judiciary through simple legislation (non-constitutional amendments) and the expansion of the Minister of Justice's power beyond any previous legal tradition in Poland (as claimed by PiS). The conclusion of this work emphasizes that while there was a drop in democratic quality in Poland due to the reduction in judicial independence; the results may not have been deliberate but rather a reaction to both the polish opposition and EU actions

Santrauka

Pastaraisiais metais daug diskutuojama apie demokratijos atsilikimą Europoje ir visame pasaulyje. Tokie indeksai kaip „Freedom House“ skelbia, kad pasaulyje demokratija mažėja, o Europoje daugelis tyrėjų neliberalių partijų iškilimą laiko demokratijos nykimo įrodymu. Kalbant apie demokratijos kokybę Rytų Europoje, daug dėmesio skiriama Lenkijai. Šio dėmesio kulminacija tapo ES veiksmai prieš Lenkiją dėl nedemokratinio elgesio. Vis dėlto šią temą reikia toliau tirti, nes daugelyje atliktų tyrimų dažnai daug dėmesio skiriama konkrečiom situacijoms, o ne bendriems demokratijos kokybės pokyčiams per kelerius metus. Nors tam tikros situacijų baigtis gali turėti didelę įtaką demokratijos kokybei, negalima atmesti valstybės demokratinės sistemos kaip funkcionuojančios ar nefunkcionuojančios remiantis vienos problemos buvimu. Daug etiškiau ir atsakingiau būtų sutelkti dėmesį į bendrą problematiškų įstatymų poveikį. Todėl svarbu iš naujo išnagrinėti PiS partijos priimtus įstatymus ir nustatyti, kaip prieštaringi įstatymai pakeitė Lenkijos demokratijos kokybę plačiame spektre, o ne atskirais klausimais priimtus įstatymus.

Šiai analizei atlikti šiame darbe naudojamas tarpdisciplininis doktrininių teisės studijų metodas. Doktrininių teisinių tyrimų metodologija orientuota į įstatymo teksta, o ne kaip įstatymas yra taikomas praktikoje. Taikydamas šį metodą tyrėjas sudaro aprašomąją ir išsamią pirminiuose šaltiniuose rastų teisės normų analizę. Šiame darbe pirminiai šaltiniai buvo įstatymai, priimti 8-osios Seimo kadencijos metu (2015-2019 m.), šiuo laikotarpiu buvo priimta daugiausia prieštaringai vertinamų įstatymų, o Lenkijos partija „Teisė ir teisingumas“ (PiS) vis dar turėjo stiprią opoziciją teismų sistemoje. Sutelkus dėmesį į pirminius, o ne antrinius šaltinius, galima pateikti aiškių įrodymų, kaip PiS reformos pakeitė Lenkijos politinę sistemą, o ne remtis gerai žinomais frazėmis, pavyzdžiui, „teisinės valstybės krize Lenkijoje“.

Darbe gauti rezultatai rodo, kad teisinga teigti, jog demokratijos kokybė Lenkijoje pablogėjo. 2015-2016 m. demokratijos kokybė labiausiai pablogėjo dėl to, kad PiS partija bandė pasinaudoti įstatymų leidžiamąja valdžia, siekdama įveikti opoziciją konstituciniame teisme, tačiau galiausiai nusprendė atsitraukti ir bendradarbiauti su teismais. Toliau demokratinės kokybės praradimą lėmė tai, kad 2016-2018 m. teisingumo ministras įgijo didelius įgaliojimus bendrųjų teismų ir lenkų prokuratūros sistemos atžvilgiu. Vis dėlto Lenkijos aukščiausiasis teismas ir konstitucinis tribunolas iš esmės išliko nepriklausomi, tačiau ne tokiu mastu kaip iki PiS. Bendra

demokratijos kokybė Lenkijoje sumažėjo dėl dviejų pagrindinių priežasčių: įstatymų leidžiamosios valdžios bandymų valdyti teismų sistemą paprastais teisės aktais (nekonstitucinėmis pataisomis) ir Teisingumo ministro galių išplėtimo, viršijančio bet kokias ankstesnes teisines tradicijas Lenkijoje (kaip teigė PiS). Šio darbo išvadose pabrėžiama, kad demokratijos kokybė Lenkijoje sumažėjo analizuojamu periodu, kadangi teismai tapo mažiau nepriklausomi, tačiau tai nebuvo PiS partijos tikslas, o veikiau reakcijos tiek į Lenkijos opozicijos, tiek į ES veiksmus pasekmė.

Confirmation

I confirm that I am the author of submitted thesis: **Quality of Democracy in Poland: The Doctrinal Legal Analysis of the Polish Law and Justice Reforms between 2015-2020**, which has been prepared independently and has never been presented for any other course or used in another educational institution, neither in Lithuania, or abroad. I also provide a full bibliographical list which indicates all the sources that were used to prepare this assignment and contains no un-used sources.

Tomas Jankauskas