



ACADEMIC ARTICLE

Legislative Practice and the 'Judiciary Reforms' in Post-2015 Poland – Analysis of the law-Making Process

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This paper examines changes that occurred in the Polish lawmaking process associated with primary legislation (laws and amendments) affecting the court system. It uses the database of 126 laws adopted in the 1991–2019 timeframe (Ist to VIIIth term), that modified either (i) the law on common courts system or (ii) the law on the National Council of Judiciary – two legal acts constituting the backbone of the general jurisdiction courts system. A significant extension of our research is the coverage of RIAs and assessment of their quality. Analysis documents the transition from a rather consensual and deliberative law-making process to the partisan voting machine. That, in turn, enabled so-called 'reforms' of the Polish judiciary, implemented after 2015.

Keywords: law-making process; the court system; judicial independence; illiberal democracy

I. Introduction

Since V. Orban's 2014 proclamation of "*the new state that we are constructing in Hungary ... an illiberal state, a non-liberal state*,"¹ the specter of *illiberalism* is looming over Europe. Likely, the issue of defining and distinguishing *illiberal democracy* from its counterparts will engage political philosophers for a while; see the early discussions of Zakaria, 1997; Plattner 1998. However, recent practice suggests that subversion of judicial independence is among the defining principles of such a political system.

By its nature, the judiciary, the highly professional, unelected branch of government tasked with constitutional review and application of the law in individual cases, is prone to the clash with the populists and would-be strongman. "*To be populist, ... [one] must claim that a part of the people is the people – and that only the populist authentically identifies and represents these real or true people*" as opposed to the "*corrupt, immoral elites*" (Müller, 2016). Courts easily fit into this narrative, as evidenced in Trump's so-called judge tweets,² Daily Mail's *Enemies of the*

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¹ Orban's Băile Tușnad speech (26 July 2014), 25th Bálványos Summer Free University and Student Camp.

² <https://www.politico.com/story/2017/02/trump-judge-james-robart-234645>.

People front page³ or the Polish Prime Minister's defense of the supreme court purge using the Vichy regime analogy.⁴

As populist support grew across the EU member states (Pew, 2019),⁵ it became relevant to examine how populists – once elected – handle the transition from the *liberal* to *illiberal* governance framework. The paths differ, depending on the balance of power. For example, in Hungary, the supermajority enabled V. Orban to tailor the country's constitution along with his wishes (Bánkuti et al., 2012; Pap, 2018). In Poland, the effective constitutional framework was turned upside-down using only primary legislation. For the legal scholar view see, Sadurski, 2019; for the political scientist perspective see Curry, 2018).

This paper draws on the database of 126 pieces of primary legislation (laws and amendments) adopted during the 1991–2019 timeframe (1st to VIIIth term of the lower house of the Polish bicameral parliament or *Sejm*), to examine changes in the lawmaking patterns associated with changes in the Polish court system organization. Specifically, it examines all pieces of legislation, that affected the two legal acts constituting the backbone of the general jurisdiction courts system: (i) the *law on common courts system* (hereafter *lccs*), and (ii) the *law on the National Council of Judiciary* (hereafter *INCJ*) (**Figure 1**). Of 126 examined laws, 27 affected both *lccs* and *INCJ*; six affected only the *INCJ*, while 93 affected only the *lccs*.

First, the sheer volatility of these fundamental acts, reflecting phenomenon referred to as '*legislative inflation*', is revealing. Second, the parliamentary routines regarding legislation on the court system were modified. The conventional consensual process was replaced by partisan voting, and the bicameral lawmaking accelerated beyond the standards of prudence (the upper chamber or *Senat* abdicated its corrective role).

Moreover, out of few competing legislative tracks (draft laws initiated by the President, the Cabinet or members of the Parliament) the quickest route became dominant at the expense

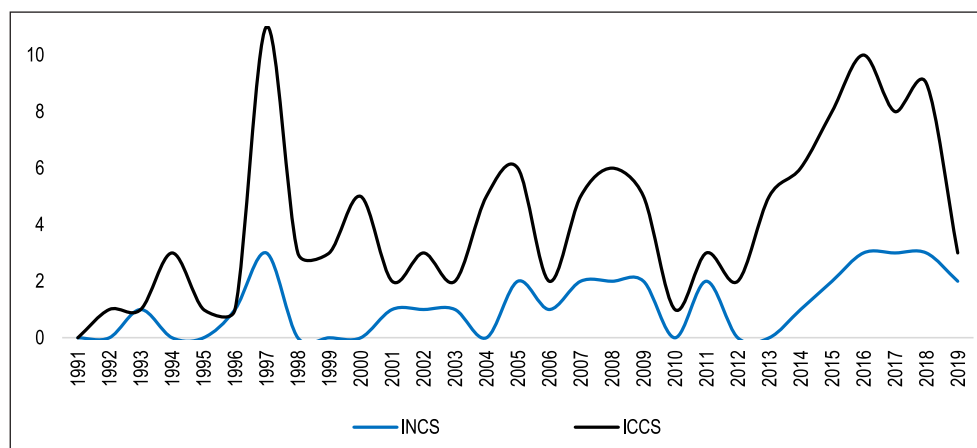


Figure 1: The number of laws, affecting the text of *lccs* and *INCJ*, passed by *Sejm* (lower chamber of the Parliament) in a given year.

Source: Own compilation based on the Wolters Kluwer's LEX database of the legal acts.

³ <https://www.dailymail.co.uk/news/article-3903436/Enemies-people-Fury-touch-judges-defied-17-4m-Brexit-voters-trigger-constitutional-crisis.html>.

⁴ <https://www.bloomberg.com/news/articles/2017-12-14/poland-s-plan-to-avert-eu-reprimand-is-a-blast-from-the-past>.

⁵ See also BBC *Europe and right-wing nationalism: A country-by-country guide*, <https://www.bbc.com/news/world-europe-36130006>; for recent classification of European populisms see Zulianello (2020).

of the consultations and the formalized Impact Assessment process. Also, the last phase of the law-making process, Presidential approval, accelerated considerably. All in all, the Parliament was transformed into a rubber stamp, approving the ever-growing number of modifications to the legal basis of the court system.

The remainder of this paper is organized as follows: Section II briefly reviews the Polish law-making process; Section III introduces *lccs* and *INCJ* as the backbone of the general jurisdiction courts system; and, Section IV reviews empirical data on legislative practice before and after 2015. Section V concludes.

II. Polish law-making process

According to the Constitution of 1997, draft laws can be submitted to the Parliament by (i) a group of members of Parliament or MPs, (ii) the President, (iii) the Council of Ministers and (iv) a group of 100,000 citizens.

If the initiative comes from the Council of Ministers or cabinet, it is subject to the requirements of the by-law regulating the development of government policy. These include:

- i) *Public consultations* (PL: *konsultacje publiczne*, former *social consultations*) including relevant stakeholders outside the public administration,
- ii) *Mandatory consultations* (PL: *opiniowanie*) prescribed by relevant law provisions⁶ – for example, the National Council of Judiciary is authorized to express its opinion on every draft law that might affect judicial independence – in particular amending *lccs* and *INCJ*,
- iii) *Regulatory Impact Assessment, RIA* (PL: *Ocena Skutków Regulacji*) introduced in 2001 in line with OECD requirements to established, evidence-based policymaking.

Noteworthy, in case of other legislative tracks, only mandatory consultations are carried out by the lower chamber speaker.

Once the draft law enters the lower chamber of the Polish Parliament or *Sejm*, it is subjected to three *readings*, including MP's questions and proposals. The draft is also worked out through committees; laws that change the *lccs* and *INCJ* are referred to the Committee of Justice and Human Rights.

As the lower chamber adopts the law, it is transferred to the upper chamber (PL: *Senat*), which can approve, reject or amend the law. The lower chamber can overturn these with an absolute majority.

Finally, the adopted law is transmitted to the President, who can sign it into law, veto or refer it to the Constitutional Court, whose judgment would be final. To overturn a veto, a two-thirds majority in *Sejm* is required.

All in all, this constitutes a fairly a balanced and – by design – collaborative process, marked with various checks and balances. The legislative veto of the President, elected by popular vote, is perceived as a particularly strong corrective mechanism.

However, at the human-factor level, for more than 60 per cent of the time, the Presidency was held by the politician more-or-less linked⁷ to the Cabinet. Thus, in daily practice, the checks and balances and the mechanisms designed to improve the quality of adopted laws are much more fragile than pure textual analysis would suggest.

⁶ Note that this process is, from the legal point of view, the most rigid one because it is regulated by primary legislation that grants particular entities the right to opinion particular kinds of initiatives. By contrast, both *public consultations* and *inter-government consultations* are governed only by the Cabinet bylaw.

⁷ As President is required to resign from party membership.

III. Polish General Jurisdiction Court System

According to the Constitution of 1997, the judicial branch comprises the Supreme Court, courts of general jurisdiction, administrative courts and military courts. The Kelsenian Constitutional Court is regulated separately. Thus, the vast majority of court cases – civil, criminal, commercial, family and labour – are adjudicated by courts of general jurisdiction. Notably tax cases and interactions between citizens and the government administration, i.e., building permits, are handled by the administrative courts.

The legal backbone of the courts of general jurisdiction is the *Law on Common Courts System (lccs)*. After the 1989 systemic transition, the Communist-era *lccs* of 1985⁸ was comprehensively amended to facilitate the organization of the independent judiciary. After the adoption of the Constitution in 1997, the new *lccs* of 2001 was adopted.⁹ Both acts established the court system structure, the courts' authority framework (the court president and collective bodies representing judicial community), career paths for judges and judicial remuneration, and disciplinary proceedings.

The second fundamental act, adopted in 1989,¹⁰ was the *law on the National Council of Judiciary* (hereafter INCJ). The National Council of Judiciary, modelled on Italian and Portuguese High Councils of the Judiciary, is tasked with deciding upon appointment and promotion of judges serving in the Supreme Court, courts of general jurisdiction, administrative courts and military courts. Constitutional Court judges are appointed by vote in the lower chamber of the Parliament.

Just like in case of *lccs*, the *INCJ* was also replaced in 2001¹¹ and again in 2011.¹²

As a consequence of the double electoral victory in 2015, the Law and Justice (PL: PiS) party took control of the presidency and achieved absolute majorities in both chambers of the Parliament.¹³ Among the party priorities proclaimed in the 2014 electoral manifesto (PiS, 2014, p. 66) was strengthening the Minister of Justice's oversight of the judiciary (specifically, to cover '*jurisprudence*') and a mandate to rebalance the composition of the National Council of Judiciary to prevent '*domination of judicial community*'.

As the new Parliament adopted multiple amendments for both laws, concerns over the deterioration of judicial independence mounted. These concerns were expressed by, among others, the reporting of the Venice Commission, initiation of the Article 7 procedure by the European Commission,¹⁴ verdicts of the European Court of Justice, protest letters by former Constitutional Court presidents, street protests and uniform decline in various quantitative metrics of judicial independence (**Figure 2**). All in all, the situation amounted to a '*constitutional crisis*' at best and outright violation of the Constitution at worst.

⁸ Official Gazette reference: Dz.U. 1985 nr 31 poz. 137.

⁹ Official Gazette reference: Dz.U. 2001 nr 98 poz. 1070.

¹⁰ Official Gazette reference: Dz.U. 1989 nr 73 poz. 435.

¹¹ Official Gazette reference: Dz.U. 2001 nr 100 poz. 1082.

¹² Official Gazette reference: Dz.U. 2011 nr 126 poz. 714.

¹³ During the 1989-2015 period, a single political party had never obtained the absolute majority, thus coalition governments were formed. Although right-wing commentators typically refer to the PiS government as a 'coalition' of the '*United Right*' – composed of the actual Law and Justice (PiS) and two small parties established by Z. Ziobro and J. Gowin, during 2015-2019 period – their structures and agenda were dominated by PiS. Ziobro and Gowin themselves entered the Parliament from PiS lists, where they were featured as guests. Perhaps the best insight into the inner workings of so called '*coalition*' was provided by Gowin himself, who remarked that although he voted in favor of the 2017 Supreme Court and National Judiciary Council laws, he '*had not enjoyed*' doing so. https://www.polsatnews.pl/video/gowin-rok-temu-glosowalem-ale-nie-cieszyłem-sie-dzisiaj-i-glosowalem-i-cieszyłem-sie_6728858/.

¹⁴ https://ec.europa.eu/commission/presscorner/detail/en/IP_17_5367.

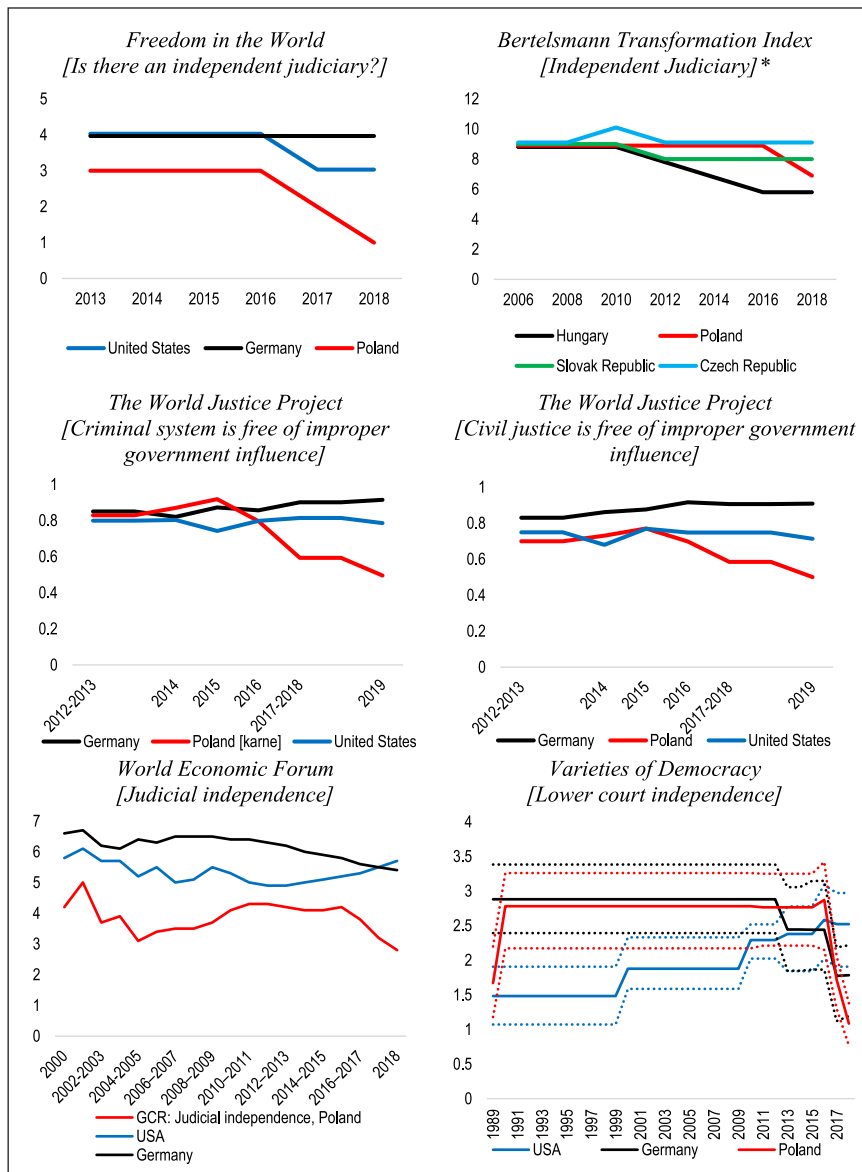


Figure 2: Evolution of the court independence metrics for Poland and selected jurisdictions.

*-Bertelsmann Transformation Index covers only 'transition countries'.

Source: Own compilation.

IV. Legislative Practice and the Court System Regulation

To examine how the above-mentioned '*judiciary reforms*' were introduced into the Polish legal system, it is useful to quantitatively assess the legislative practices associated with their adoption. To this end, a database of 153 pieces of primary legislation (laws and amendments) adopted over the 1991–2019 timeframe was compiled. Specifically, all legal acts affecting the *lccs* and *INCJ* were selected.

Notably, such sample covers all laws that introduced even slight changes to the wording of *lccs* or *INCJ*. For example, the general retirement reform implemented in 2012, that among

others affected judges even though they were not targeted. Further still, even IT-related laws, like regulations on the electronic signature, affected the *lccs* – obviously without impact on the judicial independence.

IV.1. Faster...

The first pattern, visible in the data, is the increasing speed of draft law processing. Counting from the First Reading to the final voting in the lower chamber, procedures normally associated with questions, corrections and work in committees and subcommittees, drafts processed in fewer than two weeks emerged. For record-breaking pieces of legislation, all lower chamber proceedings were carried out within a single day. **Figures 3 and 4** present the proportion of examined laws, for which *Sejm* processing time was shorter than 14 and 21

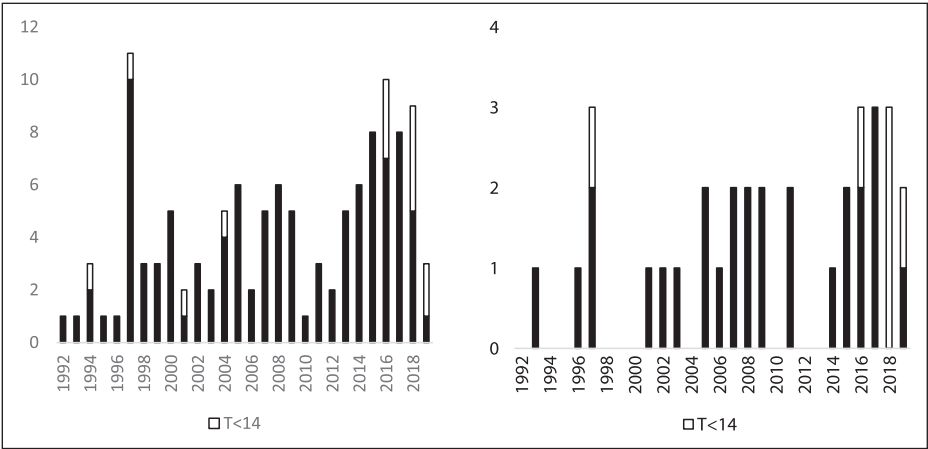


Figure 3: Proportion of laws affecting the text of *lccs* (left panel) and *INCJ* (right panel) with time from the First Reading to the *Sejm* voting lower than 14 days.
Source: Own compilation.

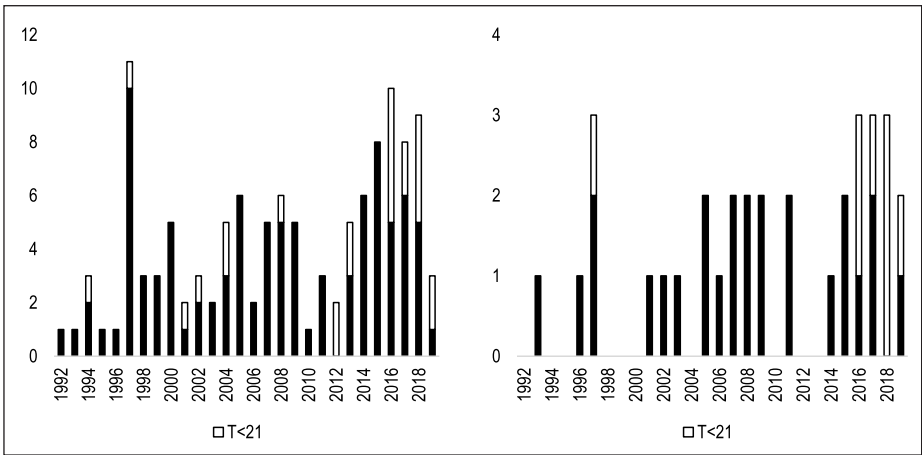


Figure 4: Proportion of laws affecting the text of *lccs* (left panel) and *INCJ* (right panel) with time from the First Reading to the *Sejm* voting lower than 21 days.
Source: Own compilation.

days respectively. While such expedited processing had occasionally occurred before 2015, it became much more common afterwards (VIII term).

IV.2. Higher...

Another pattern, particularly visible in case of *lccs* amendments, is a growing tendency toward partisan voting. Before 2015, laws amending *lccs* – either technical or substantially affecting the organization of the common court system – tended to be consensual in the sense that at least part of the opposition voted in favor of the proposed draft law. Indeed, the slower pace of draft law processing and extensive collaborative work in committees and subcommittees encouraged bargaining and consensus-seeking.

Such way of proceeding was deliberately rejected by *Law and Justice*, as various phases of the law-making process were hollowed out to the point of items in a checklist. Perhaps the best summary of the new, bright, lawmaking process is that offered by S. Piotrowicz, at that time chairman of the *Justice and Human Rights Committee of the Sejm*, who in 2019 was sworn into the Constitutional Court. During the discussion of the amendment to the law on public prosecution, *lccs* and others¹⁵, he restricted (in a partisan vote of the Committee) the discussion time to 30 seconds per MP.¹⁶ The First Reading was carried out on that same day; the final vote of the lower chamber occurred the next day.

To illustrate the degree of partisan voting, the ratio of *Nay* to *Yea* votes was calculated. By definition, it ranges from 0 – unanimous vote – to slightly below 1 – for 50 per cent +1 vote. Noteworthy, this metric relies only on straight preferences (*Yea* or *Nay*) omitting blank votes,¹⁷ considered as tacit support. However, any MP might also strategically abstain either to protest or to break the quorum. **Figure 5** plots the proportion of laws for which *Nay* to *Yea* votes ratio exceeded 0,5 – in other words, at least one-third of the voting MP's opposed the law. To account for the strategic absenteeism, laws for which at least one-third of the MPs did not vote were also indicated.

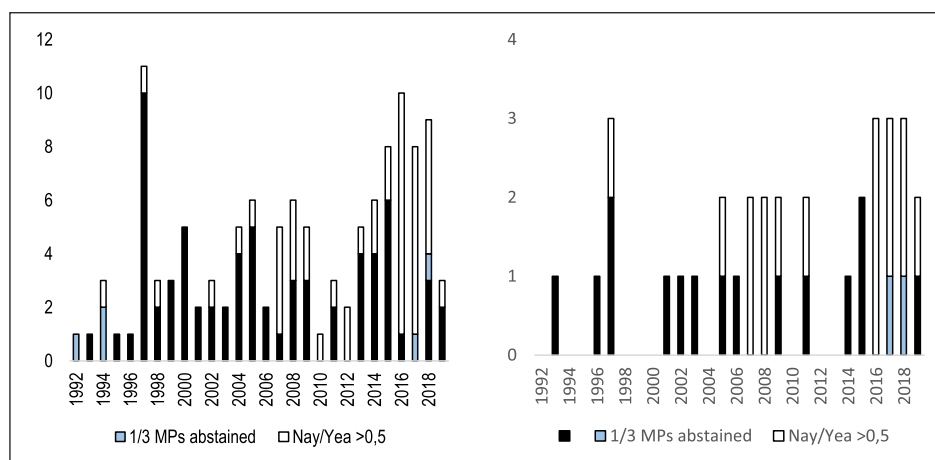


Figure 5: The proportion of laws affecting the text of *lccs* (left panel) and *INCJ* (right panel), for which *Nay* to *Yea* votes ratio exceeded 0,5, or at least 1/3 of the MPs abstained.

Source: Own compilation.

¹⁵ Official Gazette reference: Dz.U. 2018.1443.

¹⁶ Committee hearing on 19 July 2018, *Komisja Sprawiedliwości i Praw Człowieka /nr 154/, VIII Term.*

¹⁷ MP participates in the voting, thereby affecting quorum calculation, however votes neither for nor against.

Noteworthy, such situation referred to just two laws passed after 2015 – both of them affected *lccs* as well as *INCJ* – thus they are reflected on the left as well as right panel of **Figure 5**.

IV.3. Harder...

The last pattern relates to the activity of the higher chamber of Parliament. As a rule, lower and upper chambers are controlled by the same majority coalition, despite the fact, that the *Senate* is elected in single-member districts while *Sejm* is elected in multi-member electoral districts. The 2019 election was the first to deliver different majorities in both chambers, although *Senat* majority relies on the single vote in the 100-member chamber.

Although the upper chamber, jokingly referred to as the '*chamber of meditation*', typically allows for amendments to passed legislation, at least on technical, not conceptual grounds (in other words, it corrected legislative mistakes). After 2015, even this corrective mechanism was abandoned, as depicted on **Figure 6**.

All in all, the presented patterns suggest a substantial, qualitative shift in the law-making process for laws affecting the common court system organization. The traditional consensual and more-or-less deliberative style was replaced by the road-roller legislative model that has delivered independence-crushing amendments ordered by PiS chairman.

Building upon three patterns identified above, the empirical classification exercise can be carried out. The following three criteria were specified:

- i. The *Sejm* law-making process (from First Reading to the final vote) took less than three weeks,
- ii. At least one-third of the MPs opposed the law or were absent when the voting occurred, and,
- iii. The upper chamber has not introduced any changes to new laws adopted by the lower chamber.

Out of 126 analyzed laws, only 17 fulfilled all three criteria. Of them, just four were passed during the 1991–2015 timeframe (i.e. before VIII term of the *Sejm*). These four laws included:

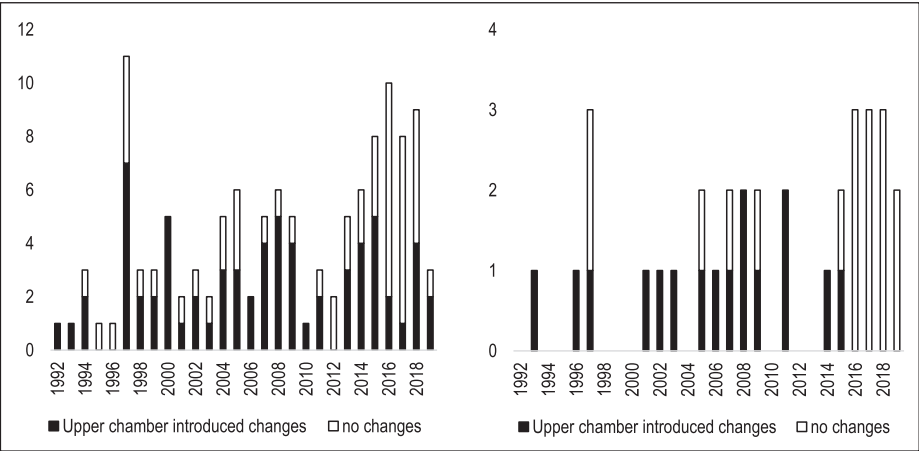


Figure 6: Proportion of laws affecting the text of *lccs* (left panel) and *INCJ* (right panel), for which upper chamber introduced changes.
Source: Own compilation.

- i. 1994 law that implemented changes to the *lccs*, resulting from the ruling of the Constitutional Court – in other words, it required fixing the unconstitutional provisions implemented in 1993, by the previous Parliament.¹⁸
- ii. 1998 law that was declared partially unconstitutional after Constitutional Court scrutiny initiated by the President.¹⁹
- iii. Two 2012 laws associated with the general change of the retirement age,²⁰ that were highly partisan and controversial (*Britannica Book of the Year 2013* pp. 473), however not directed against the judiciary.

The remaining 13 laws were adopted during the VIII term of the Sejm by PiS majority.²¹

IV.4. Smarter?

As indicated in Section II, draft laws initiated by the Council of Ministers (cabinet) are subject to the requirements of consultations and Regulatory Impact Assessment (RIA). In practice, the vast majority of laws adopted by the Parliament originated in the cabinet. That was also the case with laws affecting the text of *lccs* and *INCJ* (Figure 7). On the one hand, it is not surprising, as the cabinet, like the Parliament and the Presidency is controlled by PiS. On the other, it raises questions on the quality of the cabinet procedures like RIA.

Since 2006, analyzed laws fulfilled RIA requirement in a sense that a document was attached to the draft law submitted by the cabinet to the lower chamber. Moreover, the volume of RIA, as measured by the number of pages, exhibited a persistent upward trend (Figure 8).²²

Judging by the face value, that should represent a more analytic and evidence-based approach to the law-making. However, as evidenced by the law-making process that resulted in the creation of so-called pseudo-NCJ²³, illiberal could use RIA as a tool of deception.

The initial draft law, dated May 2nd, 2016, was accompanied by a short RIA, pointing out in the competitiveness and entrepreneurship section that proposed changes, once interpreted as an assault on the judicial independence, could negatively impact the country's economic

¹⁸ Official Gazette reference: Dz.U. 1994.91.421. Law implemented the ruling of the Constitutional Court no K 11/93.

¹⁹ Official Gazette reference: Dz.U. 1998.98.607. Ruling of the Constitutional Court no K 3/98.

²⁰ Official Gazette reference: Dz.U. 2012.1544 and Dz.U. 2012.637.

²¹ During the legislative process most of the laws listed here were criticized by an independent legislative watchdog, among others for unreasonable rush in adopting such important acts, using the constitutional doubt procedure, omitting the necessary elements of the legislative path, etc. Obywatelskie Forum Legislacji, 2019, Jakość procesu stanowienia prawa w drugim roku rządów Prawa i Sprawiedliwości (Eng. Quality of the lawmaking process in the second year of rule by Law and Justice) https://archiwumosiadzynski.pl/images/2018/03/X-Komunikat_OFL.pdf.

The set of laws remain: Act amending the act on the Police and some other acts Dz.U.2016.147; Act – Provisions introducing the act – Law on the prosecutor's office Dz.U.2016.178; Act on the Prosecutor General's Office of the Republic of Poland Dz.U.2016.2261; Act amending the Act – Law on the structure of common courts, the Act on the National School of the Judiciary and the Prosecutor's Office and some other acts Dz.U.2016.633; Act amending the Act on medical activities and certain other acts Dz.U.2016.960; Provisions introducing the Act – Educational Law Coll. Dz.U.2017.60; Personal Data Protection Act Dz.U.2018.1000; Act amending the Act – Law on the structure of common courts, the Act on the Supreme Court and certain other acts Dz.U.2018.1045; Act amending the Act – Law on the structure of common courts and certain other acts Dz.U.2018.1443; Act amending the Act on the National Council of the Judiciary and certain other acts Dz.U.2018.3; Supreme Court Act 2018.5; Act on the digital availability of websites and mobile applications of public entities 2018.848; Act amending the Act on the Supreme Court and certain other acts 2019.914.

²² To better visualize the trend, LOWESS smoothing was applied. Three mammoth RIAs – counting 73, 60 and 49 pages, included respectively: the large scale penal procedure reform, law implementing directive on personal data protection and general retirement age reform mentioned also in section IV.

²³ As previous NCJ was dissolved and new body created, it was suspended by the ENCJ on the legality grounds. To distinguish the two institutions, some legal scholars refer to the later as 'neo-NCJ' or 'pseudo-NCJ'.

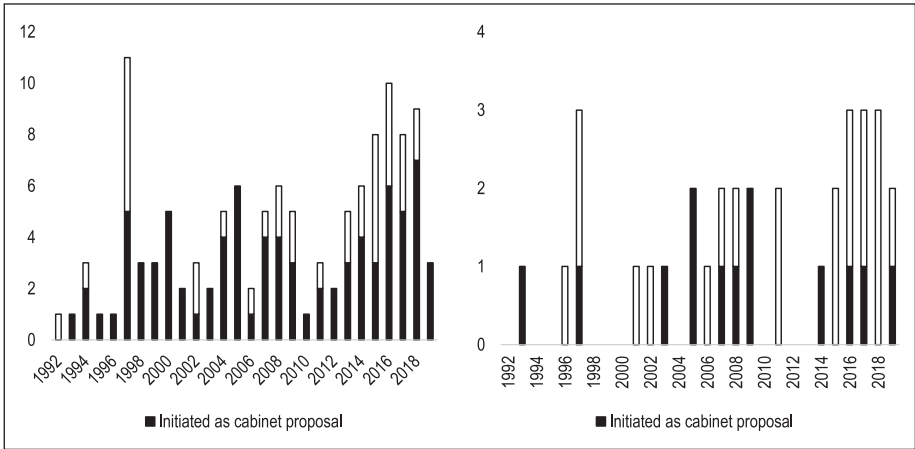


Figure 7: Share of laws affecting the text of *lccs* (left panel) and *INCJ* (right panel) initiated as cabinet proposal.
Source: Own compilation.

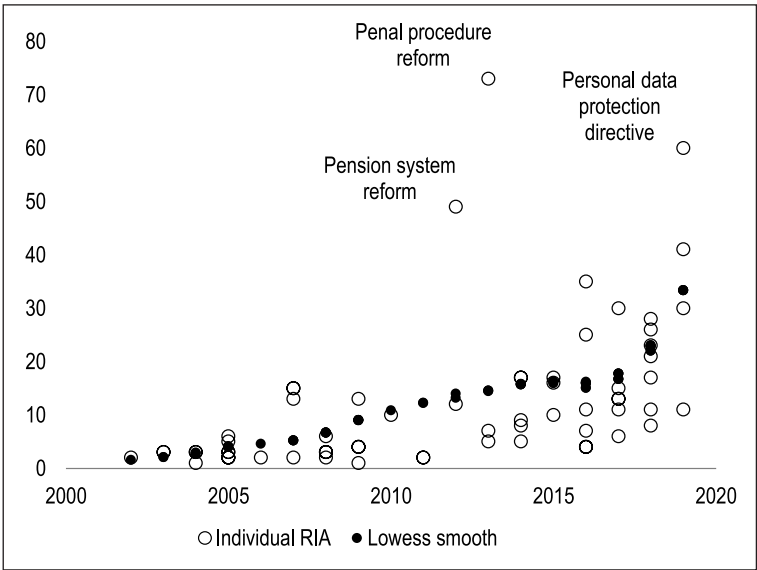


Figure 8: Volume of RIAs attached to the cabinet draft laws.
Source: Own compilation.

competitiveness.²⁴ The second version of RIA, dated 22 Feb 2017, failed to address the competitiveness impacts. Instead, it provided elaborated comparative analysis aimed at proving that the law conforms to the EU standards; the argument was reiterated later in the so-called

²⁴ See cabinet draft law np. UD73, VIII term (Projekt ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw). This conclusion was published on the front page of 10 May 2019 issue of Puls Biznesu (Polish business daily newspaper). Gazeta Wyborcza daily revealed, that during the internal consultations procedure, the initial draft law received critical comments form the Ministry of Finance (on the grounds referring to the competitiveness impacts described in the RIA) and Ministry of Foreign Affairs (citing ECHR verdict in Hungarian Supreme Court President case). See Rząd wiedział, czym grożą zmiany w KRS, GW, Oct 11th, 2019.

White Book addressed to the European Commission. The Council of Europe referred to such practice²⁵ as '*Frankensteinisation of legislation*', based on a combination of '*worst practices*' existing in other countries. See also the analysis of Pech and Scheppele, 2017.

V. Conclusions

Otto von Bismarck is reputed to have observed that laws are like sausages – it is better not to see them being made. However, by examination of the production process, one can infer useful information on the quality of both, and neglecting them might prove painful in the long run.

This paper examined the patterns of legislative practice associated with laws affecting the organization of the common court system in Poland. By scrutinizing 126 laws adopted over the 1991–2019 timeframe, 1st to VIIIth term, that modified (i) *the law on common courts system*, (ii) *the law on the National Council of Judiciary*, or (iii) both (i) and (ii), it documented profound changes introduced by *Law and Justice* (PiS) majority after 2015 election.

With the visible shrinking of traditional draft-law processing deliberations, in some cases to a single day, accompanied by the late-night voting, the more-or-less consensual process was replaced by party-line voting. Moreover, the upper chamber abdicated from its traditional role of reviewing and correcting final drafts before approving them.

The deterioration of the law-making standards enabled the adoption of laws that amplified the constitutional crisis and undermined confidence in Polish courts' independence. Our results seem to support Urbinati's (2019) thesis that "populists work incessantly to prove that their ruling leader is an *incarnation* of the voice of people and should stand against and above all other representative claimants and repair the fault of constitutional democracy. Populists assert that, because the people and the leader have effectively merged and no intermediary elite sets them apart, the role of deliberation and mediation can be drastically reduced, and the will of the people can exercise itself more robustly".²⁶

Indeed, in the author's opinion, there are reasons to believe that this change was not an incidental by-product or accident, but reflects the very essence of *Law and Justice* (PiS) agenda. Goals, like fortifying the Minister of Justice's oversight over the judiciary and preventing the 'domination of judicial community' in the National Council of Judiciary, were explicitly stated in PiS electoral manifesto (PiS, 2014, p. 66). Achieving these goals required the new road-roller legislative routines, embarked by PiS Parliament majority after 2015.

Additional File

The additional file for this article can be found as follows:

- **Laws and lawmaking procedures.** List of laws and law-making procedures affecting the law on common courts system and the National Council of the Judiciary. DOI: <https://doi.org/10.36745/ijca.315.s1>

Funding Information

Research project financed by National Science Center grant no. 2016/23/B/ HS5/03542. Views and opinions expressed in the paper are those of the authors, and do not necessarily reflect the official position of *The International Journal for Court Administration* or the institutions with which authors are affiliated.

²⁵ See Resolution 2316 (2020) The functioning of democratic institutions in Poland, adopted Jan 23rd 2020.

²⁶ Nadia Urbinati, *Me the people: How Populism Transforms Democracy*. Cambridge: Harvard University Press, 2019, p. 9.

Competing Interests

The authors have no competing interests to declare.

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How to cite this article: Kamil Joński and Wojciech Rogowski, 'Legislative Practice and the 'Judiciary Reforms' in Post-2015 Poland – Analysis of the Law-Making Process' (2020) 11(2) International Journal for Court Administration 3. DOI: <https://doi.org/10.36745/ijca.315>

Published: 10 August 2020

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