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THE AVERAGE CITIZEN VS. THE COURT: POLISH CITIZENS TRUST IN THE JUDICIARY IN THE PERIOD OF JUDICIAL REFORMS (FROM 2015 TO THE PRESENT)

DOI: 10.2478/ppsr-2018-0002

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Abstract

The Constitutional Crisis, which started in 2015 and has resulted in several bills aiming to “repair” the functioning of this institution, has undermined Polish citizens’ trust not only in political institutions such as the Sejm and the President but also in the judiciary. The level of trust in public institutions in general tends to be low in Polish society, but recent events and the circumstances in which the bills regarding the Constitutional Tribunal, common courts, the National Council of the Judiciary and the Supreme Court were passed, has led to a politicization of judicial institutions. Society, though, is very divided and opinions of the judiciary may vary and may depend on political preferences as well as many other factors.

The aim of this paper is to examine the attitude of Polish society towards the judiciary in the period of time from 2015 until now. I will also analyze the public campaign Just courts (Sprawiedliwe sądy) in the context of media content’s influence on public perception of the judiciary. The findings of this analysis could also contribute to the explanations of government’s ability to pass the bills with decreasing protest from the population even though the bills were deemed unconstitutional.

Keywords: Constitutional crisis, trust, judiciary, media

Introduction

Trust in political institutions is one of the elements of social trust. It has been proved that trust in the private sphere has a significant influence on trust in public institutions. Poles generally have a low level of trust in social relations, therefore it should not be surprising that political institutions do not inspire much confidence among Polish citizens (CBOS, 2016). Although the situation is still not critical (according to 2016 social trust polls, the average respondent trusts approximately every second institution listed), it has recently been challenged in the sphere of judicial institutions. The Constitutional Crisis which started in 2015 and brought us several “repair bills” which were proved to be unconstitutional, was the first major challenge to citizens’ trust in the judiciary. After that, another bills followed: concerning common courts, the National Council of Judiciary and the Supreme Court. According to the government and ruling party officials the bills were supposed to democratize judicial institutions. It does not change the fact that they violat-

ed the Constitution to a certain extent and gave much more competencies to the Minister of Justice, which significantly politicized the Polish judiciary. This, as we shall see, was reflected in opinion polls performed during the crisis and it brought fundamental issues onto the public agenda, e.g. judicial independence, division of power, understanding of democracy. The way in which citizens understand these notions is crucial for their perception of the judiciary. This understanding and the general attitude to the judicial institutions will be the object of my analysis.

My paper will be divided on three main parts. Before I discuss the fluctuations of public opinion about the judiciary, I shall present the background and describe the circumstances in which judicial reforms were introduced. The brief description of the events as well as their consequences for the Polish judiciary will be the topic of the first section. After that, I would like to analyze and compare the changes in public opinion and attitudes towards the judiciary since 2016 until the present and explain which factors or political events might have influenced it. The main question which I am trying to answer by conducting this research is how did the government actually manage to pass the unconstitutional bills without many losses in the polls? Which factors have worsened the judiciary's position in the public view and what was the role of the media? That is why the last section will be devoted to the analysis of a particular type of media content – the most popular tabloid – in order to prove the relationship between scandal-oriented and rather populist content and the worsening assessment of the judiciary (especially the criterion of independence) by the public. I would like to argue that the way in which the Constitutional crisis and judicial reforms were covered by popular tabloids might have actually influenced public's perception of the judiciary and clearly put its independence in doubt.

Background

The Constitutional Crisis in Poland started after the parliamentary elections in 2015, although the main reason for it was actually the bill passed by the previous Sejm, in which the Civic Platform and PSL had a majority. They managed to pass a law which allowed the Sejm to elect two judges whose terms were supposed to start after the new Sejm would be formed (Helsińska Fundacja Praw Człowieka, 2016). This particular paragraph was the most controversial and the election of the two judges was in fact deemed unconstitutional, which was later confirmed by the verdict of Constitutional Tribunal (Dziennik Ustaw, 2016). At that time, though, Sejm managed to pass the bill and president signed it. After that, parliament proceeded to choose five judges: three of them were supposed to start their term in office in November and the other two in December.

After Law and Justice came to power and a new Sejm was formed, they managed to pass an amendment to the previously mentioned bill which basically introduced the repeated election of all the five judges as well as the ending of the President and Vice-President's Constitutional Tribunal functions (Monitor Polski, 2015). It has to be noted that the five judges chosen by the previous parliament were not sworn in by the newly elected president, Andrzej Duda. He only swore in the new four judges elected by the new Sejm, dominated by Law and Justice MPs on 3rd of December (the same night in which the Sejm passed the resolutions and elected the new judges), and the fifth judge few days later. On the same day, the Constitutional Tribunal announced the verdict about the bill passed by the previous Sejm. It stated that three judges were elected legally (those whose terms

were to start in December) and that the election of the other two violated the Constitution (Dziennik Ustaw, 2016). The Tribunal called the president to swear in legally elected judges, but he refused explaining that the judges have already been sworn in. In other words, the main organs of power, by involving judicial institutions into a political conflict, had created legal dualism.

Such a situation naturally raised the public's concern, as expressed in the polls (CBOS, 2016) which had quickly turned into a political protest. In fact, the constitutional crisis was one of the main reasons for establishing the Committee for the Defense of Democracy (KOD), the social movement whose name was inspired by the article of Krzysztof Łoziński, Polish writer and journalist, in which he referred to the name of legendary Workers Defense Committee (KOR) and appealed for the defending of democratic judicial institutions, power of which is currently being challenged by the Sejm (Łoziński, 2015). The Committee quickly gained popularity and events which were announced on Facebook managed to get people out onto the streets. Although KOD was organizing protests on various topics related to Law and Justice policies, the judiciary was its main concern, especially at the beginning of its existence. The first protest took place overnight between 25th and 26th of November when the Sejm was proceeding with the resolutions annulling the election of judges by the previous Sejm. The next one took place next to Tribunal building on 3rd of December when the judges elected by the Law and Justice dominated Sejm were sworn in and were supposed to start their work in Tribunal. In the beginning the demonstrations were not that impressive – they gathered approximately a few hundred people. The first big march took place on 12th of October in Warsaw. Unfortunately, we are not able to specify the number of participants since the police and city hall announced significantly different numbers (from 17000 to 50000 people). The following protest took place on 19th of December and another one in March, concerning the verdicts of the Constitutional Tribunal which the Prime Minister decided not to publish – contrary to her public duty.

Other than the amendments passed by the Sejm and the refusal to publish the verdicts of Constitutional Tribunal by the government, the Sejm passed the new law on the Constitutional Tribunal. It was justified by the need for change: the legal mess which was created by the political conflict about the judges had to be cleaned up. The new law, however, was deemed unconstitutional in many ways. For instance, it introduced that a 2/3 majority of judges votes is necessary to make a verdict whereas the Constitution requires only a simple majority. It has also omitted any *vacatio legis* period and made the law valid from the day it is passed which was supposed to make it difficult for Tribunal to give a verdict as to whether the law is constitutional. It has also given the right to initiate disciplinary procedure to the President and the Minister of Justice which was met with great concern in judiciary circles since it violates the rules of the separation of powers and the independence of the judiciary (Iustitia, 2015).

The law's unconstitutionality was confirmed by the verdict of Constitutional Tribunal on 9th of March 2016 (Trybunał Konstytucyjny, 2016). Political conflict occurred again due to the fact that Prime Minister refused to publish the verdict, despite pressure from the public. There were demonstrations and there was even a leak to the press. Party Razem organized a protest and showed a projected image of the verdict on the PM's Chancellery building (Kazimierczuk, 2016). The Prime Minister, though, did not change her mind because according to her giving the verdict omitting the new law was against procedure. The problem is that this "new law" was the object of judgement (PAP, 2016).

The law from 22nd of December was not the last one which aimed at reform of Constitutional Tribunal. A new bill was passed in July the same year, but it too was deemed partially unconstitutional. The Tribunal was concerned, among other things with paragraphs about allowing three unconstitutionally elected judges to work and applied to the PM for publication of verdicts (until then it was her duty) and the possibility to block the verdict by four judges (Szułdurzyński, 2016). Just as with previous one, this verdict of the Tribunal was not published in *Dziennik Ustaw*.

All in all, in the period from November 2015 until December 2016 there were six so-called “repair bills” passed regarding the Tribunal. None of them were without controversies since they were to various extents violating the rule of the separation of powers, and a large part of them also violated the Constitution. The crisis is not solved according to legal experts, but for Law and Justice the termination of Andrzej Rzepliński’s time in office was certainly a breaking point. Julia Przyłębska was then elected President of the Tribunal (also not without controversy). She was one of the judges elected in December 2015 by new Sejm and she never agreed with Andrzej Rzepliński’s policies. Obviously since then there has been no conflict between the Constitutional Tribunal and the government as well as the Sejm majority.

As I have mentioned before all these events have naturally provoked political protest, mostly organized by the Committee for the Defense of Democracy. For a long time the organization was quite strong and it managed to mobilize thousands of people at the demonstrations. They did not manage, though, to influence authorities behavior and the power of political protest slowly decreased. Many factors had an impact on that; among them were suspicions against the leader of the movement, Mateusz Kijowski, who was eventually accused of committing fraud (Prokuratura Okręgowa w Świdnicy, 2017). That scandal practically killed the movement and since then it has remained rather insignificant in public life. Many of its members rightfully lost trust in the sense of their fight when it appeared that the leaders are not so idealistic (Nowakowski, 2017). Also, since the beginning of its existence the movement has been criticized for close ties with parliamentary opposition (Civic Platform and Nowoczesna). The leaders of the main opposition parties spoke at the demonstrations and published pictures with KOD’s leader. Given the fact that in the background of the Constitutional Crisis was the law passed by the PO dominated Sejm, it did not improve credibility of the movement. That may be one of the reasons why many Poles believe that the Committee is defending not democracy but particular partisan interests. Consequently, more and more citizens are convinced that judiciary institutions are politicized and not worth fighting for because they do not defend the law, but rather those who rule. I will later discuss and develop this hypothesis when I will move to the analysis of opinion polls.

Although, the protests did not prevent the Sejm from passing the laws on Constitutional Tribunal, they were more powerful when it tried to pass three another bills: about common courts, the National Council of the Judiciary (KRS: Polish acronym) and the Supreme Court. Those bills violated the separation of powers: the law about common courts gave the Minister of Justice power to appoint and dismiss presidents of courts in the whole country (Matczak, 2017). The second bill, about the KRS did, in fact, violate the constitution by the introduction of a new system of electing judges to this body: they will be elected by the parliament, and not by their peers as is specified in Constitution (Sadurski, 2018). The law about the Supreme Court was controversial especially in regards to the

retirement of judges. Many SC judges are already at, or are close to, the retirement age, though in the case of the President of Supreme Court, the Constitution specifies the term (it is six years). Therefore the bill seemed suspicious and for many it looked like a change of staff. Social organizations, thus, decided to organize protests.

In summer 2017, a number of protests sprang up in Poland. The protesters were demanding the veto from the president, since the parliament passed the law despite the controversies (PAP, 2017). He eventually decided to veto two out of three bills (he signed only the bill about common courts), being chased by the protesters even on his vacation in Jurata (Wprost, 2017). Following this, his rating increased in opinion polls as he successfully managed to create a statesman-like image. He also declared that he was going to initiate his own project. This he did and the Sejm passed his laws in December 2017. The only problem is that the bills proposed by the President still contain the controversial solutions, although maybe in a different form (for example, giving the right to appoint the Chief Justice to the president and not to the Minister of Justice). The unconstitutional paragraph about the election of KRS judges by the Sejm remains as well as the part about retirement and the termination of the terms of the SC judges. What has really changed is the dynamics of the protests. First of all, they were organized by various organizations (not only KOD, but also Akcja Demokracja, Obywatele RP, Party Razem) and although in Warsaw the crowd was still impressive, in other cities there were much fewer people which was even noted by the speakers (Newsweek, 2017). Apart from that, the government has not once proved that it had the ability to pass the law even though there were street protests. This was, in my view, because they knew that despite the protests they still have a strong social base of support. In fact, the judicial bills did not influence public support for the ruling party as it is reflected in opinion polls (CBOS, 2017). That is why, what bothers me in this work is not *what* the government actually achieved through the bills but *how* it managed to pass them, not losing anything in opinion polls.

In the next paragraphs, I will briefly analyze the dynamics of the change of the public's attitude towards the judiciary in the period 2015–2018. I will also try to prove that, through its public campaigns, control of the public media, as well as successful establishment of the agenda in public discourse, the government has successfully managed to establish distrust between the public and the judiciary.

The dynamics of public opinion concerning the judiciary in 2016–2018

I have decided to use various kinds of reports, among them reports examining: social trust, the assessment of public institutions, opinions about the Constitutional Tribunal, social assessment of the judiciary. It seems to me that opinion regarding the functioning of the judiciary does reflect the level of trust in it because respondents express their opinion about the proper functioning of the judiciary as well as its reliability. I began by examining reports from 2016, when the constitutional crisis started. In fact, at the end of November 2015 and during last two months of the year I did not find any report concerning public trust in judiciary.

The report from March 2016 titled *The assessment of public institutions*, however, recognizes that something has changed in the public perception of the Constitutional Tribunal. It compares the opinion about Constitutional Tribunal from September 2015 with that from March 2016 and concludes that there had been a 16% increase in respondents having

a negative opinion about the CT occurred accompanied by an 8% decrease in positive opinions. As a result, in March 2016, 31% of respondents had a positive opinion about the CT, and only 3% less – 28% had a negative opinion about this institution. This was the month, as I have mentioned in the previous section, was the time when the Tribunal announced its verdict in regard to the new law on the Tribunal passed by the parliament, and the Prime Minister refused to publish it. The authors of the report noted that the involvement of the Tribunal in political argument had a negative impact on its assessment in opinion polls (CBOS, 2016).

Subsequently the situation only got worse, and eventually in June 2016 the number of respondents having a negative opinion about the Tribunal exceeded the amount of those having a positive opinion (37% and 29% of respondents, respectively). Since that time negative assessment increased until it achieved its peak in January-March 2017 (46%). In March 2017, the positive opinion of the Tribunal reached its lowest level – 19% (CBOS, 2017).

As the Public Opinion Research Center noted, citizens' attitude to the Constitutional Tribunal was strongly related to their political views. It was proved in December 2016 when the term of Andrzej Rzepliński as the president of the Tribunal expired and he was succeeded by Julia Przyłębska, the Law and Justice appointee. In the opinion polls which were held after that nomination, the right-wing voters and ruling party supporters appeared to be among those who most often express positive opinion about the functioning of the Tribunal, whereas the center/left-wing electorate shifted in their opinions to more negative degree (CBOS, 2017). This clearly shows how the judicial institution, which is supposed to defend the constitutional order, has been politicized in the view of society. There were several factors, which facilitated this, especially in the media discourse, but they will be discussed in the next section. For now I should move to the opinion about the courts and the general trust in the judiciary.

As soon as the proposal for the reform of courts was announced by the Minister of Justice, the Public Opinion Research Center launched a poll in which they asked citizens about their opinion about the Polish judiciary. The results were significant: more than half of Poles (51%) had negative opinion about the judicial system. Asked about which problems of the judicial system they find the most common, the respondents pointed out too complicated procedures, corruption and unfair judgements. Without undermining the seriousness of this issues, we must mention that 54% of citizens forms their opinion mostly based on the media coverage, as has been confirmed in opinion polls. Only 21% of the respondents cited friends and family's experiences and only 18% their own experience as the main source of knowledge (CBOS, 2017). In the third section, I will show examples of the media content which is widely available and which may foster a negative attitude towards the judges.

The political conflict which I have briefly described in the background section combined with tabloid media content and public campaigns which will be the object of further analysis are, in my opinion, the main factors which diminished public's trust in judiciary. The significant decrease in this trust is visible if we compare the *Social trust* polls from 2016 and 2018. Two years ago, 45% of Poles expressed their trust in the judiciary in opinion polls, whereas in 2018 it is only 33%. At the same time, according to CBOS polls, half of society does not trust the courts and judges at the moment (CBOS, 2018). Now how did this happen?

In my opinion, section three will help us to understand the role of media in the process of decreasing of society's trust in public institutions (in our case, the judiciary). Though, the public agenda has been set outside of government's control, later the tone of public discussion about the judiciary, though still sharply polarized, included some narratives which were in line with ruling party's stance. We will consider the most popular Polish daily, *Fakt*, to show how the nature of tabloids (not necessarily politically-biased) fosters populist thinking and cynicism which are obviously factors facilitating the distrust in public institutions. We will also analyze how the government used these certain moods established in the society by launching a public campaign which was clearly anti-judiciary in its narration trying to present the reforms as repairing current, unjust (according to campaign) system.

Media's influence on citizens' trust in the judiciary

81 articles in the period from November 2015 until May 2016 were published in the most popular daily in Poland, concerning, directly or indirectly, the Constitutional Tribunal. Only 14 articles were directly negative about the Tribunal and especially its president but the rest of them often suggested that the conflict is not over following the Constitution, but rather between two visions of the Tribunal: the vision of Jarosław Kaczyński and the vision of Andrzej Rzepliński. This way, though the major part of the content seems to be neutral, it portrays the Tribunal as a politicized institution which rather represents one side of the conflict and has always been far from being truly independent.

For the purpose of this research I have analyzed the content of negative articles and I distinguished some dominating narratives in them:

- Anti-CT president articles accusing him of being rude to journalists, and one-sided or rather Civic Platform oriented;
- In the article discussing the conflict, information about the spending of the Tribunal as well as about judges salaries is underlined, instead of a description of the conflict itself;
- The paper criticized the fact that "judges give the verdict in their own case" even if that case was about whether the reform of the CT is constitutional or not;
- Some previously elected judges also remain controversial (the article discusses their communist past)
- They (the judges) serve the authorities rather than the people (unfair – according to the newspaper – verdicts of the CT which are not good for the citizens)
- The Tribunal's president should be apolitical and un-biased; newspaper accuses Andrzej Rzepliński of being involved in political argument
- The President of the Tribunal is paralyzing its work and is not behaving according to the rule *dura lex, sed lex* by ignoring government's amendments, allowing only 10 "old" judges to work (before Law and Justice amendments)
- Tribunal judges are rich and privileged people and they are going to earn even more; comparing them (and especially their salaries) certainly does not encourage solidarity with judges
- *The enormous pensions of Stalinist judges* (the title of article); the government based its narrative about the need for a reform of the judiciary on the replacement of the old generation of judges (those who were already serving during communist times) with

new ones who have nothing to do with Communism; by publishing such articles the paper facilitates and promotes this narrative

- The scandal regarding the leak of the CT verdict from March 2016 (it was claimed to be possessed by Civic Platform MPs)
- The husband of Tribunal's new judge (Przyłębska) is the candidate for an ambassador position (nepotism)
- Privileges only for the upper class; *Authorities win, Poles lose* (comparison of salaries of the President of CT, senator Anna Anders and the average Pole makes the Tribunal a political actor and facilitates a negative opinion)

It was difficult to assess the neutrality of the content since almost all articles are written in, typical for tabloids, an emotional manner. Nevertheless I have decided to place 43 articles in the neutral category mostly because they criticized all sides of the conflict: the Tribunal, the Sejm majority and the opposition. It is important to note that the CT was, in this simplified narrative, put together with opposition, which was only facilitated by the fact that the parliamentary opposition was attended the social protests and openly met with the Tribunal's president. For the reader the message is clear: the Tribunal is involved in political competition. That may be one of the reasons why the opposition lost ideologically in the conflict about the Tribunal (as we mentioned before, Law and Justice ratings in polls did not decrease). Since the CT has been presented as one side of the political conflict in the mainstream media, the narrative about its independence and objectivity was no longer believable. Therefore, as I shall argue, even the neutral articles put the Tribunal in the wrong considering its constitutional role. This will be more clear when we will shortly summarize their content.

Many of those articles were simply calling for a compromise. In the early narratives from the end of 2015 the conflict about the Tribunal was often presented as something unnecessary and irrelevant in relation to average citizen's life. A populist narrative demanding compromise became more frequent especially after the Venice Commission visit when the context of losing EU funds appeared in public discussion. It is important that both sides were usually blamed equally in such articles and were often accused of being quarrelsome. Also, when discussing the proposals for compromise, the Tribunal was treated as a side of the conflict being at the same time its object which certainly showed the institution in a bad light. Therefore, we can conclude that the articles we considered "neutral" in this case (mainly because they criticize both sides of the conflict) were often more harmful for the image of the Tribunal since the essence of this conflict was its neutrality. Politicians are always the object of criticism in the media, but the judicial institution presented as the participant of the conflict was unprecedented and as we have seen from the polls it had a certain impact on the public's perception of the courts.

I also found 10 articles which I called for myself "positive" because they were condemning the government's unconstitutional actions. At the same time, it is hard to find in them positive elements about the Tribunal or support for an independent judiciary. Rather, they recognize that the reform passed by the new Sejm will politicize the Tribunal even more which is visible in the titles *PiS will pass the Tribunal to themselves*, *Will PiS take the Tribunal by force?*, *PiS closes the Constitutional Tribunal with one sentence*, *Paralyzing the Tribunal*. The articles, though in a very simplified manner, tried to familiarize the reader with the complexity of the issue and recognized the government's unconstitutional actions.

Although the difference between directly positive and directly negative articles regarding the judiciary in this period is not that significant, the neutral articles, as I have mentioned before did not improve the image of judicial institutions. Quite to the contrary, it was shown as part of the conflict which neglected its neutrality from the beginning. I think it was one of the reasons why the government managed to pass the bill without much loss in the polls. Nevertheless, it could not ignore the protests which accompanied the whole process. That is why it decided to adopt a new strategy and launched a public campaign.

The campaign *Sprawiedliwe Sądy* (Just Courts) started in September 2017. It was mostly based on the black-and-white billboards which started to appear in Polish cities. Among the most frequent slogans there was *Let it be as it used to be* (the words of professor Rzepliński which were spoken in quite different context) combined with examples of unjust verdicts. Since the campaign was very offensive and it clearly aimed at the creation of a bad image of the judiciary, the Supreme Court responded to the accusations. It was revealed that many of the examples were either invalid or did not contain specific but crucial information (what was the exact verdict). The comparisons of the campaign's content and the reality are available on Supreme Court's Facebook page.

Apart from that, it was also revealed that the campaign was in fact launched by a company, owners of which were former PM's Chancellery workers. Their new company prepared a PR campaign using money from the Polish National Foundation which receives funds from 17 state-owned companies (Kacprzak, 2017). It means, that the government, in fact, ordered PR campaign which was supposed to promote judicial reform but the content of which was clearly anti-judiciary. Consequently, we may conclude, there are two reasons for such a significant decrease in trust in the judiciary in Poland recent years. One of them is the negative media content, especially in tabloids (since the media are the source of forming an opinion for over half of Poles), and the second is the government which is now in a permanent war with the judicial power and uses all available means to receive the sovereign's permission for the extension of legislative power even if the price is a humiliated and weakened judiciary.

Conclusions

Polish sociologist, Maciej Gdula, together with his co-workers went to one of the Polish small towns in the Mazovian voivodeship because he wanted to examine the so-called "Law and Justice hard electorate" and find out the reasons for the success of this party. After he asked his respondents about the Constitutional Tribunal, his conclusions from the responses were that those people who support PiS way of reforming the judiciary do not express anti-democratic opinions. They just understand democracy in a different way than their opponents. For them, what Law and Justice is doing now is the democratization of the Tribunal because the Sejm is ensuring the proper social representation in this body. For them, it is about pluralism, because the "old" Tribunal would probably block the reforms planned by the government. Therefore, the Tribunal is, in their view, an anti-democratic institution opposing the citizens' will and the party is promising a good change (Gdula, 2017).

I am mentioning this because that is the picture which has been created by the scandal-oriented media coverage of this conflict, which I partially analyzed in this work and

that is one of the reasons why the level of trust in the judiciary has decreased significantly in the last years. To have a broader picture we should analyze more content. I have just chosen just one, but the most popular daily, for the purpose of limited research and to have a representative content. I think that the analysis I performed has shown the links between tabloid content putting in doubt the values which were the object of the conflict we relate to (such as judicial independence) and the change in public opinion which in fact with time and with the development of political events related to this crisis has started to express those doubts. In fact, such coverage of the Constitutional crisis established the political environment in which the government was able to pass the reform without significant political losses. A large part of a society has lost their faith in an independent judiciary and this was partly caused by the tabloids, partly by the government's actions and partly by the opposition and the unreliable social movement leaders.

I think that when we read the responses of Dr Gdula's interlocutors and connect it with the content of tabloid I have presented we can see parallels and we can imagine how this picture of corrupted and biased judges (no matter which party rules) was established in Poles' heads. Given the fact that majority of citizens forms their opinion based on media content, and less than 20% on their personal experience, we should be careful when assessing the objectivity of those opinions. But this would be a topic for another analysis.

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