



# Laying the groundwork for “grand corruption”: the Polish government’s (anti-)corruption activities in 2015–2019

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## Summary

The results of opinion polls on the perceived scale of corruption show that the percentage of people who think that this is a serious problem has been falling steadily for many years – a trend that has continued under the Law and Justice (PiS) government. The improving perception contrasts with the number of scandals, affairs and other activities that skirt or even break the law taking place in the United Right government, which has been in power since 2015. To understand this discrepancy, we cannot reduce corruption to corruption crime alone. It is more than that – a phenomenon best described in terms of the manifestation of particularism in public life. This means the distribution of various public goods (such as funds, positions, rights, etc.) that favours a particular group – for instance, the political groupings in power at the time. This type of corruption need not be criminal; it may even be legal, regulated by law. It will, however, be equally – and perhaps even more – harmful than criminal corruption, particularly from the perspective of a democratic state, which is expected to uphold the rule of law and therefore also equality before the law.\*

Groups intent on pursuing their interests are capable of embedding corruption in the system, creating legal frameworks and institutions that assure them a privileged position and facilitate access

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to public resources. At the same time, it is in these groups' interest for their actions to be less visible to the public eye and therefore less transparent. This reduces the risk of them being held to task for abuse of power, negligence or errors – in keeping with Robert Klitgaard's classic definition of corruption as "monopoly plus discretion minus accountability".

However, if corruption is integrated in the system and concentrated among political, administrative or business elites, it can be more difficult for the average citizen to notice, especially when the economic situation is relatively good and social programmes are being developed. Ordinary people, concentrating on improving their quality of life in the short term, become less sensitive to the corruption taking place in the upper echelons of power. This mechanism, which can already be discerned in Polish public life, explains to a great extent why Poles are less concerned about the scandals and affairs in the ruling camp.

It also seems likely that the average Pole has a greater tolerance for corruption because he or she faces it in person less often. It is no longer so widespread and no longer affects the simplest public decisions, unlike fifteen or even ten years ago. We seldom, if ever, encounter corruption when trying to get our child a place in the school system, going to the hospital or dealing with everyday administrative issues. As we see corruption less often, we are no longer so quick to judge the state or the doings of the political elites through our own, negative experience. Corruption today is located far from the average citizen and does not affect our everyday lives directly. Yet it is still a threat, as its consequences – a less efficient state, damage to the country's image internationally, a growing network of informal connections and clientelism – will sooner or later begin to be felt more broadly and affect society; for example, when "ordinary" people begin to lose cases adjudicated by partisan judges or fail to get a job at a state or local-government institution just because they do not share the views of the ruling party. So-called "grand corruption" develops imperceptibly, but it always leads to deep political crises and the degeneration of public life, which has an inexorable impact on the lives of ordinary people, too.

During its first term in government, between 2015 and 2019, the United Right coalition laid the groundwork for the development of "grand corruption" by doing away with the separation of powers and the system of mutual control between the executive, legislative and judicial branches, while abandoning the rule of law. This has given the ruling party and associated circles extreme privilege. It has also led to inequalities – not only regarding the law, but also in access to specific public resources, such as civil service posts, state grants and subsidies, and state companies' advertising budgets. This hits media outlets critical of the government hard.

A policy for tackling corruption that bears the hallmarks of a systemic phenomenon embedded in the structures of the state and public life requires systemic solutions. Prioritising restoring the balance between the executive and the legislature is therefore essential. The parliament, and especially the opposition, must have the chance to exercise its control function towards the government and other organs of the executive.

Reform of the electoral system is also crucial to minimise the future risk of the concentration of legislative and executive power in the hands of one political grouping. The new system should be treated as a further safeguard guaranteeing balance between the branches of power and favouring the formation of coalition governments. The mutual checks and balances between powers should start within the ruling camp; ideally, if it were formed by autonomous groupings.

It is essential to create conditions in which the judiciary and public prosecutor's office are not directly dependent on politics. The independence of judges and autonomy of the prosecutor's office are not only a fundamental feature of the rule of law. They are also the main condition for the accountability of the legislature and the executive, especially when its representatives are in conflict with the law and suspected of participating in corruption.

An important element of systemic countermeasures against grand corruption is the creation of a central administration structure allowing officials to actually carry out public service, acting in citizens' interest, rather than the short-term interest of the ruling party. It is therefore crucial to standardise the legal standards of operation of the central administration and create a uniform civil service. This must incorporate a clear division between the corps of political officials and civil service officials. Appointments to the highest state positions must be based on merit, rather than purely political concerns. Without this, the public administration will turn into a *nomenklatura*, one more reservoir of resources for the privileged ruling party to tap. This constitutes a direct path to the multiplication of the cases of official corruption.

Another important subject is the creation of various "technical" solutions, such as the digitisation and streamlining of the financial disclosure system, passing a law protecting whistle-blowers who report abuses of the system in the workplace, or producing legislation that holds not only individuals, but also legal entities, liable for corruption. It is also necessary to regulate lobbying to make it a transparent form of participation in public decisions. Many solutions lacking in Poland would significantly improve the state's capacity to combat corruption. But without restoring the fundamental, structural institutions that make it possible to fight corruption at the highest levels of power, the effectiveness of these "precise" instruments responding to concrete problems and threats linked to corruption will be minimal. In this study, I therefore concentrate on the systemic threats from corruption and the key structural solutions that can limit its risk and negative consequences.

This article focuses not so much on recent cases of corruption as on the longer-term situation. The analysis does not ignore current events, but focuses on what should be done at the level of the state's fundamental structures to make it more resistant to particularism and the associated abuses of power. The problem of how to react directly to cases of corruption in a setting of fundamental legal and institutional deficiencies would require analysis from a different perspective, and therefore a different description.

## **What understanding of corruption shows that it is a problem?**

The times when corruption in Poland was understood almost exclusively as giving and taking bribes are long gone.<sup>1</sup> Poles today are aware that corruption is a much broader phenomenon. We distinguish other forms, such as influence peddling, public servants failing to perform their duties or abusing power, and election bribery. Perhaps we are less aware that the Polish penal code, following international law, also penalises bribery between private companies and classifies so-called "money laundering" as a particularly dangerous form of corruption. In general, though, we know that corruption means more than backhanders. However, it is still widely seen mostly as a crime. This picture of

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<sup>1</sup> See T. Chrustowski, *Prawne, kryminologiczne i kryminalistyczne aspekty łapówkarstwa*, Warszawa 1985.

corruption dominates in the media and opinion polls sometimes give this impression, too. Yet corruption is not limited to crimes defined in the penal code.

Research in sociology, political science or economics shows that corruption goes beyond legal definitions and that corruption crimes – even as diverse as those outlined in the penal code – are just the tip of the iceberg.<sup>2</sup> The base of this iceberg is in society; in culture, customs, practices and social institutions that are by no means necessarily “criminal” (they might be lawful), but that create fertile ground for corruption crimes. If we disregard this broader social aspect of corruption and concentrate solely on corruption as acting against the law, we will lose sight of many important aspects that show just why it is so dangerous – particularly from the point of view of a contemporary, democratic state and Poland’s current situation.

## Corruption as particularism

The approach to research on corruption that describes it in terms of a dichotomy between particularism and universalism has become more popular in recent years.<sup>3</sup> To put it simply, contemporary Western societies aspire to realise the universalist idea of a liberal, democratic state, where the highest system of norms is the law. On the other side, we have societies organised according to exclusive, segregating, particularistic norms. In these societies, the guarantee of having the full range of rights is belonging to a specific group, such as an ethnic group, political faction, or community formed by a specific religious or ideological worldview. The separation of powers (although it might exist formally), like the legal system, is not a reference point that shapes the full set of social, political and economic relations. In systems following the logic of particularism, the concept of equality before the law does not exist. They are dominated by discretion. People live and act according to the rules of those who happen to be in power and can impose the rules. This is the essence of particularism, the extreme embodiment of which is totalitarian and authoritarian regimes.

Examining corruption from the point of view of the particularism–universalism dichotomy expands the analysis and clarifies several questions that are problematic in terms of narrowing concepts. In particular, the more a given society and state are guided by the logic of particularism, the more susceptible they will be to corruption, i.e. to dividing public goods in a way that privileges a specific group and discriminates against another. Furthermore, this division takes place in an untransparent way. This means that anybody who tries to obtain a particular good has to struggle against the privilege of others. He or she therefore looks for a way out – for example, through bribery or influence peddling.

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2 See G. LaFree, “Corruption as a Global Social Problem”, in: *Handbook of Social Problems. A Comparative International Perspective*, ed. G. Ritzer, Thousand Oaks 2004; G. Makowski, *Korupcja jako problem społeczny*, Warszawa 2008; R. Karklins, *The System Made Me Do it: Corruption in Post-communist Societies*, Taylor & Francis 2005.

3 See *Contextual Choices in Fighting Corruption: Lesson Learned*, ed. A. Mungiu-Pippidi, 2011, <http://www.oecd.org/countries/zambia/48912957.pdf>, pp. 25–36, accessed: 23 September 2019.

**Table 1. From particularism to universalism – characteristics of government and the threat of corruption**

Characteristics	Characteristics of governments			
	Maximum particularism, high threat of corruption	←————→		Maximum universalism, low threat of corruption
Distribution of power	Hierarchical, centralised	Structured, concentrated in narrow groups	Weakly structured, “competition of elites”	Egalitarian, participatory
Autonomy of state institutions	Appropriation	Appropriation taking election results into account	Appropriation of individual areas of state responsibility	Major autonomy supported by appropriate institutional-legal guarantees
Distribution of public resources	Narrow predictable	Narrow unpredictable	Mixed	Universal/egalitarian
Public sphere – private sphere	No differentiation	Limited to specific cases	Weak differentiation	Clear differentiation
Formal/informal institutions	Dominance of informal institutions	Supremacy of informal institutions	“Competition” between formal and informal institutions	Complementarity
Mentality	Collectivist	Collectivist with elements of individualism	Mixed	Individualistic
Accountability of public institutions	None	Only during change of government	Occasional	Continual and multi-level
Rule of law	None	Façade	Narrow scope	Standard

Source: prepared by the author based on Mungiu-Pippidi A. (ed.) (2011), *Contextual Choices in Fighting Corruption: Lesson Learned*, <http://www.oecd.org/countries/zambia/48912957.pdf>, p. 13, accessed: 23 September 2019.

Adopting a broad perspective shows that, even in societies and states that call themselves democratic and liberal, there might be many different areas of particularism. In this case, not by chance, corruption is not necessarily a crime. This is because democratic, liberal states are capable of legalising corruption almost in spite of themselves, or at least creating institutional and legal solutions conducive to it. A now historical but strong example of this kind of “legal corruption” was the legal sanctioning of bribery of public officials from third countries by Western companies. These were still used in the late 1990s in countries including the Netherlands, Germany, France and Belgium. Companies from these countries who bought off foreign officials and politicians in relation to investments in other countries could lawfully deduct these “costs” from their taxes. These practices were not delegalsed until after

ratification of the OECD convention on combating bribery of foreign public officials in international business transactions in 1997.<sup>4</sup>

Even today, there is no shortage of policies that, although created by liberal democratic governments, adhere to the logic of particularism. Even if they do not legalise a particular form of corruption directly, they contribute to it indirectly by creating a space of privilege for specific groups, as well as arbitrary and untransparent decisions. An example that we will return to later in the analysis is the broad range of changes to the justice system (specifically, the judiciary and the public prosecutor's office) in Poland by the United Right government since it came to power in 2015. These changes subject many state institutions to the interest of the ruling party and promote party particularism in appointments to public posts, and in the final reckoning create a social and institutional environment that is receptive to criminal forms of corruption, e.g. influence peddling. Yet these changes have were introduced using legal methods (although they sometimes violate the Polish constitution or international law) and with the assent of large numbers of voters. In unfavourable conditions, even initiatives with "anti-corruption" in their names can also be particularistic and corrupt in practice, as they restrict access to a certain public good and opportunities for fulfilling civil rights. One such example is the bill on transparency in public life, which will be discussed below.

Corruption should be viewed in broad terms; not as unlawful conduct or even a set of crimes, but as a phenomenon almost intrinsic to the system. Whether this or another action contravenes the legal norm is not the most important thing. Whether something is corruption depends on whether it causes a particularistic redistribution of goods, to which access should be fundamentally open and equal.

## **Corruption as a source of inequality**

Here we come to the second important aspect, which reveals how dangerous corruption is and why it demands a comprehensive response from society and the state. Demoralisation, loss of trust in the state and an increasing number of corruption crimes, as well as others that are usually related to it (e.g. organised crime), are all a serious problem. Yet they are just symptoms, by-products or consequences of actual corruption. Its fundamental and most serious outcome, however, is growth in social inequalities. To simplify, if corruption is particularism, the most serious problem is in fact inequality in access to diverse public resources. Of course, this consequence of corruption is most visible in developing countries, where society is less affluent and the state less efficient. This was noticed some time ago by the United Nations. In 2015, the UN defined the Sustainable Development Goals (SDGs) that countries around the world should achieve by 2030 to minimise poverty and hunger, halt negative changes to the environment and ensure better access to healthcare and education.<sup>5</sup> In short, the goal was to reduce inequalities between the developed and the developing world. Not by chance, the description of the circumstances in which the SDGs could be achieved emphasised the need to reduce the scale of corruption. Documents on the fulfilment of the SDGs mention how corruption damages economic growth by creating uncertainty among businesses, discouraging investment and preventing public tender markets, which billions in taxpayers' money pass through, from being competitive.

The second main issue raised in this context is how corruption damages human rights by blocking access to fundamental goods and services, thereby denying people of the chance to live in decent conditions and improve them. A drastic example often cited in this context are Transparency International's estimates showing that corruption increases the costs of households' access to water – the

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<sup>4</sup> Dz.U. [Journal of Laws] 2001, no. 23, item 264.

<sup>5</sup> See <https://sustainabledevelopment.un.org/>, accessed: 23 September 2019

most basic public good imaginable – by as much as 30%.<sup>6</sup> Other goods – education, the justice system and public posts – can also become more expensive and therefore less accessible.

The third aspect identified in analysis of the connection between corruption and social inequalities is the “right to good government”. It is correctly assumed (and also shown by empirical evidence, as discussed below) that only an effective government focused on the common good can implement public policy that reduces inequalities. Corruption as a form of particularistic distribution of goods and a factor in social inequalities is therefore clearly not only discussed in an academic environment, but a constant factor for decision makers to consider and an element of public policy.

In the literature on corruption, there are many interesting works on the connection between corruption and social inequalities.<sup>7</sup> Perhaps the most experienced researcher in this field is Eric Uslaner of the University of Maryland. Uslaner analysed a vast amount of data on economic growth, access to various types of social services, inequalities, perception of corruption, and the assessment of the risk of corruption and its perception.<sup>8</sup> He found that, at the level of simple correlations (e.g. between the Gini coefficient, measuring the level of inequality, and perception), it is not easy to prove the existence of a connection between corruption and the level of inequality (although common sense would suggest that this link is obvious). Yet if we take other indicators into account too, such as the quality of governance or social trust, this correlation can be identified at the level of comparisons between states on a global scale.

Uslaner proposed several interesting hypotheses on the link between corruption and social inequalities. The main one refers to “corruption and the inequality trap”. The prime victims are countries unable, for various reasons, to offer their citizens free access to fundamental public services (education, health service, security, etc.). This is usually due to disorganisation, the corruption of political elites and what we might call more objective factors (such as global economic crises). Failing states almost by definition do not gain public trust. They are unable to provide decent remuneration to their functionaries, especially public officials, who are therefore more likely to seek illegal, additional sources of income, like forcing citizens to pay bribes or seeking opportunities for illegal benefits, usually within public procurement.<sup>9</sup> Inequalities are growing, because those who can afford to pay off a politician or official are privileged, gaining access to a public service – a favourable legal regulation, a hospital bed, expensive medication or a place at a good public school. This increases distrust in the state. The spiral is hard to escape. As shown by the Polish People’s Republic and other Eastern Bloc countries, whose political and administrative systems were already extremely corrupt and deficient in the late 1980s, the only opportunity for improvement emerges when the state becomes fully mired in crisis and simply collapses. After that, the population can attempt to build a more efficient and fairer system almost from scratch.

Uslaner’s analyses demonstrate the complexities of corruption and its close connections with the particularistic distribution of goods, leading to extreme social inequalities. They also reveal the direct links between corruption and state erosion, which, far from being sudden, might go on for years before average citizens begin to feel it first-hand. This can pave a way from which there is no return.

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6 See *Global Corruption Report 2008 Corruption in the Water Sector*, Cambridge 2008.

7 One of the earliest analyses on this subject was published in 1998 by the International Monetary Fund; see <https://www.imf.org/external/pubs/ft/wp/wp9876.pdf>, accessed: 23 September 2019.

8 See E. Uslaner, *Corruption, Inequality, and the Rule of Law*, Cambridge University Press, Cambridge 2008.

9 M. Fazekas, “The Political Economy of Grand Corruption in Public Procurement in the Construction Sector of Hungary”, in: *Government Favouritism in Europe*, ed. A. Mungiu-Pippidi, *The Anticorruption Report*, vol. 3, Berlin–Toronto 2015.

Sometimes, many bad things need to happen before the public becomes aware of this complexity and people begin to oppose the corrupt *status quo*. Uslaner also points to the huge responsibility on those in power to avoid a situation in which the state's general failings set off an almost unstoppable avalanche of abuses that will sooner or later lead to the general demoralisation of society, the disintegration of public institutions, systemic crisis and deep social inequalities.

## **Contemporary corruption requires a comprehensive anti-corruption policy**

It is important, then, to avoid reducing corruption to a crime. Similarly, anti-corruption policy must be more than penal policy.<sup>10</sup> There is no “happy medium” for combating corruption and repression is certainly not the answer. The problem of corruption (and other crimes, too, incidentally) cannot be solved by continually adding to the list of crimes or increasing penalties. Even if corruption is punished by a brutal death, like in China, this will not deter those who see it as an opportunity to make a fortune or secure power. Based on the current state of knowledge on corruption, we can conclude that the best approach to understanding and combating it is an all-encompassing one.

Modern anti-corruption principles emphasise prevention and the creation of systemic solutions that make society and the state more resistant to corruption, rather than repression. I adapt one such perspective on anti-corruption policy for the purposes of this analysis, while offers a better description and understanding of the nature of corruption in Poland and what countermeasures should be taken. This approach is the National Integrity System (NIS) created by Transparency International.

The National Integrity System assumes that a society and state can be resistant to corruption only when certain fundamental institutions operate properly and are capable of both preventing and actively combating this problem. This refers not only to state institutions but, owing to the complex nature of corruption, also to various social institutions: the three main branches of power – the legislature, executive and judiciary – and the public administration, law enforcement authorities, the office of the human rights commissioner (ombudsman) and political parties. This concept also points to the importance of the media, the private sector and non-governmental organisations, whose engagement is needed to prevent corruption.

To sum up: an efficient system for combating corruption includes legislative and executive authorities that operate transparently and with integrity and are able to create and subsequently apply appropriate legal instruments. Law enforcement bodies capable of detecting corruption crimes are no less important. Independent courts with the capacity to enforce justice are equally crucial. The media and social organisations that report abuses, inform the public about the need to oppose corruption, educate and support such people as whistle-blowers who expose abuses are essential, too. The better various public and private institutions work and collaborate to reduce corruption, the greater the chances of it being reduced, the rule of law being observed, and corruption not leading to growing social inequalities and a declining quality of public life. The NIS concept is illustrated concisely and clearly in the diagram below.

It is worth noting that, apart from the institutions mentioned, for corruption to be combated successfully, the foundations on which they are built are also important. This means the general social,

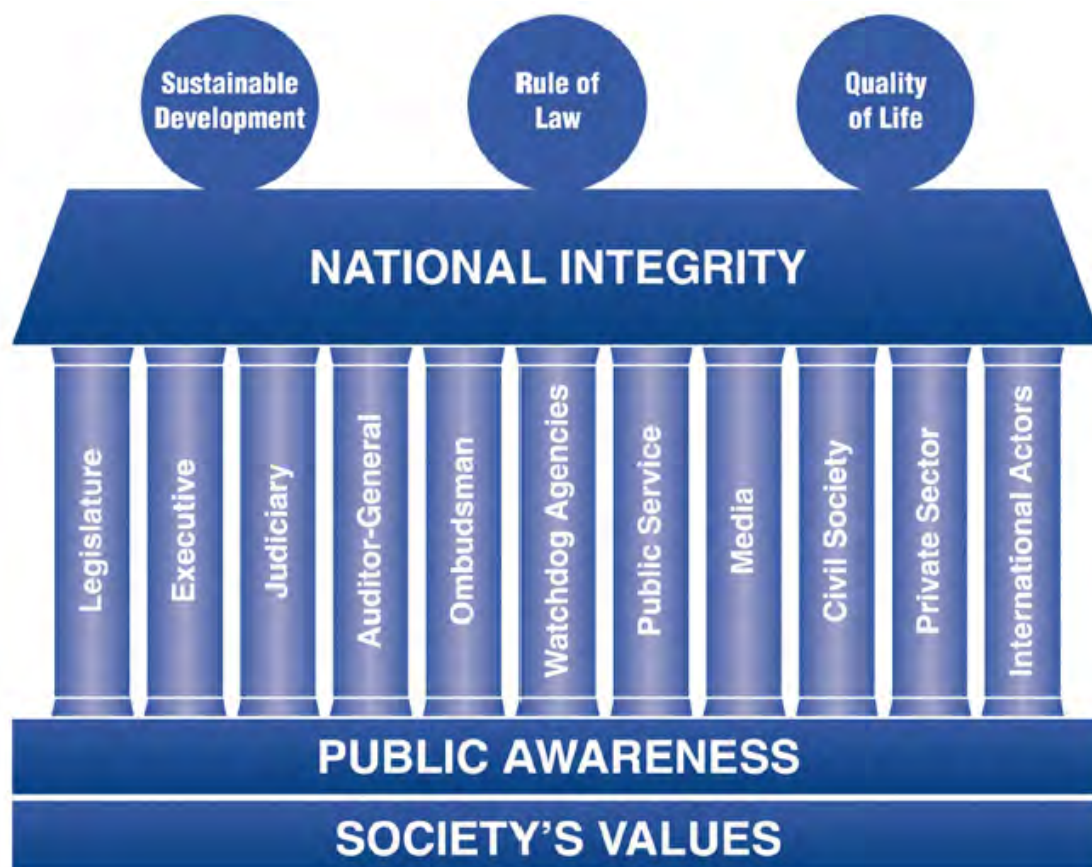
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<sup>10</sup> G. Czubek, G. Kopińska, A. Sawicki, A. Wojciechowska-Nowak, J. Wojciechowicz, *Jak walczyć z korupcją? Zasady tworzenia i wdrażania strategii antykorupcyjnej dla Polski*, Warszawa 2010; H. Sutch, *Strategia walki z korupcją – teoria i praktyka*, Warszawa 1999.



cultural, political and economic conditions; for example, the axiological system dominant in society, from religious worldview to political convictions (e.g. more right-wing or left-wing views) and the general characteristics of the political and economic system. Only by describing all these elements can we perform an accurate diagnosis of the sources of corruption, as well as the strong and weak points of society and that state that allow these elements to combat corruption more or less effectively.

**Figure 1. Diagram showing the National Integrity System**



Source: A.J. Brown, F. Heinrich, “National Integrity Systems – An evolving approach to anti-corruption policy evaluation”, *Crime, Law and Social Change* 2017, no. 68 (3), pp. 283–292.

Furthermore, analysing corruption from this perspective means asking not only whether it takes place in a specific area or institution, but above all how capable they are of counteracting it. Corruption has been analysed based on the NIS concept in several dozen countries so far (in several, this analysis has been repeated several times), providing valuable information and recommendations regarding anti-corruption policy.<sup>11</sup> In 2009–2012, NIS analyses were conducted in all the European Union member states, including Poland.<sup>12</sup> Performing them in full is an expensive, painstaking and time-consuming process. This article, of course, is not an NIS analysis in the strict sense.

I share the views of the creators of this concept on the complexity of corruption and the need for a comprehensive response to the problem, and will attempt to analyse selected issues using its logic. In Poland’s current situation, I argue that the most important “pillars” of the system of integrity of

<sup>11</sup> [https://www.transparency.org/whatwedo/activity/european\\_national\\_integrity\\_systems\\_project](https://www.transparency.org/whatwedo/activity/european_national_integrity_systems_project), accessed: 23 September 2019.

<sup>12</sup> Ibid.

public life that anti-corruption policy should concentrate on are mutual relations between the centres of the legislature, executive and judiciary, the public prosecutor's office and the central administration (especially the civil service).

A particularly important factor is the separation of powers, the main guarantee of the proper functioning of the contemporary democratic state, apart from the opportunity to choose one's public representatives or abidance by fundamental civil liberties. (Liberal) democracy should not only guarantee freedom in the choice of representatives, but also contain safeguards preventing the ruling majority from turning it into the tyranny of the majority (as was often the case in ancient democracies).

Liberalism in the classic, political sense regards liberty as freedom from fear – of the state and of other citizens.<sup>13</sup> One of the safeguards guaranteeing freedom is the rule of law, which can also be expressed by the phrase “the law is sovereign”. Of course, this does not mean that the law is immutable and cannot be shaped by the legislature and executive or by courts, whose pronouncements formulate its practical meaning. The law cannot be changed solely based on the rulers' will, but above all according to the rules of the law itself. The most important collection of these rules and the framework for changes is the constitution. Its provisions are above other laws and each government. This, in a nutshell, is the idea of the rule of law.

Another safeguard is the separation of powers, which boils down to the distinction between the legislature, executive and judiciary. The sense of this separation comes down to none of these state authorities having full power. Yet they must have the capacity – as scholars of this issue sometimes put it – to “get in each other's way”. None of them should have the chance to dominate the others, but they should complement one another, and, most importantly for this analysis, keep each other in check. In a democratic system, there should be a network of institutions to enable these mutual controls and checks.<sup>14</sup>

**From the point of view of anti-corruption policy, the system of checks and balances institutions is crucial.** If it exists and works, it is possible to hold the government accountable for its decisions or its neglect and abuses. Lack of accountability is the first step towards disregarding the law and entirely discretionary actions. It is no accident that one of the classic definitions of corruption is the formula  $C = M + D - A$  (“corruption equals monopoly plus discretion minus accountability”).<sup>15</sup> **Power that is not balanced by another power cannot be expected not to circumvent the law and slide into lawlessness and, consequently, into corruption.** Robert Klitgaard's formula essentially says the same as Lord John Acton did more than a century earlier: “Power tends to corrupt, and absolute power corrupts absolutely.”

At the same time, we should remember that in contemporary democracies the separation of power between executive and legislative bodies is often only a formality. This is especially true in countries like Poland, where political parties are dominated by the leader and parliamentary majorities are not interested in controlling the government that they appoint. Nonetheless, even in these circumstances,

13 S. Kautz, “Liberty, Justice, and the Rule of Law”, *Yale Journal of Law & the Humanities* 1999, no. 11 (2), pp. 435–468.

14 An example of a specific institution enabling checks and accountability between these powers is the vote of confidence, which each government must obtain from a parliamentary majority before it begins to operate (it can also lose this trust if a vote of no confidence is voted through). Another instrument of parliamentary checks and balances of the executive is parliamentary questions to ministers. An example of the executive's checks and balances of the legislature is the institution of the presidential veto of bills that have been passed or the ability to refer them to the Constitutional Tribunal. In practice, the balance between the executive and the legislature involves numerous legal and institutional tools.

15 R. Klitgaard, *Controlling Corruption*, University of California Press, 1988.

the separation of powers along this line still makes sense; for instance, in the context of the authority and rights of the parliamentary opposition – more on this later.

Analysing the main sources of contemporary corruption, I therefore focus firstly on the legislature and executive and the question of mutual checks and balances between them. **The interference in relations in this field is key to understanding the greatest threat of corruption in Poland, as well as the connection between corruption and the weakening of successive pillars of integrity in public life – the judiciary, the public prosecutor and the public administration.** Before discussing the problems in these areas, though, it is worth examining the scale of corruption in Poland and the United Right government's anti-corruption policy in 2015–2019.

## **Corruption in Poland and the government's (anti-)corruption policy in 2015–2019**

Determining the scale of corruption is a difficult task. Although information resources, the results of research and diverse indicators describing this phenomenon with varying degrees of directness have been developed over the past two decades,<sup>16</sup> it is impossible to get away from two types of data – surveys and various types of secondary data, especially criminal statistics. We also have various kinds of indices of corruption, which are usually based on surveys, too. None of these enable us to determine the scale of corruption precisely. Surveys only inform us about perception, which tells us little about how often corruption occurs. Secondary data, and especially criminal statistics, is encumbered with a dark figure (the unknown number of crimes that took place, but are not recorded or reported). Surveys in which respondents are asked about their personal experiences with corruption also have the problem of a dark figure.<sup>17</sup> The answer to questions about how big a threat corruption is in Poland is therefore: it depends how you look at it.

Using what we have available, we can suggest that the general picture and public sense of the threat of corruption in Poland are by no means dramatic. Although we are a long way behind the countries seen as the least corrupt (such as New Zealand or the Scandinavian states), the situation in Poland is much better than in most developing countries and even many EU member states.

### **Corruption in Poland as shown by the available data**

Let us therefore begin by discussing the indexes describing corruption, which provide the most general picture. Despite the lack of precision, they are most often used by international institutions or investors to compare countries in terms of the threat of corruption. Concrete political and business decisions are frequently made on this basis.

The best-known index is the *Corruption Perception Index* (CPI) by Transparency International first published in 1995. Since 2012, after a change in methodology, its advantage is the possibility of comparing results over time (owing to the index's statistical procedures, its previous editions did not allow this). The CPI is based on survey research on samples of experts, including specialists in evaluating economic and political risk. As its name suggests, the index reflects perception and should therefore be interpreted with a certain distance, if only because perception may change under the influence of individual events with major media reach (e.g. corruption scandals). Despite an advanced statistical

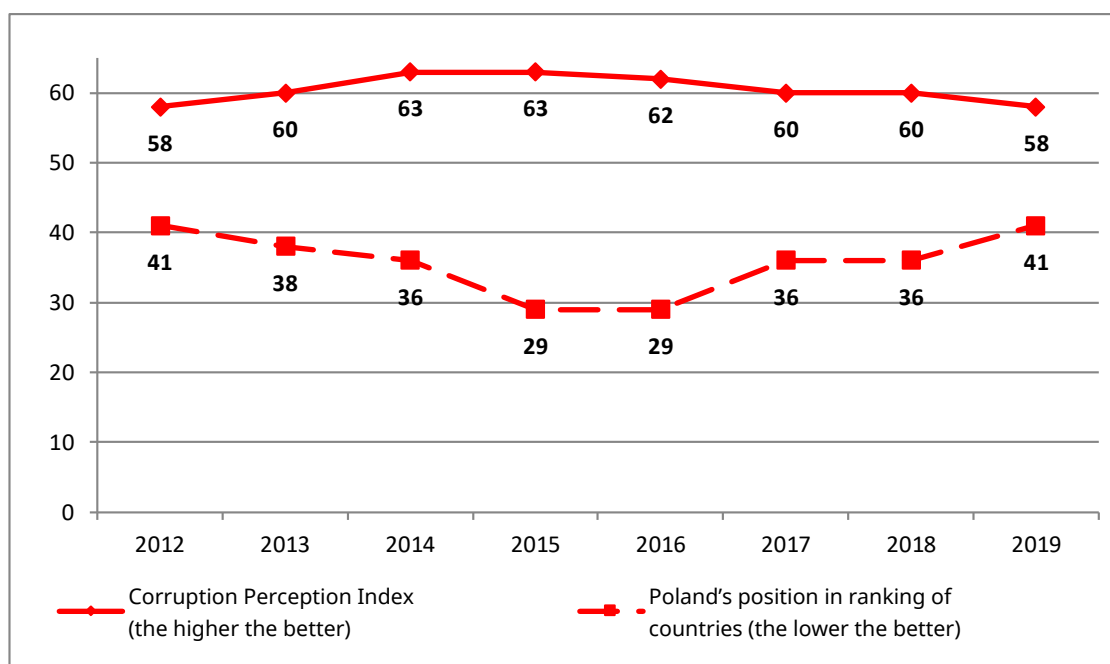
<sup>16</sup> <http://anticorrp.eu/>, accessed: 23 September 2019.

<sup>17</sup> See C. Sampford, A. Shacklock, C. Connors, *Measuring Corruption*, Ashgate Publishing, 2006.

formula, these fluctuations can never be fully eliminated from the CPI and other similar measurements. The index ranges from 0 to 100 – the highest and lowest level of perceived corruption respectively. This is also the basis of the ranking of countries, which, for more than two decades, has prompted considerable interest among journalists, politicians and investors around the world.

**In most recent CPI (2019, published in 2020), Poland received 58 points, putting it in 41st place among the 180 states covered.** Denmark, New Zealand and Finland came first with 87, 87 and 86 points respectively. The EU average was 66. By this measure, Poland is only slightly behind the EU average. It has a much better perception than Hungary, with just 44 points (the country's score and rank has been falling for years), Slovakia (50 points) and Bulgaria (43 points). In 2019, Poland obtained the second-best result of all the countries of the former Eastern bloc, after Estonia (with 74 points and 18th place). **Yet while its result improved in 2012–2014, between 2015 and 2019 the perception of Poland in terms of corruption slowly worsened.**

**Chart 1. Changes in Transparency International's Corruption Perception Index and Poland's position in it in 2012–2019**

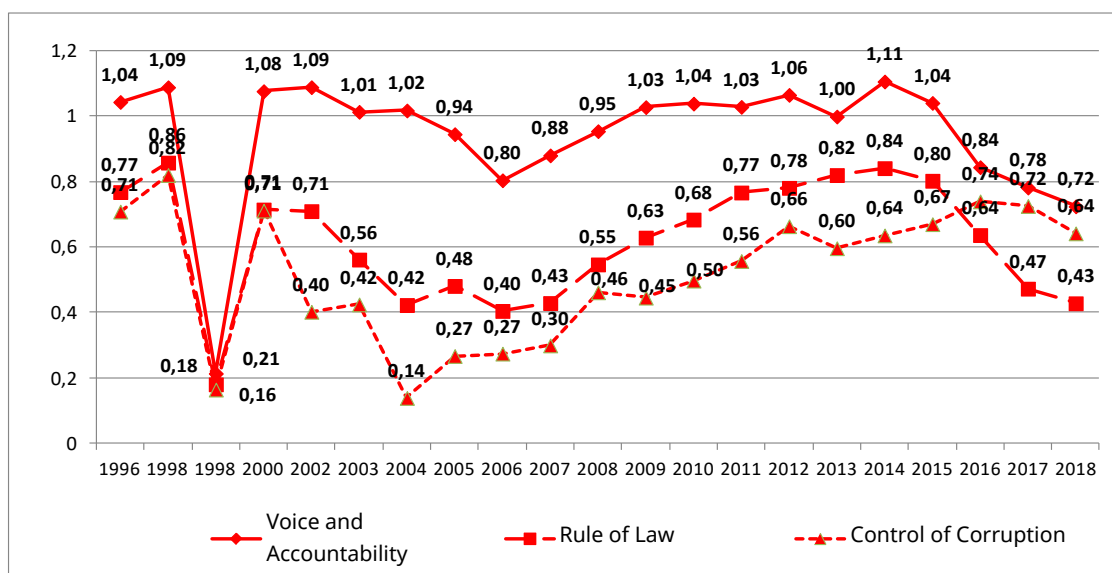


Source: prepared by the author based on: <https://www.transparency.org/cpi2018>, accessed: 23 September 2019.

A year after the first CPI was published, the World Bank created a similar index, *Control of Corruption*. This is part of a set of six Worldwide Governance Indicators, describing states in terms of accountability, political stability, effectiveness of governance, quality of the law and the rule of law. Without going into detail, we should note that the corruption index is based on a set of data that is similar but larger than that in Transparency International's index. For example, the World Bank takes into account opinion polls and surveys of representatives of social organisations, so is not solely based on expert opinions. It can give a value from -2.5 to 2.5 (this index's higher level of methodological advancement enables its results to be presented on other scales, as well as comparisons from the time it was first published in 1996). However, it remains a perception index, like the CPI.

Poland's results in the World Bank index in 2007–2017 are stable and, interestingly, reveal a growth trend, which would suggest that Poland is dealing with corruption increasingly well. This might mean, for example, a greater emphasis not only on perceptions of corruption *per se*, but also – as the index's name suggests – the perception of a state's capacity to counteract (or control) corruption. This perception might seem higher, if only because of the continual increase in various anti-corruption solutions, especially legal regulations, which are usually perceived positively, even if they do not work in practice (new, tougher legislation often plays a placating role and makes a good impression on public opinion, and even experts, although later it proves to be unenforceable and does not reduce crime). The World Bank index should be interpreted with the Voice and Accountability and the Rule of Law indexes. Here, the Rule of Law index shows a drop in Poland's score after 2015.

**Chart 2. Selected indicators of the Worldwide Governance Indicators concerning corruption and changes in 1996–2018.**



Source: prepared by the author based on: <https://info.worldbank.org/governance/wgi/>, accessed: 23 September 2019.

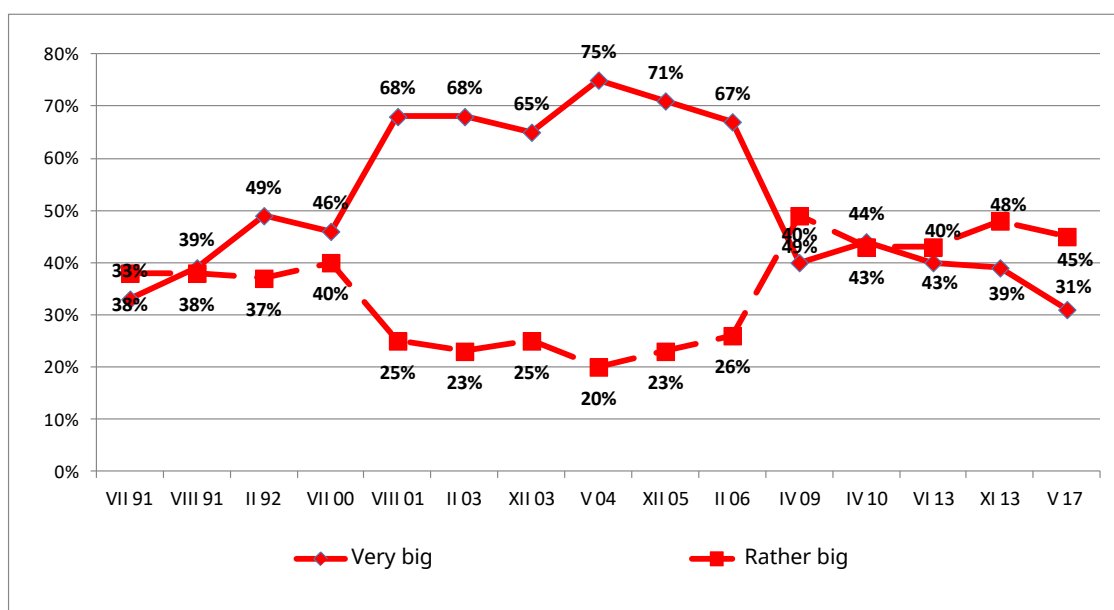
**Although they only measure perception, the Transparency International and World Bank indexes provide a certain picture of how Poland compares to other countries in terms of corruption and to what extent it might be a threat.** This picture is not unequivocal. A certain worsening of perception can be observed during the United Right government compared to the previous coalition of Civic Platform (PO) and the Polish People's Party (PSL), but it is neither radical nor deep – although this should not be reassuring (I will return to this question at the end of the chapter).

Polish surveys on corruption might also seem reassuring. The Centre for Public Opinion Research (CBOS), which has been surveying Poles' views on corruption the longest and most systematically, last asked them about it in 2017. It asked them about their perception and their own experiences. Without getting into a discussion about the shortcomings and virtues of CBOS's research,<sup>18</sup> it is worth emphasising several conclusions that result from the 2017 survey.

18 G. Makowski, *Korupcja jako problem społeczny...*, pp. 120–136.

Reaching back a little further into the past, we can note that, compared to the 2006 survey, the percentage of respondents in 2009 who said that corruption is a very big problem in Poland fell from 67% to 40%. The Polish public was guarded in its assessment, though, because more than 80% of people claimed that corruption is a significant problem (taking into account both strong and moderate – “rather big” – responses). As the chart shows below, this percentage fell abruptly again in the 2017 survey. For the first time for 26 years, the percentage of these responses fell below 80%. Despite this, 76% of Poles still said that they see corruption as a significant problem. **Compared to previous years, however, it is clear that this opinion is changing for the better and is much less negative, even given the right-wing government’s many controversial actions and affairs in 2017.**

**Chart 3. Opinions on the scale of corruption in Poland in 1997–2017 according to CBOS polls.**  
**Question: Do you think that corruption in Poland is a big or a small problem?**

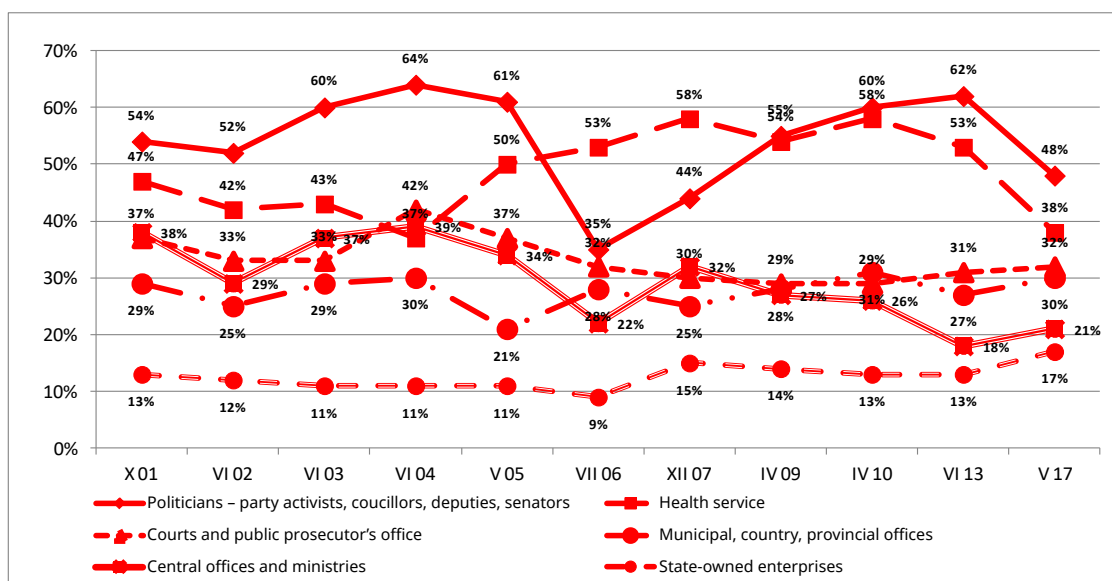


Source: prepared by the author based on: [https://cbos.pl/SPISKOM.POL/2017/K\\_063\\_17.PDF](https://cbos.pl/SPISKOM.POL/2017/K_063_17.PDF), accessed: 23 September 2019.

When it comes to Poles’ views on the areas of social life especially susceptible to corruption, the main ones identified are invariably politicians, the health service, courts and the public prosecutor’s office, local government and central government. Two changes are interesting if we compare the 2017 poll to previous results. Opinions improved markedly with regard to politicians and especially the health service. In the latter case, this is only a seeming paradox, considering the worsening evaluation of the quality of the health service. Most people evidently realised that the health service’s problems are not a result of corruption, but of disorganisation and bad state policy.<sup>19</sup>

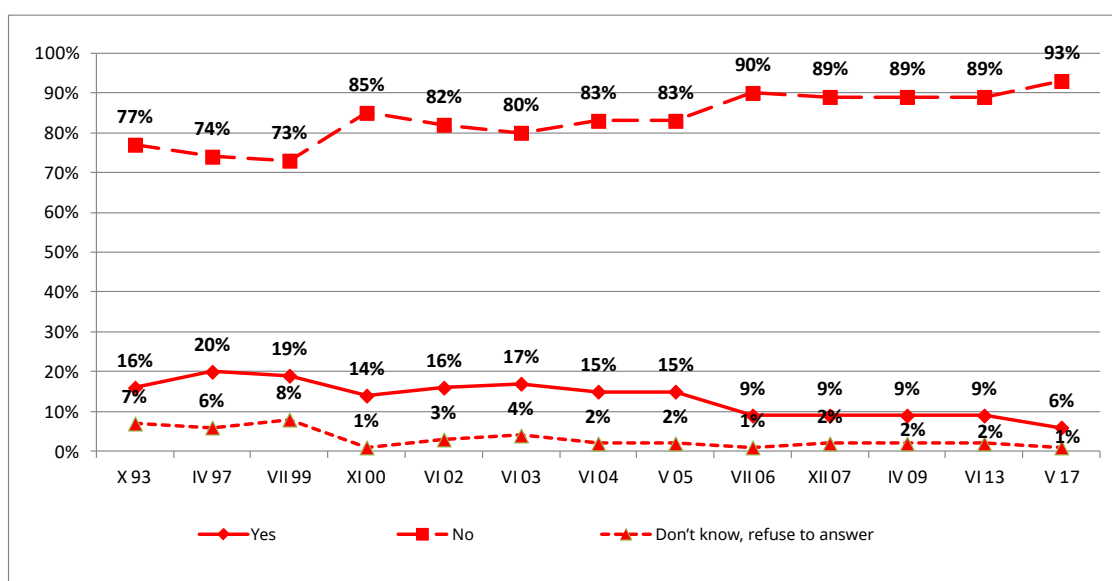
<sup>19</sup> See <https://www.rp.pl/Sondaze-wyborcze/191009542-Sondaz-Co-trzeci-Polak-uwaza-ze-nikt-nie-zreformuje-sluzby-zdrowia.html>, <https://pulsmedycyny.pl/65-proc-polakow-zle-ocenia-publiczna-opieke-zdrowotna-902870>, <https://fakty.tvn24.pl/fakty-w-poludnie,98/sytuacja-w-ochronie-zdrowia-sondaz-dla-faktow-tvn-i-tvn24,972760.html>, accessed: 23 September 2019.

**Chart 4. Opinions on the main areas in which corruption is widespread in 2001–2017, according to CBOS polls. Question: Every so often we talk about corruption in various areas of our public life. In which of these areas do you think corruption is most widespread?**



Source: prepared by the author based on: [https://cbos.pl/SPISKOM.POL/2017/K\\_063\\_17.PDF](https://cbos.pl/SPISKOM.POL/2017/K_063_17.PDF), accessed: 23 September 2019.

**Chart 5. Declarations about paying bribes in 1993–2017, according to CBOS polls. Question: In the past three or four years, were you ever in a situation where you were forced to give a bribe?**



Source: prepared by the author based on: [https://cbos.pl/SPISKOM.POL/2017/K\\_072\\_17.PDF](https://cbos.pl/SPISKOM.POL/2017/K_072_17.PDF), accessed: 23 September 2019.

In 1993 the question was: "In the past four years, were you ever in a situation where you were forced to give a bribe?"; in 1997 and 1999, it was: "In the past four years, were you ever in a situation where you had to give someone a present or money to get something done or speed it up?"; in 2000 and 2006, it was: "Very often when we talk about corruption we mean giving and taking bribes. In Poland there is a belief that to get many things done it is necessary to give a bribe. Have you had a situation

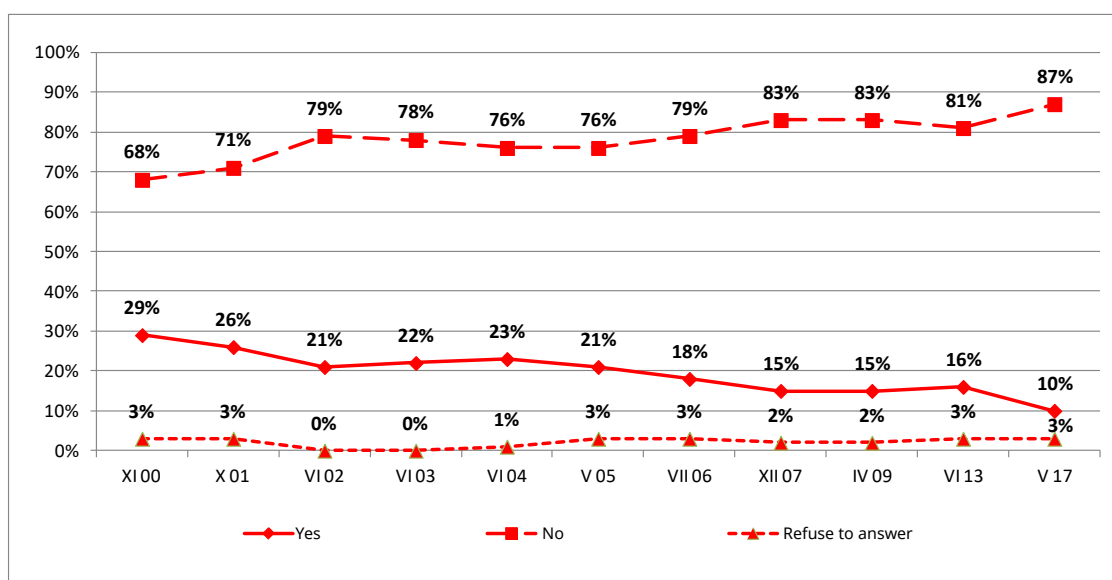


when you've given a bribe in the past three or four years?" Later the question was asked in the form: "In the past three or four years, were you ever in a situation where you were forced to give a bribe?"

In terms of Poles' own experiences, it is worth noting one indicator: a question which CBOS has been asking with certain modifications since 1993. In the 2017 poll, we see a marked drop in the number of people who say that they have been forced to give a bribe, i.e. to participate in the most common form of corruption, in the past three or four years.

This was the first time in 26 years that this indicator had been so low. Only 6% of respondents said that they had had to pay a bribe in the past three or four years. This is similar for another indicator: knowing people who have accepted a bribe. Today, just one in ten Poles knows someone who has; 18 years ago, it was 29%.

Chart 6. Knowing people who accept bribes (in 2000–2017). Question: Do you personally know someone who accepts bribes?



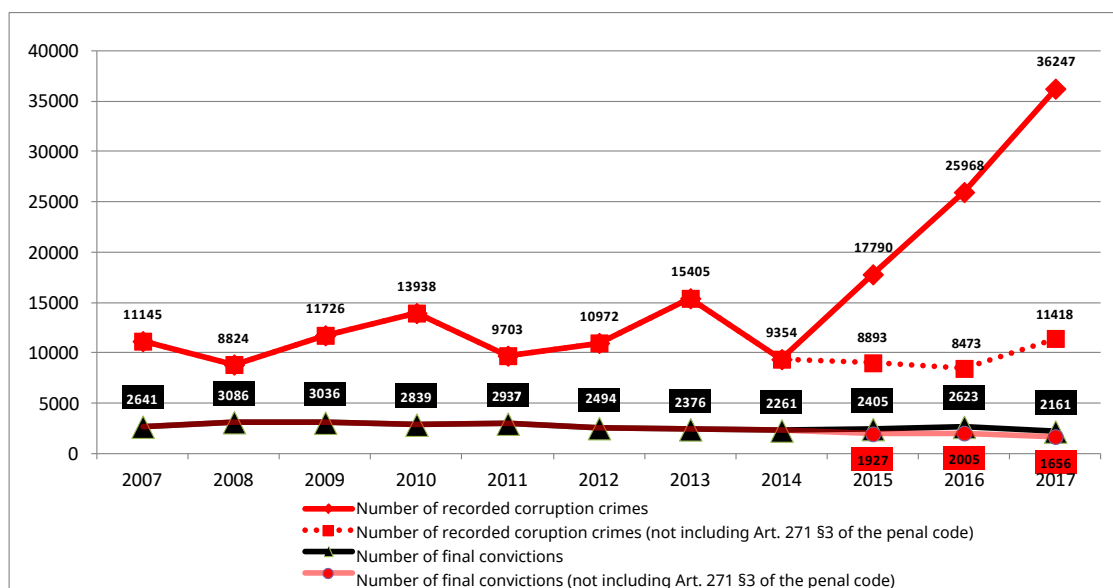
Source: prepared by the author based on: [https://cbos.pl/SPISKOM.POL/2017/K\\_072\\_17.PDF](https://cbos.pl/SPISKOM.POL/2017/K_072_17.PDF), accessed: 23 September 2019.

We can conclude by referring to criminal statistics. Unfortunately, the only available study for collecting this data is the so-called corruption map. This report has gaps and shortcomings, but it is the only source that compiles relatively current statistics on the main types of corruption crimes. The Central Anti-Corruption Bureau issues analyses of this issue systematically. The most recent map, published in early 2019, encompasses data until the end of 2017. Its main finding is that, over the first three years of the right-wing government's rule, the number of recorded corruption crimes increased significantly.<sup>20</sup>

<sup>20</sup> A definition of corruption and a list of crimes is contained in Art. 1. sec. 3a of the 2006 Act on the Central Anti-Corruption Bureau, Dz.U. [Journal of Laws] 2018, item 2104, 2399, 2019, item 53, 125, 1091.



**Chart 7. Number of records of the main types of corruption crimes and final convictions in 2007–2019**



Source: prepared by the author based on: <http://www.antykorupcja.gov.pl/ak/wydawnictwa-cba/publikacje-w-jezyku-pol/mapa-korupcji>, accessed: 23 September 2019 and G. Makowski, *Diagnosis of Governing Regime in Poland, Background paper for the AntiCorrp Project*, Hertie School of Governance, Berlin 2014.

The most common types of corruption crimes recorded are false attestations seeking financial or personal gain (Art. 271 §3 of the penal code), followed by passive and active bribery (Art. 228 and 229 of the penal code), and abuses of power or negligence by public officials (Art. 231 §2 of the penal code) seeking financial or personal gain. It is important to note that the crime referred to in Art. 271 §3 of the penal code only began to be included in the corruption map in 2016. Previously, although this act is within the legal definition of corruption, it was not described in the report. It is unclear why it was overlooked, but it seems that the decision to add it was dictated by a desire to increase the overall number of corruption crimes included in the map. In 2016, for example, this amendment alone increased the total number of recorded corruption crimes by 67%.<sup>21</sup> This theory is made more credible by the fact that, although the definition of corruption in the Act on the Central Anti-Corruption Bureau mentions many other actions that are not included in the map (probably because of the difficulty with acquiring data),<sup>22</sup> this crime was included because it would abruptly increase the scale of the phenomenon. This is a typical example of “creative” crime statistics. In the chart above, to preserve at least a rudimentary possibility of comparison over time, the data is presented both with Art. 271 §3 and without it.

However, the number of recorded crimes contrasts radically with the number of preparatory proceedings initiated, of which there were fewer than 2,000 in 2017, similarly to previous years (in addition, the number of convictions has remained unchanged for years, especially if we disregard Art. 271 §3). Of course, understanding the difference between the number of crimes recorded and the number of

21 [https://cba.gov.pl/ftp/pdf/Mapa\\_korupcji\\_Zwalczanie\\_przestepczosci\\_korupcyjnej\\_w\\_2016\\_r\\_\(pdf\\_1\\_427\\_KB\).pdf](https://cba.gov.pl/ftp/pdf/Mapa_korupcji_Zwalczanie_przestepczosci_korupcyjnej_w_2016_r_(pdf_1_427_KB).pdf), accessed: 23 September 2019.

22 M. Dudkiewicz, G. Makowski, “Możliwości oszacowania i prezentacji skali zagrożenia korupcją na podstawie statystyk przestępczości”, in: *Korupcja i antykorupcja – wybrane zagadnienia*, eds J. Kosiński, K. Krak, A. Koman, part II, Szczytno 2011, pp. 12–63.

final convictions would require in-depth sociological-legal research.<sup>23</sup> If we compare them, we can certainly suggest that it shows the convergence of three factors (leaving aside creative crime statistics). First, there is citizens' growing inclination to report corruption crimes "just in case", even in situations when they did not take place. Secondly, we see law enforcement authorities' inability to amass sufficient evidence to press charges against anyone. Finally, the public prosecutor is clearly not engaged enough in these cases. In 2017, just 1,873 proceedings ended in indictment. It is also worth adding that the map shows that there were only 2,161 final convictions in 2017 – the fewest since 2015.

Even taking into account the problem of so-called "dark figures", and notwithstanding the regrettable fact that 2000 to 3000 people are convicted for corruption every year (which is just a tiny fraction of the total number of convictions), we must conclude that corruption is not a significant problem – also in terms of crime statistics. From a systemic point of view, however, corruption understood not as a common crime, but as a form of particularism, is a growing threat, as we shall see.

## **The government's (anti-)policy toward corruption in 2015–2019<sup>24</sup>**

**Since the data available does not encourage more large-scale and coherent actions against corruption, it is hardly surprising that the United Right government *de facto* has no specific "anti-corruption policy" – if we assume that "policy" means setting far-reaching objectives and rationally selecting the means for realising them. There are no promises of anti-corruption measures, and hardly any mention of corruption, in the 2015 election programme of Law and Justice (the main party in the ruling camp).<sup>25</sup> The same is true of its programme in 2019.<sup>26</sup> **This could also be the reason why the ruling coalition's anti-corruption "policy" during the 2015–2019 parliamentary term was just a set of initiatives scattered between individual ministries (or even ministers), most of which did not have tangible results. Nonetheless, it is worth looking at some of the most important initiatives.****

### **Corruption Prevention Programme for 2018–2020**

The main initiative was the Government Corruption Prevention Programme for 2018–2020, adopted on 19 December 2017.<sup>27</sup> One might expect a government document containing the word "programme" in its title to present a broader vision for solving the problem. Yet the very fact that the timeline for implementing the programme is less than two years and that it was adopted just before the implementation period (in late 2017) shows that it cannot be a serious manifestation of state policy. Furthermore, as the authors of the document themselves admit, it is a pared-down version of a programme adopted during the previous PO–PSL government, the Governmental Corruption Prevention Programme for 2014–2019.<sup>28</sup> It therefore took the United Right almost two years to modify a document prepared by its predecessors, when it could have proposed its own new, better strategy.

As one might also expect, the modification, which reduced the priorities and actions of the previous government's programme (implementation of which received a critical evaluation from the Supreme

23 Some clarification on this issue is provided by Jan Winczorek's article "Ściganie przestępczości korupcyjnej w latach 1998–2010 w świetle danych urzędowych. Analiza socjologiczno-prawną", in: *Polityka antykorupcyjna. Ocena skuteczności polityki antykorupcyjnej polskich rządów prowadzonej w latach 2001–2011*, Warszawa 2011.

24 State of affairs at the end of February 2020.

25 <http://pis.org.pl/document/archive/download/128>, accessed: 23 September 2019.

26 <http://pis.org.pl/media/download/962a6041c364e939903caa9f7e9e54ea9f13c248.pdf>, accessed: 23 September 2019.

27 <http://www.antykorupcja.gov.pl/ak/aktualnosci/12900,Nowy-Rzadowy-Program-Przeciwdzialania-Korupcji-RPPK-na-lata-2018-2020.html>, accessed: 23 September 2019.

28 <http://isap.sejm.gov.pl/DetailsServlet?id=WMP20140000299>, accessed: 23 September 2019.

Audit Office (NIK)),<sup>29</sup> could not be a way of improving the document. The programme is a list of eight general declarations, which undertake to:

- Strengthen the openness and transparency of public life
- Develop rules to protect the civil law system as well as the major public procurements and to monitor the execution of laws on commercialisation and consolidation of property by companies of economic significance
- Strengthen the transparency and objectivity of the public procurement process.
- Strengthen solutions limiting the possibility of corruption in the public and private sector
- Implement anti-corruption education into training and education programmes for public officials and people holding public office
- Shape public awareness through anti-corruption education
- Implement solutions for the collaboration and coordination of law enforcement authorities in combating corruption
- Strengthen international cooperation on preventing and combating corruption.

For each of these priorities, tasks were identified that were mostly already at an advanced stage when the programme was adopted (e.g. work on the public procurement bill). Some of these tasks were more general and softer – mostly educational and information initiatives. An effective programme should set new objectives and propose actions that are yet to be taken, or at least that have not yet started. There are only four initiatives of this kind in the document. They are: reform of the financial disclosure system, reinforcing regulations on the liability of collective identities, increasing the transparency of political party and campaign funding, and creating laws to protect whistle-blowers. Another interesting direction is the introduction of an evaluation system for legal acts in terms of the risk of corruption. From the point of view of the generally opaque legislative process in Poland, which has significantly worsened during the current government,<sup>30</sup> this point can be treated purely as a curiosity.

None of the key anti-corruption solutions proposed in the government programme materialised before the end of the 2015–2019 parliamentary term. The reasons are prosaic: above all, it reproduced the main errors of the programme adopted by the PO-PSL coalition. A budget of PLN 3 million was allocated to the programme, which is entirely inadequate for the planned initiatives. Responsibility for implementing the programme was handed to the Central Anti-Corruption Bureau, which has neither the personnel nor even the competences in the coordination and implementation of public policy. The bureau is a typical law enforcement agency, an intelligence service, not an institution capable of preparing bills, educational materials, studies, and so on. In short, the way the programme was prepared, the funds assigned to it and the management structure rendered its implementation impossible. Moreover, other significant anti-corruption initiatives by the United Right government appeared separately from the programme and were announced by different ministers – although the document's title seemed to suggest that it would encompass anti-corruption policy at the government level.

<sup>29</sup> <https://www.nik.gov.pl/plik/id,11324,vp,13673.pdf>, accessed: 23 September 2019.

<sup>30</sup> *Skrywane projekty ustaw. XII Komunikat Obywatelskiego Forum Legislacji o jakości procesu legislacyjnego na podstawie obserwacji prowadzonej w okresie od 16 maja do 15 listopada 2018 roku oraz podsumowujący aktywność legislacyjną rządu i parlamentu w trzecim roku ich działalności*, [http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/XII\\_Komunikat\\_OFL.pdf](http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/XII_Komunikat_OFL.pdf), accessed: 23 September 2019.

## Transparency in public life bill

Perhaps the most radical anti-corruption initiative was the transparency in public life bill<sup>31</sup> announced by Mariusz Kamiński, a minister without portfolio and coordinator of the secret services, in January 2017 and unveiled that October. The bill was therefore being worked on long before the government's anti-corruption programme was adopted, which shows again that the programme's value as the foundation of state policy was minimal. It is worth paying some attention to the transparency in public life bill, as it was an ambitious and controversial idea for regulating four areas in one legal act: the financial disclosure system, the conditions of access to public information, lobbying, the status of whistle-blowers, and also, to a certain extent, the responsibility of collective entities (especially private enterprises and public institutions) in terms of producing internal ethical management rules.

The act was supposed to repeal three laws regulating lobbying, access to public information and restrictions on economic activity by individuals in public posts. In practice, however, Kamiński's bill largely copied the texts of these acts, modifying certain aspects. This process alone – combining regulations concerning different issues in one act – was strongly criticised as an example of calamitous legislative practice. Much more damaging, however, were the solutions that the act was supposed to introduce.<sup>32</sup> The scale of the controversy is demonstrated by the fact that, at the public consultation stage, some 265 positions with various comments were reported. At this point, I will only mention a few of the most serious solutions that the bill foresaw.

Using the attractive-sounding catchphrase “transparency”, the sponsors of the bill proposed to expand the list of people obliged to submit and publish financial statements. It was supposed to include rank-and-file soldiers and municipal police officers and, in the first versions of the bill, their spouses, too. It was estimated that this would oblige as many as two million people to publish financial declarations. This idea was controversial not only in terms of the constitutional principle of proportionality. After all, it was hard to argue that the battle with corruption demanded such heavy restrictions on the right to privacy (critics soon began to dub it the “transparency in private life” bill, as opposed to public life). It also made no sense from a technical point of view. Who would be able to monitor the regularity of such a high number of declarations, since the current legal conditions require almost 600,000 people to submit declarations and the CBA, responsible for verifying them, is only capable of checking 69 cases per year?<sup>33</sup>

Another controversial proposal was the one to make participation in the consultation of any draft administrative decisions, including draft legal acts, dependent on the interested parties declaring their sources of income. These regulations were supposed to apply to civil society organisations and natural persons (interestingly, private companies were supposed to be exempt). Civil society organisations, apart from declaring sources of income from legal entities (e.g. grants), were also supposed to provide the data of individual donors. Natural persons, meanwhile, were supposed to publish tax declarations from the two years preceding their desire to participate in a decision-making process. Once again, a bill, under the pretext of battling corruption and seeking transparency in public life, envisaged far-reaching interference in the right to privacy. These solutions also *de facto* restricted the constitutional right to petition by giving citizens a dilemma: to use their right to petition and take part

31 <https://legislacja.rcl.gov.pl/projekt/12304351/katalog/12465407#12465407>, accessed: 23 September 2019.

32 Opinion of the Stefan Batory Foundation on the transparency in public life bill of 23 October 2017, <https://legislacja.rcl.gov.pl/docs//2/12304351/12465407/12465410/dokument315048.pdf>, accessed: 23 September 2019.

33 [http://cba.gov.pl/ftp/dokumenty\\_pdf/Informacja%20o%20Centralnego%20Biura%20Antykorupcyjnego%20w%202018%20roku.pdf](http://cba.gov.pl/ftp/dokumenty_pdf/Informacja%20o%20Centralnego%20Biura%20Antykorupcyjnego%20w%202018%20roku.pdf), accessed: 23 September 2019.

in consultations, at the cost of giving up their right to privacy, or to give up the right to participate in public decisions.

Finally, the third controversial proposal in the transparency in public life bill was its articles on whistle-blowers. Apart from using the name, the proposed format of legal protection of people who expose improprieties in their workplace or the risk that they might occur had nothing in common with international standards. In short, the definition the bill assigned to a “whistle-blower” was something like a witness, and the only authority entitled to freely accord whistle-blower status without any cause was the public prosecutor.<sup>34</sup> The bill envisaged providing whistle-blowers with certain forms of protection, such as making it impossible to dismiss them from work or access to free legal aid for the duration of the proceedings. Yet the public prosecutor could both award whistle-blower status and take it away at any moment, denying such a person any protection. Not only Polish social organisations, businesses and trade unions protested against this regulation of whistle-blower status, but also international organisations.<sup>35</sup> In practice, it reduced whistle-blowers – individuals who, on the basis of freedom of speech, ought to be guaranteed the possibility to report abuses – to the role of prosecutorial confidants.

The transparency in public life bill prompted indignation in various circles, from social organisations to local government officials, via trade unions and employers’ organisations. It was almost a textbook example of exploiting the ostensible battle against corruption to limit human and civil rights. In practice, if this act had entered into force, it would also have been corruptogenic, as it would have radically reduced the transparency of decision making by limiting citizens’ access to it. The bill also created various solutions that could be used at the discretion of law enforcement authorities to provoke citizens, such as the aforementioned regulations on whistle-blowers. Discretion and lack of checks and balances on the acts of a politicised public prosecutor’s office and law enforcement agencies can lead directly to corruption in the form of abuse of power, as demonstrated during the first Law and Justice government in 2005–2007.<sup>36</sup> In the end, Kamiński did not find allies for his bill – not even in the government. Despite promises that the act would come into force at express speed, in January 2018 it had yet to be accepted by the cabinet and it was never sent to the Sejm.

### **Bill on liability of collective entities for prohibited acts under penalty of law and other anti-corruption initiatives**

The government’s third significant anti-corruption initiative met a similar fate – the bill on liability of collective entities for prohibited acts under penalty of law<sup>37</sup> prepared by the Ministry of Justice. As with the transparency in public life bill, work on this bill started long before the government’s anti-corruption programme was adopted. Again, this shows that there was no agreement within the government on a coherent state policy in this respect. There are also many reasons to suspect that Kamiński was competing with Zbigniew Ziobro, the justice minister, for the status of the leader of anti-corruption activities. For example, both the transparency in public life bill and the liability of collective entities

34 G. Makowski, M. Waszak, Przepisy cyrylicą przez PiS pisane, <https://www.rp.pl/Opinie/304069992-Przepisy-cyrylica-przez-Pis-pisane---Grzegorz-Makowski-i-Marcin-Waszak-o-projekcie-ustawy-o-jawnosci-zycia-publicznego.html>, accessed: 23 September 2019.

35 <https://legislacja.rcl.gov.pl/docs//2/12304351/12465407/12465410/dokument319949.pdf>, accessed: 23 September 2019; [https://www.transparency.org/news/pressrelease/proposed\\_transparency\\_legislation\\_in\\_poland\\_must\\_be\\_rethought\\_and\\_revised](https://www.transparency.org/news/pressrelease/proposed_transparency_legislation_in_poland_must_be_rethought_and_revised), accessed: 23 September 2019.

36 A. Krajewska, G. Makowski, “Corruption, anti-corruption and human rights: the case of Poland’s integrity system”, *Crime, Law and Social Change* 2017, no. 68 (3), pp. 325–339.

37 <http://orka.sejm.gov.pl/Druki8ka.nsf/dok?OpenAgent&8-020-1211-2019>, accessed: 23 September 2019.

bill contained rival regulations concerning the obligation to implement ethical management and protection for whistle-blowers. However, the liability of collective entities bill was much better prepared in legislative terms and, furthermore, addressed a genuine need to change the regulations in place since 2002, which are in practice dead.<sup>38</sup> For various reasons, the 2002 law, which allows legal entities to be punished for crimes, particularly corruption crimes, is useless.<sup>39</sup> Owing to the enormous difficulties with conducting proceedings in the way foreseen by the act, the public prosecutor's office very seldom uses this measure. At the same time, the obligation to produce laws on this matter results from international conventions signed by Poland (in particular, the UN Convention against Corruption) and the demands of the EU. In response to this problem, the Ministry of Justice prepared the bill, but it proved no less controversial than the transparency in public life bill. The most concerns were prompted by the vague premises allowing the public prosecutor's office to commence proceedings against a legal entity (a company, social organisation, political party or even church legal entity), as well as the far-reaching preventative measures that the public prosecutor could invoke within the proceedings. In the first versions, the bill envisaged authorising the prosecutor, even without court control, to prohibit a collective entity from concluding any contracts or to suspend its board, thereby taking control of the company or organisation.<sup>40</sup> The bill therefore contravened the right to private property and freedom of economic activity. In the end, after several years of work, the bill reached the Sejm in early 2019, but was not set in motion. It did not even receive a Sejm paper number, meaning that for political reasons it was consigned to the so-called "freezer". This is a typical situation when a legal solution is not fully accepted within the government and the parliamentary majority, but cannot be fully withdrawn for political and PR reasons.

In addition to these "major" initiatives, which were not implemented, we should at least mention smaller and indirect activities that could be part of anti-corruption policy, if only they had been coordinated at the government level in any way. For example, in 2017 an amendment to the penal code was passed tightening penalties for certain corruption crimes, among other things. The law enforcement authorities also received new instruments for uncovering and combating corruption, including corruption crime – a broader range of investigation powers, the possibility of using "fruit of the poisonous tree" (evidence obtained illegally), or making it easier to confiscate property obtained through crime.

In general, though, it is difficult to argue that the 2015–2019 government pursued any anti-corruption policy. Its actions in this area were incoherent, unplanned and encumbered by departmentalism – several ministers attempted, without really working together or with the prime minister, to introduce their own ideas, most of which did not come to fruition. It is also important to note that the main anti-corruption initiatives – the transparency and liability of collective entities bills – proved to be too radical. Their adoption would have meant far-reaching interference in fundamental civil rights, such as the right to privacy, petition, ownership or freedom of economic activity. These bills would therefore have been examples of an increasingly present trend in global anti-corruption policy, in which human rights and the rule of law are threatened under the pretext of combating abuses.<sup>41</sup> Ultimately, therefore, the bills were not passed – a blessing in disguise.

38 Dz.U. [Journal of Laws] 2019, items 628, 1214.

39 C. Nowak, "Implementacja przepisów konwencji. Ocena implementacji wybranych artykułów konwencji dotyczących penalizacji zachowań korupcyjnych", in: G. Makowski, C. Nowak, C. Wojciechowska-Nowak, *Realizacja wybranych postanowień Konwencji Narodów Zjednoczonych przeciwko korupcji w Polsce*, Warszawa 2015, pp. 17–35.

40 G. Makowski, *Odpowiedzialność karna podmiotów zbiorowych według PIS*, <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Odpowiedzialnos%20karna%20podmiotow%20zbiorowych.pdf>, accessed: 23 September 2019.

41 A. Krajewska, G. Makowski, "Corruption, anti-corruption and human rights: the case of Poland's integrity system", *Crime, Law and Social Change* 2017, no. 68 (3), pp. 325–339.

## **Perception and reality. Why is corruption in the United Right government so harmful (or harmless)?**

In this section, I will address several fundamental questions that become very visible if we compare the aforementioned data on the threat of corruption (perceptions, experiences and crime statistics) with the government's (anti-)corruption policy (or lack thereof) in 2015–2019.

**As opinion polls show, the overall public sense of the threat of corruption is steadily decreasing. Poles are increasingly less likely to see it as a significant problem and less likely to say that they have been victims of corruption.** At the same time, the 2015–2019 coalition government behaved similarly to all its predecessors by taking over public institutions and generating a succession of affairs. The difference is that it represents an incomparable more aggressive and radical type compared to any government before it.

Right after the 2015 elections, there was instant invasion of all the public posts that could be filled by party nominees – at state-owned enterprises, in the central and local administration (and especially the civil service), the administration of courts, the public prosecutor's office, and so on. Although previous governments had also inserted "their own people", in this case the scale, speed and decrease in the quality of the "new elites" were unprecedented.<sup>42</sup> In many places, it was not just party nominees, but even the families of politicians or officials with ties to the ruling parties that filled posts. Something of a novelty was the appropriation of entire institutions in a systemic manner, by a change in the law. This was the case for the civil service, presiding judges and the court administration as well as the public television broadcaster, when the government simply adopted resolutions allowing it to carry out mass layoffs at these institutions and staff them with hundreds or even thousands of their own people in one fell swoop.

Another example of this "systemic clientelism", particularism and appropriation of public resources is the creation of various types of funds, agencies and foundations dependent on the state, but outside the public administration's structures. In 2015–2019, for example, the vast Polish Waters National Water Holding, Future Industry Platform Foundation and National Freedom Institute – Centre for Civil Society Development were established. These entities have hundreds of millions of złoty of public money to spend, but are not subject to the same strict state or public control faced by public administrative bodies. Special funds, agencies and various entities deliberately set up outside the strict state structures are a typical source of abuses resulting from excessive party influence combined with less control. This problem is described in many books on corruption, which recommend reducing the number of this type of entity to a minimum.<sup>43</sup> One particularly flagrant example of an entity that causes problems is the Polish National Foundation (PNF). This is an unprecedented formation: it was not established on the basis of any special act (unlike the Future Industry Platform Foundation, for instance), in which at least tighter control and greater transparency could be guaranteed. It was established in line with the general regulations of the law on foundations, on the initiative of Prime Minister Beata Szydło and on the basis of donations from the largest state-controlled enterprises (such as Orlen and PGE). The PNF's aims and operations are extremely untransparent. The foundation very soon prompted justified criticism and accusations of partisan influence; for example, for funding

<sup>42</sup> See G. Kopińska, *Stanowiska publiczne jako łup polityczny. Polityka personalna w okresie od 16 listopada 2015 do 31 października 2017 roku*, Warszawa 2018; J. Paczocha, *Partia w państwie. Bezprecedensowa wymiana kadr w administracji rządowej i jej legislacyjne podstawy*, Warszawa 2018.

<sup>43</sup> J. Wedel, *Shadow Elite: How the World's New Power Brokers Undermine Democracy, Government, and the Free Market*, Basic Books, 2009.



a political campaign supporting the controversial changes to the judiciary and affecting the judicial community.<sup>44</sup> Later, journalists from the Onet news website discovered that the PNF had pumped tens of millions of zloty into a dubious campaign to improve Poland's image in the United States.<sup>45</sup> Little is known about the effects of the campaign, but publicly available reports submitted by one of the Washington-based lobbying companies that it hired showed that most of the money had gone to members of a Polish diaspora family friendly with the ruling camp. In practice, the PNF's entirely one-sided activity, focused solely on pursuing the ruling coalition's political goals while putting activists with close ties to the government in key posts, is nothing other than sly circumvention of the rules on funding political parties. It de facto uses money from state companies to fund political activity. This is a subtle example of "legal corruption" because the PNF's formula is legal (although some of its actions have been deemed unlawful by courts, with no legal consequences).<sup>46</sup> The PNF's activity and the controversies associated with it are an example of the typical problems with entities set up on political orders on the fringes of the state's structures, where it is impossible to implement high enough standards of transparency and the accountability of the people responsible for its operation.

The coalition government's firm term also featured a series of scandals unequivocally tinged with corruption, involving leading politicians and officials. One worth mentioning was the "Financial Supervision Commission affair". The government-appointed head of the commission, Marek Chrzanowski,<sup>47</sup> was recorded by the owner of a Polish bank suggesting that he could help avoid the bank being taken over by the state treasury in return for a favourable contract for a lawyer friend. Although Chrzanowski was arrested on misconduct charges in late 2018, there has been no significant progress in the case since then.

At this point, we cannot avoid mentioning the "Srebrna affair" of early 2019. On this occasion, Jarosław Kaczyński, the PiS party chairman and de facto head of the government, was recorded at the party headquarters negotiating a solution to the problem of the payment of a fee to Austrian businessman Gerald Birgfellner. Commissioned by the Srebrna company, set up some time earlier by Kaczyński and with close ties to PiS, Birgfellner had prepared designs for the construction of two skyscrapers in the centre of Warsaw. The buildings were supposed to provide an endowment fund for Kaczyński's party and associated groups. The convergence of murky personal (including familial), political and business ties that was demonstrated in this affair is a textbook example of a situation planting the roots of systemic political corruption. The Srebrna affair also contains a direct corruption component. A bribe of PLN 50,000 was allegedly paid to a priest in the foundation council of the Lech Kaczyński Institute (named after Jarosław Kaczyński's deceased twin brother, the foundation is the formal owner of the Srebrna company), in return for signing the power of attorney that Srebrna needed to secure a PLN 300 million loan for investment in the skyscrapers. The loan was to be paid by Pekao Bank SA, of which the state and, in practice, nominees of the ruling party, had just taken control. For nine months after the public prosecutor took over this affair, the only person interviewed was one Austrian citizen, to whom the prosecutor devoted more than 40 hours. Neither Kaczyński nor anyone from Srebrna was called in to provide an explanation. Thereafter, the prosecutor finally decided not to open an enquiry, concluding that there had been no evidence of a crime. This decision is spiced up a little by the fact

44 <https://www.wirtualnemedi.pl/artykul/polska-fundacja-narodowa-kampania-sprawiedliwe-sady-niezgodna-ze-statutem-orzekl-sad>, accessed: 23 September 2019.

45 <https://wiadomosci.onet.pl/tylko-w-onecie/jak-polska-fundacja-narodowa-wyrzuca-miliony-dolarow-w-amerykanskie-blo-to/9mnqpcy>, accessed: 23 September 2019.

46 <https://www.rp.pl/Fundacje-i-stowarzyszenia/181129432-Polska-Fundacja-Narodowa-naruszyla-swoj-statut-finansujac-Sprawiedliwe-Sady---postanowienie-sadu.html>, accessed: 23 September 2019.

47 <https://www.gazetaprawna.pl/artykuly/1354154,afeta-w-knf-czarnecki-obawial-sie-o-niezaleznosc-audytora.html>, accessed: 23 September 2019.



that it was made before the elections on 13 October 2019 and not announced until after them. It is obvious that this was done to protect Law and Justice from a debate on the controversial case during the election campaign, which could have lowered support for the party. Announcing it would have prompted (justified) suspicions that the decision not to open an enquiry was dictated by Kaczyński's interest.

Finally, one more affair that should not be overlooked was hatching as work on this analysis was coming to an end. It involved the president of the Supreme Audit Office, Marian Banaś. Appointed to the post with the ruling camp's votes, Banaś was selected for the post despite ambiguities in the financial statements he submitted as deputy minister and later minister of finance. He also understated (as he admitted in an interview) his income from renting out property. Furthermore, as an investigation by journalists working for the TVN24 television channel revealed, a townhouse of 400 square metres owned by Banaś was rented "by the hour" by representatives of the Krakow underworld.<sup>48</sup> There had been doubts about the holdings of the minister and later head of the Supreme Audit Office since 2016. Despite this, the CBA, which was responsible for verifying statements, did not complete checks on him before he was appointed to the post. Certainly, this seemed like a case of the state authorities "hiding" a person supported by the ruling party and "sweeping the matter under the carpet".<sup>49</sup> In addition, it turned out that when Banaś was the deputy finance minister responsible for building the National Revenue Administration and combating VAT abuses, his closest colleagues were helping to defraud the same tax. In 2019, they were detained and then arrested on charges such as VAT fraud. As with the Srebrna affair, information about this came to public attention after the elections in October 2019.<sup>50</sup>

Against this backdrop, the problems with the financial statements of other leading members of the government camp appear innocent. Prime Minister Mateusz Morawiecki was among those who had a problem with his statement when he was finance minister, delaying its publication.<sup>51</sup> It later turned out that Morawiecki's declarations contained inconsistencies and that he kept certain assets – signed over to his wife, with whom he has separate property status – out of the public eye.<sup>52</sup> Another case was that of the late environment minister Jan Szyszko, whose declaration failed to disclose a barn converted into a luxury loft apartment. The public would not have found out about it if not for the fact that the minister's wife, also a public official, declared the barn in her statement, as well as giving its estimated value.<sup>53</sup> Yet, for a long time, the minister refused to declare the property's value, claiming that it had great sentimental value and was therefore priceless for him.<sup>54</sup> We could also mention the case of Minister Michał Dworczyk, who gave as many as 12 financial declarations with incorrect or incomplete information. Defending himself in the media, he claimed that this had been a simple mistake in each case.<sup>55</sup> These people all went unpunished. In none of the cases did the public prosecutor's

48 <https://www.tvn24.pl/superwizjer-w-tvn24,149,m/pancerny-marian-i-pokoje-na-godziny-reportaz-superwizjera-w-tvn24,971093.html>, accessed: 23 September 2019.

49 <https://wiadomosci.wp.pl/wkurzeni-pracownicy-fiskusa-zrobili-kontrolę-majatku-wiceministra-finansow-zadaja-wyjasnienie-6317578478134913a>, accessed: 23 September 2019.

50 <https://www.money.pl/podatki/afery-z-otoczenia-banasia-jeden-z-jego-najblizszych-wspolpracownikow-kierowal-mafia-vat-owska-giertych-uderza-6438823462282881a.html>, accessed: 23 September 2019.

51 <https://natemat.pl/167021,wicepremier-mateusz-morawiecki-jako-jedyny-czlonek-rzadu-nie-zlozyl-sprawozdania-majatkowego>, accessed: 23 September 2019.

52 <http://wroclaw.wyborcza.pl/wroclaw/7,35771,24804530,morawiecki-uwlaszczyl-sie-na-gruntach-koscielnych-jest-odpowiedz.html>, accessed: 23 September 2019.

53 <https://www.newsweek.pl/polska/polityka/stodola-ministra-jana-szyszko-zdjecia-wnetrza-stodoly/r2y7k2j>, accessed: 23 September 2019.

54 <https://wiadomosci.wp.pl/szyszko-pokazal-co-znajduje-sie-w-slynej-stodole-i-przeprowadzil-dowod-logiczny-ws-drewna-ktore-wcale-sie-nam-nie-konczy-6183812642347137a>, accessed: 23 September 2019.

55 <https://www.rp.pl/Rzad-PiS/190529630-Oswiadczenia-majatkowe-Dworczyk-zatail-udzialy-w-spolce.html>, accessed: 23 September 2019.

office even initiate a preliminary investigation. There are many similar cases, such as the pay bonuses given to members of Prime Minister Beata Szydło's cabinet, the gigantic salaries (far outweighing their competences and experience) of the female assistants of the PiS-nominated president of the National Bank of Poland and the repeated use of state aeroplanes by the marshal of the Sejm, Marek Kuchciński, and his family and party colleagues for private purposes.<sup>56</sup> Yet these examples seem to be a minor problem compared to the three affairs mentioned above.

The ruling coalition's time in government has therefore been characterised by many shocking affairs that demand a strong response from the law enforcement authorities. But none is forthcoming, as these matters are systematically drawn out and "buried" by law enforcement and the public prosecutor's office. Additionally, the ruling camp responds to every scandal in its own circles by immediately launching proceedings against people associated with the opposition. This shows how extremely instrumentalised the government's anti-corruption "policy" is, as it seeks at all costs to prove that its opponents are even worse.

At the same time, public opinion seems unmoved by both these affairs and corruption in general, as outlined above. Interestingly, even the government's opponents do not base their negative opinions on reports of corruption. In February 2019, CBOS carried out a poll on the overall evaluation of the United Right government after more than three years in power. A negative view was expressed by 40% of respondents. Answering an open question about the reasons for this opinion, only 4% of people stated "nepotism, putting their own people in positions, appropriating the state", and even fewer, just 1%, selected "scandals: Credit Unions, Financial Supervision Commission, etc., corruption".<sup>57</sup> People have many diverse reasons for giving a negative assessment of the government, but corruption is not a significant one. To a certain extent, this explains why support for Law and Justice and its satellites remained at a high and stable level despite the series of affairs and abuses of power. People are simply impervious to cases of this kind and are very tolerant of corrupt conduct by representatives of the government – much more so than they were towards other governments and parliamentary majorities in the past.

Perhaps this tolerance of corruption results partly from the fact that the government has enjoyed success with its social programmes, tempering citizens' criticism of the state. It is also no doubt the case (although there are no polls to confirm this, just qualitative research)<sup>58</sup> that the average citizen may indeed be aware of the affairs and scandals, but is convinced that every government steals and that this one at least gives something back to others – it divides its spoils. Criticism and concerns about government corruption are therefore smaller. But the causes of this phenomenon also go deeper and further back than the 2015–2019 term of government. Another factor, certainly, is Polish society's unique mentality, which, according to research by Przemysław Sadura and Sławomir Sierakowski, condemns individual and personal corruption, but limits criticism when the corruption concerns entire institutions.<sup>59</sup>

I would like to propose the hypothesis that this "desensitisation" to corruption results above all from several objective factors. One is the economic situation of society, which has been improving for many years. The next is the generally better quality and availability of various services (for which one might

56 <https://oko.press/kuchcinski-tlumaczy-swe-loty-sluzba-publiczna-ale-84-proc-z-nich-bylo-z-do-domu-liczby-go-demaskuja/>, accessed: 23 September 2019.

57 [https://cbos.pl/SPISKOM.POL/2019/K\\_018\\_19.PDF](https://cbos.pl/SPISKOM.POL/2019/K_018_19.PDF), accessed: 23 September 2019.

58 Internal report of the Stefan Batory Foundation on research on Law and Justice party voters (manuscript).

59 P. Sadura, S. Sierakowski, *Polityczny cynizm Polaków. Raport z badań socjologicznych*, Warszawa 2019, pp. 14–16.

have to pay, but rarely offer a backhander). A third factor is that, for the ordinary citizen (despite many deficiencies), the state seems to be generally functioning better and thus corruption has become less present in everyday experience. There are certainly still cases of common corruption – at hospitals, administration offices, schools, universities and in contact with the police – but this is no longer the 1990s or 2000s, when the scale of this kind of “everyday” corruption was much larger. Echoes can also be seen in the polls cited above; a strong example is the aforementioned improved opinion on corruption in the health service or the significant drop in the percentage of respondents who know a person who has given a bribe.

When corruption was more palpable to the average person, and therefore a more acute problem, the tendency to condemn corruption in the upper echelons of power also had to be greater. People naturally filter their appraisals of the government through their own experiences. This is why a few years – or even decades – ago, Poles were more likely to transfer their support for politicians and groupings involved in corruption affairs to their rivals than they are today. The personal experience factor no longer plays the same role.

At present, corruption seems more distant from Poles’ everyday experiences. People tend to view the affairs in the top echelons of power – or, more generally, in the public sphere – presented in the media (such as putting party nominees in state companies and offices) almost as if they were watching a crime series. Even if it is based on a true story, people seem to think: it’s still just a programme, it doesn’t affect me personally, I’ll turn off the TV and don’t need to watch it. **This does not change the fact that Poland has a problem with corruption and, more precisely, with grand corruption, with a political component at its core.** This kind of corruption is systemic (intrinsic to institutions, as I will show when discussing the main areas of threats) and involves political, administrative and economic elites. Perhaps perversely, we could even say that just as Poland has come to be seen as a highly developed country,<sup>60</sup> our corruption has also transitioned from “street” corruption to the “grand”, highly developed variety.<sup>61</sup> It is a paradox that the “grand” contemporary corruption gets, the less noticeable it becomes to the average person.

Today, therefore, we have a problem with political, systemic, “grand corruption”, and this demands systemic responses. It frequently eludes definitions in criminal legislation and cannot be regarded as a crime. After all, the statutory “appropriation” of the civil service or judicial administration by passing laws allowing mass purges and even the filling of company boards with party nominees, except for several extreme cases, have taken place within the law.<sup>62</sup> But from the perspective of the sociological understanding employed in this article, which views corruption as a form of particularism – limiting access to public resources – much of the government’s conduct in 2015–2019 should indeed be treated as corruption.

Incidentally, there are many more manifestations of this partisan particularism, especially if we examine where various streams of public money have been diverted. An example might be the ministerial subsidies or state-owned companies’ advertising budgets, a very large proportion of which went to government-friendly media after the right-wing coalition came to power; at the same time, little

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60 <https://www.money.pl/gospodarka/wiadomosci/arttykul/dolaczylismy-do-elitarnego-grona-polska,23,0,2416663.html>, accessed: 23 September 2019.

61 Transparency International is seeking for international organisations to adopt a legal definition of corruption to emphasise the participation of high-ranking public officials and costs in the form of loss of significant public funds and human rights violations.

62 <https://natemat.pl/262257,byly-rzecznik-mon-bartlomiej-m-zatrzymany-przez-cba>, accessed: 23 September 2019.

regard is paid to the fact that these actions have no economic justification, as these media outlets have limited viewership and readership.<sup>63</sup>

There is no investigation of these signs of corruption in the sense of particularism – not only because the partisan public prosecutor’s office, secret services and law enforcement authorities remain passive. Sometimes there is not even any legal foundation to investigate, as steps have been taken to ensure that there is none. The various “technical” measures designed to counteract corruption in this form, including tighter criminal legislation or even reform of the financial disclosure system, are not helpful either. Of course, it is worth preparing these kinds of solutions, having them ready and using them. As the cases of Supreme Audit Office chief Marian Banaś and Minister Michał Dworczyk have shown, even using a deficient financial disclosure system, it is possible to conduct a decent journalistic investigation and expose abuses. Yet these measures will not be a remedy for corruption, which is increasingly becoming part of the system of exercising power. This is because they will not be used by law enforcement agencies, the public prosecutor’s office and control institutions staffed by party nominees, partisan courts and even politically influenced media and “desensitised” citizens.

**Systemic corruption demands systemic solutions to counteract the discretionary nature of public decisions and guarantee the transparency and accountability of government** (to refer once again to Robert Klitgaard’s model). I will focus on these systemic concentrations of corruption and systemic solutions in the next section.

To conclude this section, I would like to emphasise that systemic corruption – although it is particularism – will not automatically lead to increased social inequalities when it remains at a level scarcely within the average citizen’s experience. Until the consequences of this corruption have an impact on the state’s economic situation, we will not observe this effect (unlike, for example, in developing countries in a difficult economic situation, where grand corruption is almost immediately felt by the average citizen)<sup>64</sup>. This is not to say that if the deterioration of public institutions progresses and starts to have an impact on the country’s economic stability, this effect will ensue. However, we can already observe symptoms of inequalities resulting from systemic corruption; for example, in access to the justice system or in relations between local and central government. During the local government election campaign in 2018, the United Right government openly declared that local governments that were compliant partners for the state government could expect better cooperation and, as a result, concrete help from the state budget, for instance.<sup>65</sup> This could have negative consequences for the quality of life in particular local communities and is a short step away from political clientelism on a mass scale.

A good illustration of how this type of mechanism might work is provided by Prof. Paweł Swianiewicz, whose report on the Municipal Roads Fund was published as this analysis was being completed.<sup>66</sup> As its name suggests, this government grants fund, established in 2018, aims to support projects building local road infrastructure. It goes without saying that roads are a crucial element of local development. Access to these funds should be based on the most objective, merit-based criteria pos-

63 <https://www.wirtualnemedi.pl/artykul/panstwowe-spolki-najwiecej-na-reklamy-wydaja-w-sieci-prawdy-wprost-i-do-rzeczy--wydatki-w-gazecie-polskiej-zwiekszyly-o-ponad-120-proc>, accessed: 23 September 2019.

64 *Why corruption matters: understanding causes, effects and how to address them. Evidence paper on corruption*, DIFID, London 2015.

65 <https://www.portalsamorzadowy.pl/polityka-i-spoleczenstwo/michal-dworczyk-jezeli-samorzad-nie-jest-nastawiony-na-konfrontacje-to-wspolpraca-z-rzadem-jest-latwiejsza,112947.html>, accessed: 23 September 2019

66 P. Swianiewicz, “Wpływ polityki partyjnej na rozdział dotacji celowych na przykładzie Funduszu Dróg Samorządowych”, *Pismo samorządu terytorialnego Wspólnota* 2020, no. 1/2020.

sible, guaranteeing equality and taking into account the true demand for this type of infrastructure. Swianiewicz conducted a rather precise analysis of two waves of subsidies from the fund in 2019, encompassing ten provinces. This makes it clear that the distribution of these funds distinctly favours municipalities where the local leaders and council majority have ties to the Law and Justice party. Furthermore, Swianiewicz shows that, during the United Right government's term, the share of specific subsidies in municipality budgets increased sharply. Whereas in 2013 it was no higher than 16%, by the end of 2018 it accounted for over one-third. Of course, the government plays a major role in the distribution of specific subsidies, while local authorities have little influence. They are susceptible to partisan influence and therefore also to particularisation and all the ensuing consequences. It is easy to conclude that increasing the proportion of money coming from central funds, while also making them dependent on party concerns, contributes directly to the development of clientelistic networks and ties conducive to corrupt practices between politicians and officials at the local and central level.

## The main concentrations of grand corruption and how they can be removed

### Interference in the separation of the legislature and executive

#### The problem

In the context of the threat of corruption that we are experiencing during the United Right government, the problem of interference in the separation of powers is obvious. A convergence of circumstances and factors has led to the greatest concentration of executive and legislative power in the hands of one political camp since 1989. In the 2015 elections, for the first time since Poland's transition from communism, one grouping managed to win a majority that enabled it to form a government without having to form a coalition with another party. Granted, in addition to Law and Justice, the United Right camp also consists of Zbigniew Ziobro's Solidary Poland and Jarosław Gowin's Agreement, but this is not a coalition of entities of equal status, as was the case in the previous parliamentary majorities formed by Civic Platform and the Polish People's Party (PSL) and, earlier, the Democratic Left Alliance and PSL or Solidarity Electoral Action and the Freedom Union (more on this in the next section). The main characteristic of this quasi-coalition is the hegemonic position of the strongest party (PiS) compared to the minor partners, which results in a limited pluralism of views and homogeneity in the ruling camp. This homogeneity of the parliamentary majority need not have been dysfunctional, but it turned out to be in practice in terms of the separation of powers between the legislative and executive centres, to the detriment of the former. On top of this, the presidential election in 2015 was won by the United Right's candidate. **The concentration of executive power at the government and presidential level, as well as in parliament, in the hands of one political alliance is therefore huge. This is an objective and systemic factor affecting the risk of corruption, as mutual checks and balances between the branches of power are diminished in an obvious way. The consequences of this are diverse.**

Above all, the Sejm, dominated by a single political opinion, changed the working regulations and act on holding office as a deputy and senator. The objective was not only to give the opposition less room

for manoeuvre, but also to reduce opportunities for control.<sup>67</sup> These changes were targeted at the opposition. Draconian penalties for deputies were introduced, while increasing the list of reasons for which they could be applied (for example, a new premise – insulting the Sejm – that could be freely interpreted and for which a deputy could be docked as much as half his or her salary for three months). Deputies found their ability to ask government representatives questions about current issues and submit formal motions during parliamentary debates limited. Many procedural changes were introduced, making it difficult for deputies and senators not only to hold public debate but also – most importantly from the point of view of this study – to carry out the parliament’s checks and balances function. The pretext for this and many other changes limiting the possibility of parliamentary checks on the executive was the major protest mounted by the opposition in the Sejm in late 2015 and 2016, among other things, against how laws were passed, which went against basic legislative standards, as well as against the limited access of the media and citizens to parliament.<sup>68</sup> Even without this, however, the ruling majority had planned to curb parliamentary activity and managed to eliminate the opposition from debate (a widely described case, but not the only one, was the decision to limit statements by participants in a committee debate on key changes to the judiciary to just 30 seconds).<sup>69</sup> The legal changes were also accompanied by concrete decisions that were not unlawful, but controversial from the point of view of political custom, such as the removal of a representative of the Polish People’s Party caucus from the Presidium of the Sejm. Although the law does not specify this, it had previously been considered good form for each parliamentary caucus to have one place in the presidium.

By reducing the parliament’s competences in debates and control, a space was created where, without any particular obstacles, the ruling majority could vote through many controversial or even unconstitutional, and thus corruptogenic, changes to the law. The most significant examples include the act on the Constitutional Tribunal and the judicial system, as well as changes to regulations on the public prosecutor’s office and the civil service (more on these later).

Furthermore, it is important to address the way in which most of the most controversial acts (and others) have been processed. During the United Right government, and especially in the first two years, it became standard practice to bypass bills. Bills that were drafted in the government reached the Sejm in the form of bills submitted by a group of deputies. This meant that the need to carry out public consultations, reviews or interministerial agreements could be bypassed.<sup>70</sup> Acts processed in this way could be passed very quickly – within a few days or even a matter of hours, like an amendment to the Act on the Institute of National Remembrance in 2019.<sup>71</sup> The problem with this practice is not only that it contravenes the principles of proper legislation and renders the entire law-making process untransparent, closing it to citizens and resulting in numerous major legislative errors.<sup>72</sup> It is also corruptogenic, in the sense that it constitutes another violation of the standards of mutual checks and

67 <https://oko.press/zeby-opozycja-gardlowala-zadawala-tych-pytan-przerywala-pis-zmienia-regulamin-sejmu-chce-karac-naruszenie-powagi/>, accessed: 23 September 2019. It is also worth noting that the right-wing coalition made these changes contrary to its electoral promises from 2015, when it had pledged to introduce a so-called “democratic package” that would guarantee the parliamentary opposition a decent place in the democratic process and provide it with genuine checks and balances functions. The package was never debated in parliament and the changes adopted by the majority severely limited the possibilities for control not only of the opposition, but of all deputies.

68 <https://wiadomo.co/sejm-nie-dla-dziennikarzy/>, accessed: 23 September 2019.

69 <http://300polityka.pl/live/2018/07/19/piotrowicz-na-spc-ogranicza-czas-wypowiedzi-do-30-sekund/>, accessed: 23 September 2019.

70 See *Skrywane projekty ustaw...*

71 G. Makowski, *Nowelizacje ustawy o Instytucie Pamięci Narodowej i siedem grzechów głównych państwa PiS*, [http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Grzechy\\_PiS\\_nowelizacje\\_IPN.pdf](http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Grzechy_PiS_nowelizacje_IPN.pdf), accessed: 23 September 2019.

72 G. Makowski, *Wolne 12 listopada? To wcale nie jest niewinna ustawa*, <https://www.newsweek.pl/opinie/wolne-12-listopada-to-wcale-nie-jest-niewinna-ustawa/6yryt3s>; 5 tys. mandatu za spacer z dzieckiem po ścieżce rowerowej, <https://www.bankier.pl/wiadomosc/5-tys-zl-mandatu-za-spacer-z-dzieckiem-po-chodniku-7735301.html>, accessed: 23 September 2019



balances, as deputies, by taking part in bypassing government projects, relinquish the opportunity to monitor the actions of the executive.

It is a similar story for the government, the main centre of executive power. By bypassing the normal process and ignoring the standards of correct legislation, which, apart from consultations, also require a regulatory impact analysis (RIA), the government essentially sends a half-product to the Sejm. It therefore allows deputies to make far-reaching modifications to bills, which of course means that the government cedes some of its control over public policies to parliament.<sup>73</sup> **Instead of checks and balances between the legislature and the executive, we therefore have the relinquishing of checks and balances.**

On the side of the executive, we also observe a blurring of competences, liability and accountability. The problem, which mainly applies to the government, is that the prime ministers during the parliamentary term were not the leaders of the parliamentary majority. There is much evidence to support the view that the actual centre of executive power was not the government or even the prime minister, but the leader of Law and Justice, Jarosław Kaczyński, **formally a rank-and-file deputy**, together with a close circle of people in the party authorities. **This is a corruptogenic arrangement, since public decisions are made outside formal structures, ignoring procedures regulated by law, un-transparently and invisibly to citizens.**

The workings of this mechanism can be observed, for example, during the course of the European Parliament election campaign in spring 2019. The electoral programme was announced by party chairman Jarosław Kaczyński. There would be nothing strange about this if not for the fact that it included promises that came as a surprise to government ministers. Among them was finance minister Teresa Czerwińska, who resigned after the election.<sup>74</sup> It is an open secret that she did not want to take responsibility for expensive social programmes such as the extension of the 500+ scheme to every child and an additional (“13th”) monthly pension payment. The situation was repeated in the parliamentary election campaign later that year. Again, Kaczyński announced the main electoral promises, including a sharp rise in the monthly minimum wage to PLN 4,000 gross. This time, Jadwiga Emilewicz, the minister of enterprise and technology, could not contain her surprise, distancing herself publicly and making it clear that this could have negative effects on the economy and labour market.<sup>75</sup> Interestingly, it was not Emilewicz’s theoretical boss, Prime Minister Mateusz Morawiecki, who responded (also in the media) to her reservations, but again Kaczyński, who was formally only a normal deputy of the Sejm.<sup>76</sup>

**This therefore begs the question about actual accountability and liability for public policy. Formally, the government is responsible for it, but in practice it is the party leader, sitting in the wings. Yet he cannot be held formally liable for mistakes and bad decisions. The lack of clarity and large scale of informality in this area is an evident factor causing problems in the state**

73 During debates on bypassing bills, the deputy acting as rapporteur of a bill was often replaced by a minister. The MP in question was not even familiar with the bill he or she was sponsoring. On the other hand, this meant that in a debate on what is formally a deputies’ bill, the representative of government has a much weaker position, and therefore less control over the changes in its content. <http://wyborcza.pl/7,75398,22088949,ustawa-o-sadzie-najwyzszym-w-sejmie-kim-jest-andrzej-matusiewicz.html>, accessed: 23 September 2019.

74 <https://gospodarka.dziennik.pl/news/artykuly/592900,piatka-kaczynskiego-resort-finansow-teresa-czerwinska.html>, accessed: 23 September 2019.

75 <https://gospodarka.dziennik.pl/praca/artykuly/607291,placa-minimalna-jadwiga-emilewicz-minister-przedsiębiorczosci.html>, accessed: 23 September 2019.

76 <https://fakty.interia.pl/raporty/raport-wybory-parlamentarne-2019/aktualnosci/news-jaroslaw-kaczynski-odpowiada-jadwidze-emilewicz,nId,3195755>, accessed: 23 September 2019.

**administration, but also a field for systemic wrongdoing and corruption.** This is reminiscent of the situation during the communist era, when actual power in the state was in the hands of the Politburo of the Central Committee of the Polish United Workers' Party, with the first secretary at the helm, while the government and parliament were a mere façade. The consequences in terms of corruption are well documented in a large amount of research and literature.<sup>77</sup>

Checks and balances between the government and parliament were therefore disabled – or, to be more precise, left in the hands of the opposition, although with reduced scope for action. In addition, new mechanisms were created to “discipline” opposition deputies when they became too inquisitive. The balance between the presidential and parliamentary centres was disrupted. President Andrzej Duda, from the same political camp, turned out to be entirely subordinate to it. The best evidence of this is the fact that Duda hardly used his right to veto any of the evidently unconstitutional, as well as corruptogenic, laws. In particular, this meant judicial acts regulating the status of the Constitutional Tribunal, National Council of the Judiciary, Supreme Court and common courts. To a large extent, these acts brought the judiciary under the control of the executive, thereby reducing its capacity to implement the law – including in the battle against corruption (more on this in the next subsection). We should also note the president's absolute approval for the changes to the public prosecutor's office, which in practice ended its autonomy from political power (this is another corruptogenic change whose effects soon became visible, as we shall see later).

A drastic example of how the excessive concentration of power and accompanying dissipation of checks and balances creates the threat of corruption was the situation in 2017. Following street protests, President Duda decided to veto some of the acts concerning the National Council of the Judiciary and the Supreme Court. The attempted amendments, which shifted competences to the government (and, specifically, the justice minister) at the cost of the head of state, prompted not only protests, but a vociferous reaction from the president. Duda vetoed the law prepared by the government and presented his own, restoring his powers of control regarding judges. Ultimately, however, the decision on the distribution of this power was made not in an open debate in parliament, but in covert discussions between the PiS chairman, the president and envoys of the justice minister, out of public view. “Ready-made” versions of the bills agreed on in this informal way were sent to the Sejm, where they were immediately voted through using the “bypass” principle described above. This case not only illustrates the drastic deterioration of checks and balances between the executive and parliament, but is also an example of absolutely untransparent law-making outside of official procedures, which can itself be seen as a manifestation of corruption. The laws made in this way, incidentally, are also corruptogenic, as their purpose was the further subordination of the judiciary to the executive.

## Proposals

In searching for measures to prevent such extensive disintegration of the principle of checks and balances at the level of relations between the legislature and the executive, the best solution would be to create a framework for the operation of the parliament and government permitting the highest possible level of political and ideological pluralism. Two systemic factors are significant here: the first is the nature of Polish political parties and the second is the electoral system.

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<sup>77</sup> See J. Kurczewski, *Umowa o kartki*, Warszawa 2004; A. Rychard, *Władza i interesy w gospodarce polskiej u progu lat osiemdziesiątych*, Warszawa 1995; R. Karklins, *The System Made Me Do it...*



In terms of political parties, we can distinguish between the cultural and the legal level. With a few exceptions (PSL and part of the left), Polish political parties tend to be leader-focused organisations – Law and Justice is the prime example of this model.<sup>78</sup> These parties are based on the principle of the leader and his team. They are built not on internal, pluralistic dialogue, but on the rule of loyalty and command by the party leader’s iron fist. PiS in particular is one such “totalitarian” party. The very fact that since its inception the party has been led by the same person, Jarosław Kaczyński, makes it exceptional on the Polish political scene. No other grouping has such a uniform and centralised leadership that has managed to stay in power for so long. Furthermore, PiS’s statute contains numerous provisions handing the party chairman almost unlimited power within the organisation.<sup>79</sup> Nevertheless, the other main parties, despite changes in leadership, also have strong leadership characteristics.

**In terms of the subject of this study, this is important because the leader-focused organisational culture of a given party is evidently transferred to the workings of the organs of a democratic state when it comes to power.** The 2015–2019 parliamentary term is the best example of this: the majority formed by Law and Justice showed unprecedented discipline, voting through without due consideration and almost unanimously even the most controversial changes, almost without losing deputies. The government also evidently operates according to the dictate of the party head, although he has no official function.

Suppressing discussion within the party as well as outside it – in the state bodies under its control – is a factor causing corruption, reducing the transparency of public life and the accountability of the government. In short, the authoritarian culture of Polish political parties, especially PiS, is conducive to the concentration of power – with all the negative consequences that this entails.

On top of this, there are also defective regulations concerning the funding of political parties and election campaigns, which make public checks of party activity more difficult. For example, it is impossible to extract precise information from parties on what money from their expertise fund is spent on or to find out exactly how money is spent during election campaigns.<sup>80</sup> This is another factor where there is a threat of corrupt practices. Moreover, insufficient reflection on this problem from the opposition exposes it to an attack from the ruling party, which is no different from these bad standards. As the ruling coalition has the instruments of power in its hands, it can easily exploit this to attack its opponents. The aforementioned government corruption prevention programme for 2018–2020 promised to make new proposals for controls on the funding and activity of political parties. To date, no concrete plans have been suggested in the public debate, but it is easy to imagine that a potential bill would be similarly controversial to the transparency in public life bill. With the ostensible objective of combating abuses in politics, which always sounds good, the *de facto* purpose would be to tie the opposition’s hands. **It would be desirable for the opposition to propose its own bill to improve the transparency and operation of political parties, before the ruling camp can dominate these issues.**

Regarding the electoral system, as the 2015 election results showed, it is possible that a party with relatively low support (just 38.3%), with a relatively low turnout and major fragmentation of the political

78 *O demokracji w polskich partiach politycznych*, eds M. Chmaj, M. Waszak, J. Zbieranek, Warszawa 2011; P. Marczewski, D. Sześciło, *Co wolno opozycji i dlaczego jest potrzebna? Uprawnienia opozycji parlamentarnej*, Warszawa 2017, [http://www.batory.org.pl/upload/files/Programy%20operacyjne/Masz%20Glos/Co%20wolno%20opozycji%20i%20dlaczego%20jest%20potrzebna%20Uprawnienia%20opozycji%20parlamentarnej\(1\).pdf](http://www.batory.org.pl/upload/files/Programy%20operacyjne/Masz%20Glos/Co%20wolno%20opozycji%20i%20dlaczego%20jest%20potrzebna%20Uprawnienia%20opozycji%20parlamentarnej(1).pdf), accessed: 23 September 2019.

79 P. Marczewski, *Partie polityczne a jakość polskiej demokracji*, Warszawa 2017.

80 A. Gendźwiłł, G. Bukowska, J. Haman, A. Sawicki, J. Zbieranek, *Finanse polskich partii*, Warszawa 2017.

scene, could gain a majority large enough to govern on its own. It can then use this ruthlessly to concentrate more and more power in its hands without undue care even for the constitution. To simplify, this is the result of two factors. First, the way votes are counted, which rewards the winner of the elections. Second, the relatively high electoral thresholds, especially for smaller parties and coalition committees. The thresholds do not encourage groupings with lower support to work together. In 2015, the United Left coalition failed to win representation in the Sejm by a hair's breadth – 0.6% (the threshold for a coalition is 8%). Meanwhile, the use of the D'Hondt method means that support for parties below the threshold increases the number of seats obtained by the party that wins the elections – the smaller the difference by which a party fails to get into parliament, the more it helps the winner. In 2015, apart from left-wing parties, the KORWiN party also fell just short of gaining seats in parliament, with 0.3% less than the 5% party threshold. If at least the coalition had crossed the threshold, PiS would not have had a chance of an absolute majority. The 2015 elections showed how weak democratic institutions can be (the Constitutional Tribunal, judiciary, public prosecutor's office, etc.), if a consolidated party with a strong leadership culture wins.

This construction of the electoral system also encourages the formation of “quasi-coalitions”.<sup>81</sup> One such “coalition” since 2015 has been the United Right camp, bringing Zbigniew Ziobro's Solidary Poland and Jarosław Gowin's Agreement together with Law and Justice. In 2019, the opposition Civic Platform formed a similar alliance with Modern (Nowoczesna), the Democratic Left Alliance together with the Spring (Wiosna) and Together (Razem) parties, and PSL with Kukiz'15. Confederation also took on a similar form. In this type of construction, the dominant entity makes its local structures, places on electoral lists and essential resources for conducting an election campaign available to its “coalition partners”. On the one hand, this makes it possible to avoid a higher threshold for coalition electoral committees, which is especially important for committees with lower support. It is also significant in terms of political communication; quasi-coalitions of this type simply produce more coherent messages. On the other hand, the practice weakens the smaller entities within the quasi-coalition, if only because the strongest component of the alliance takes the entire party subsidy, or at least authoritatively decides on its distribution. This kind of consolidation is not conducive to party pluralism, which in itself is a corruptogenic factor as it weakens political control of the government. Moreover, with the generally deficient legal solutions for funding political parties and election campaigns, it also expands the grey area. We do not know whether there are financial transactions between the quasi-coalition partners, and what kind. The best example of problems in this respect was the controversies over the distribution of the KORWiN party's subsidies among Confederation's “stakeholders” before the 2019 elections.<sup>82</sup> **Briefly, certain features of the electoral system in the context of the 2015 and 2019 elections proved to be corruptogenic in a broad sense, because they permitted the corruptogenic concentration of power, as well as a narrow one – because they created a space for practices reducing the transparency of political funding.**

A change in these conditions could limit the risk of the concentration of power, increase pluralism and reinforce checks and balances. Yet we must also bear in mind that any changes concerning political parties' activity and funding, as well as the electoral system, must be made very cautiously. The risk is that they could result in a temptation – especially among the ruling camp, as was the case with the judiciary – to use this as a pretext to strengthen their own position and restrict opposition parties'

81 See J. Flis, *Jak bardzo sejmowa ordynacja zachęca do budowania sojuszy i jakie stwarza dla nich przeszkody?*, Warszawa 2019, <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/System%20wyborczy%20a%20integracja%20polityczna.pdf>, accessed: 23 September 2019.

82 <http://wiadomosci.gazeta.pl/wiadomosci/7,114884,25249831,przychodzi-winnicki-do-korwina-wyciekly-nagrania-na-ktorych.html>, accessed: 23 September 2019

opportunity to act. The Fidesz party in Hungary did this, causing a financial crisis for its rival Jobbik by imposing draconian penalties for transgressions in the funding of election campaigns.<sup>83</sup> This would not be possible without the earlier takeover of the institutions checking political parties' finances and without toughening regulations. It is a similar case with the electoral system.

For the time being, the ruling coalition is not trying to change the system for the allocation of seats, seeing that the current arrangements are enough to hold onto power. Yet it is important to note that a major breach has already been made in the autonomy that until recently characterised the Polish system of control of the electoral process and the funding of political parties.<sup>84</sup> In 2017, regulations changing the electoral administration operation model were passed. In one of the main changes, the National Electoral Commission model, based on judges and thus guaranteeing greater independence from current politics, was abandoned. In its place, solutions were introduced to give politicians direct influence over the operation of this key electoral organ. The United Right therefore showed that it could also introduce changes in this area.

No new proposals had emerged before this report was completed, but we cannot rule out further changes strengthening the government camp, while also disciplining the opposition and making it more difficult for it to act. Numerous pretexts for such moves can be identified. Taking a "leap forward" and proposing reforms to the party and electoral system to reinforce checks and balances therefore seems like a better strategy than reacting to changes going in the opposite direction.

I have concentrated in this section largely on the legislature, the executive and political parties. This is because, in my view, the disruption of checks and balances between the legislature and executive in 2015–2019 was itself a foundation on which corruption developed. This was the first "domino" creating further circumstances conducive to corruption – a departure from the rule of law or the far-reaching weakening of the judiciary. We have observed a huge concentration of power both within the parliament (single-party majority) and on the side of the executive. This is accompanied by the suppression of parliament's control function and a reduction in the position and powers of the opposition. At the same time, the actual centre of power was transferred outside the formal structures, to within the leadership of the ruling party. It is there, rather than in the government or in the office of the president, that the most important decisions affecting state policy are made. Yet the very fact that this arrangement emerged is closely linked to the characteristics of the party and electoral system, which emphasise the role of the leader in politics, while the winning party is excessively rewarded when the political scene is fragmented and there is a lack of transparency in the operation of political parties.

Efforts to reduce the risk of corruption should concentrate first and foremost on these elements. Above all, the electoral code needs to be considered and amended. One short-term measure could be to abandon the D'Hondt method for the allocation of seats in the Sejm and return to the Sainte-Laguë method. This would minimise the chances of one party, with a relatively low turnout and election result, being able to gain an absolute majority of seats allowing it to govern on its own. Given the still immature Polish political scene and leader-focused model of political party organisation, it would be more desirable for the government to be formed by coalitions of parties (but not quasi-coalitions,

83 <https://www.ft.com/content/9a2cbc36-199b-11ea-97df-cc63de1d73f4>, accessed: 20 January 2020.

84 See P. Uziębło, *Opinia prawna w sprawie zmian w kodeksie wyborczym wprowadzanych ustawą z dnia 14 grudnia 2017 r.*, <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Masz%20Glos/Opinia%20prawna%20w%20sprawie%20zmian%20w%20kodeksie%20wyborczym%20wprowadzanych%20ustawa%20z%20dnia%2014%20grudnia%202017r.pdf>, accessed: 23 September 2019; A. Gęndźwił, *O co chodzi w nowelizacji Kodeksu wyborczego?*, <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Masz%20Glos/O%20co%20chodzi%20w%20nowelizacji%20kodeksu%20wyborczego.pdf>, accessed: 23 September 2019.

where one large grouping is the hegemon) that are able to keep each other in check, even at a cost of overall political stability. This would be another safeguard protecting liberal democracy, guaranteeing pluralism and preventing the excessive concentration of power in the hands of the legislature and executive, which – as we are witnessing – favours the development of systemic corruption. The most desirable solution, however, would be the reconstruction of the entire electoral system (into a mixed system, which would not require a change to the constitution), ideally based on an agreement between the political forces and with experts' participation.<sup>85</sup>

In addition, the role of the parliamentary opposition should be strengthened, shaping the regulations of the Sejm and Senate, as well as the act on holding office as a deputy and senator, to give deputies greater freedom to conduct debates and parliamentary majorities less opportunity to discipline and punish their political opponents.

Last but not least, greater democratisation of intra-party life should be enforced. One way to do this would be to increase the requirements for the transparency of party finances and electoral campaign funding. Greater openness in this respect would force political parties' leadership to answer not only to party members, but also to public opinion.

## The judiciary

### The problem

As in the case of the legislature and executive, the main source of the problem in the judiciary when analysing the corruption threat is the interference in the systemic separation between the main branches of power.

There is no data showing that the judiciary itself has been particularly affected by corruption – contrary to the government's claims. As in every area of the state's operation, abuses exist. But the view that the judiciary is corrupt cannot be defended.<sup>86</sup> Among those to have repeated this false argument on numerous occasions are Prime Minister Morawiecki, defending the changes to the judiciary introduced by his government and that of his predecessor, Beata Szydło, in front of the European Commission and international media.<sup>87</sup> Interestingly, the narrative later changed tack, attempting to emphasise that the judiciary in Poland had remained unchanged since the communist period and was full of judges who had worked in the previous system. This is also untrue, considering that the average age of Polish judges is around 46.

The main problem, therefore, is not corruption within the judiciary, but the fact that the changes introduced by the government are corruptogenic. The excessive concentration of power in the legislative and executive authorities discussed earlier provided an unprecedented opportunity to gain control over the judiciary. The so-called reforms implemented since 2015 make judges extremely dependent on the executive and aim to bring party influence into the justice system. This is a manifestation of particularism entailing a specific party seeking to gain control over an institution that in principle

<sup>85</sup> See B. Michalak, *Jak zmieniać prawo wyborcze. Doświadczenia porównawcze*, [http://www.batory.org.pl/upload/files/Programy%20operacyjne/Masz%20Glos/Jak%20zmieniac%20prawo%20wyborcze\\_%20Do%C5%9Cwiadczenia%20porownawcze%20.pdf](http://www.batory.org.pl/upload/files/Programy%20operacyjne/Masz%20Glos/Jak%20zmieniac%20prawo%20wyborcze_%20Do%C5%9Cwiadczenia%20porownawcze%20.pdf), accessed: 23 September 2019; D. Sześciło, *Mieszany system wyborczy w państwach Europy Środkowej i Wschodniej*, <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Masz%20Glos/Policy%20Paper%20Dawida%20Szeszycilo.pdf>, accessed: 23 September 2019.

<sup>86</sup> <https://oko.press/sedziowie-z-krakowa-wygrali-z-gazeta-polska-bedzie-sprostowanie-slow-premiera-morawieckiego/>, accessed: 23 September 2019.

<sup>87</sup> [https://www.premier.gov.pl/static/files/files/biala\\_ksiega\\_pl\\_full.pdf](https://www.premier.gov.pl/static/files/files/biala_ksiega_pl_full.pdf), accessed: 23 September 2019.

should act in the public, rather than party, interest. If this process continues, it will limit access to the fundamental public good of the right to a fair trial.

Within months of coming to power, the United Right camp introduced regulations giving the justice minister almost total control over the judicial administration – a move that clearly reduced the autonomy of the judiciary. This was followed by laws enabling the justice minister to replace presiding judges and paving the way for the National Council of the Judiciary and the Supreme Court to come under party influence. As critics note, these changes did not improve the functioning of courts.<sup>88</sup> By creating legal instruments, however, the justice minister gained the power to dismiss presiding judges, as well as to put pressure on individual judges in specific cases.<sup>89</sup> Establishing control over the National Council of the Judiciary allowed the government and the parliamentary majority to influence judicial appointments and promotions.<sup>90</sup> Furthermore, establishing the Disciplinary Chamber of the Supreme Court, which was given special competences, and appointing exclusively party nominees accepted by the partisan National Council of the Judiciary to it, is one more means of exerting influence over judges (as well as other legal professions). Of course, these changes also all limit the judiciary's powers when it comes to checks and balances of the executive and legislative branches.<sup>91</sup> The “reforms” were partially blocked by the Court of Justice of the European Union (CJEU) judgment on 24 June 2019.<sup>92</sup> Among other things, the CJEU verdict made the replacement of a large number of Supreme Court judges and the first president of the Supreme Court impossible. Most of the changes remain in force, however, and the ruling camp has promised to continue its “reforms”, which bring the judiciary under even greater control of the government, parliament and therefore also the ruling party.<sup>93</sup>

The government's actual intention to create ways of leaning on judges, rather than to improve the state of the judiciary, is demonstrated by the numerous disciplinary proceedings launched against judges critical of the overhaul or who sent prejudicial questions to the EU Court of Justice. These actions aim to intimidate judges. There have also been instances of disciplinary cases being initiated against judges who issue verdicts that do not follow the political line of the government.<sup>94</sup> These symptoms, along with all the changes to the judiciary since the 2015 elections, unequivocally prove the severe distortion to the separation of powers and the judiciary's diminished ability to keep the legislature and executive in check.<sup>95</sup>

88 <https://www.rp.pl/Sedziowie-i-sady/308239912-Sady-dzialaja-wolniej-Ministerstwo-Sprawiedliwosci-uspokaja.html>, accessed: 23 September 2019.

89 <http://www.batory.org.pl/upload/files/pdf/Apel%20do%20Prezydenta.pdf>, accessed: 23 September 2019; [http://www.batory.org.pl/upload/files/pdf/Stanowisko%20ZEP%20ws\\_%20sadow%20powszechnych.pdf](http://www.batory.org.pl/upload/files/pdf/Stanowisko%20ZEP%20ws_%20sadow%20powszechnych.pdf), accessed: 23 September 2019; [http://www.batory.org.pl/upload/files/pdf/Stanowisko\\_Ustawa%20o%20usp.pdf](http://www.batory.org.pl/upload/files/pdf/Stanowisko_Ustawa%20o%20usp.pdf), accessed: 23 September 2019.

90 P. Buras, G. Knaus, *Where the law ends. The collapse of the rule of law in Poland – and what to do*, [http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/ESI-ideaForum\\_Batory%20-%20Poland%20and%20the%20end%20of%20the%20Rule%20of%20Law.pdf](http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/ESI-ideaForum_Batory%20-%20Poland%20and%20the%20end%20of%20the%20Rule%20of%20Law.pdf), accessed: 23 September 2019.

91 [https://europa.eu/rapid/press-release\\_IP-19-4189\\_pl.htm](https://europa.eu/rapid/press-release_IP-19-4189_pl.htm), accessed: 23 September 2019.

92 <https://www.euractiv.pl/section/demokracja/news/polskie-wladze-bagatelizuja-wyrok-tsue/>, accessed: 23 September 2019.

93 During the first term of the United Right government, not only numerous expert studies but also substantial academic literature was produced on the changes to the judiciary by the ruling camp. Yet few authors outline the link between corruption and violations of the rule of law. The main document that synthetically describes the corruption-related threats resulting from these changes is a report by GRECO (Group of States Against Corruption, operating within the Council of Europe) from March 2018: *Ad hoc Report on Poland (Rule 34). Adopted by GRECO at its 79th Plenary Meeting (Strasbourg, 19–23 March 2018)*, <https://rm.coe.int/ad-hoc-report-on-poland-rule-34-adopted-by-greco-at-its-79th-plenary-m/168079c83c>, accessed: 13 January 2020.

94 <https://oko.press/sad-odsuwa-sedziego-bilinskiego-ktory-uniewinnial-za-udzial-w-protestach-antyrzadowych/>, accessed: 23 September 2019.

95 W. Sadurski, “How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding”, *Legal Studies Research* 18 (01), 2018, [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=3103491](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3103491), accessed: 23 September 2019.

**There is no doubt that efficient and independent courts are a crucial element of a corruption prevention system (like in the aforementioned concept of the National Integrity System created by Transparency International).** Changes to the system bringing judges under the power of politicians and government representatives, and reducing courts' autonomy, can therefore hardly be said to increase the state's capacity to combat corruption. Quite the opposite, in fact – such changes are a corruptogenic factor. **One consequence that we can therefore expect is that subordinate judges will not be willing to give verdicts against the government, especially in corruption cases that could seriously challenge its legitimacy.**

**The abolition of the principle of accountability is at stake. The government cannot allow its authority to be undermined.** The simplest way to achieve this is to prevent any of its representatives from being accused of – let alone sentenced for – a crime, especially one of corruption. In terms of combating corruption, it is therefore essential to restore courts' autonomy and improve their operation. Only an independent court can hold a corrupt politician liable and accountable.

## Proposals

Recommendations in this area have been proposed by the Legal Experts Group (LEG) operating at the Stefan Batory Foundation since 2016. The process will be a difficult one, because the changes that have been introduced are extensive. The National Council of the Judiciary, which most lawyers see as established and based on regulations that go against the constitution, requires thorough reform, as well as personnel changes. It must return to its role as an authority defending judges' independence, rather than an instrument for promoting judges favourable to the ruling camp and disciplining those who are not compliant. One LEG member, Łukasz Bojarski, presented detailed recommendations in this respect.<sup>96</sup> It is a similar story with common courts. Apart from revision of the changes of 2015–2019, which should be entrusted to a special commission comprising representatives of the judicial, political and expert community, the scope of the justice minister's oversight of the judiciary should be reduced and the judges' governing body's control mechanisms over the judiciary strengthened. Only in this way will it be possible to guarantee the necessary level of judicial autonomy and increase its strength compared to the executive and legislature. In this case, too, the detailed analysis of possible changes prepared by another LEG member, Judge Jacek Czaja, can be recommended.<sup>97</sup>

## The public prosecutor's office

### The problem

A key part of the corruption prevention system (as outlined by the NIS approach) is law enforcement, including the public prosecutor's office. After all, in principle it is responsible for supervising the investigation of crimes, pursuing prosecutions, and prosecuting on behalf of the public before the court. Alongside common courts and the Constitutional Tribunal, it is an institution that upholds the law. Although, according to Polish law, it is not a constitutional organ, it plays a crucial role in enforcing the rule of law and has a more advanced role than the police and other authorities responsible for the direct prosecution of offences.

<sup>96</sup> [http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Bojarski\\_KRS.pdf?amp%3Bqid=391046](http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Bojarski_KRS.pdf?amp%3Bqid=391046), accessed: 23 September 2019.

<sup>97</sup> <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Sady%20powszechnie.pdf>, accessed: 23 September 2019.



Although, as we saw at the beginning of this article, corruption cannot be viewed solely in terms of crime, this remains an important aspect. Corruption crime is a serious threat, not only because of its scope (corruption cases often mean huge losses of public money, with prominent politicians and top state officials playing a role), but also as a result of the societal dimension. Corruption crimes usually take place at the cusp of the public and private sectors. These kinds of actions undermine trust in state institutions, but also in businesses and the whole economy. The effective investigation of corruption crimes is an integral part of any state policy in this area and the public prosecutor's office is a key instrument for combating corruption.

Unfortunately, as in the case of the judiciary, after the 2015 elections the public prosecutor's office fell victim to the concentration of power at the legislative and executive level. The ruling camp exploited its majority to bring the office under the direct control of the justice minister. Following several years of the separation of the offices of prosecutor general and justice minister, it thereby restored the communist-era model of the public prosecutor's office – a situation not encountered anywhere else in the EU. This model contravenes the recommendations of the Council of Europe, as well as recent trends in EU states, where mechanisms guaranteeing the independence of prosecutors from the executive have been developing.<sup>98</sup>

**In terms of combating corruption, the autonomy of the public prosecutor's office is particularly important, as corruption is increasingly concentrated at the highest levels of power.<sup>99</sup> In Western countries, this "grand corruption", involving influential groups (leading politicians, officials, members of the government and economic elites) is regarded as the main threat.** This form of corruption often takes the form of not only political corruption, but also money laundering, tax fraud and the fixing of tenders for public investments, and is frequently connected to organised crime. Combating these practices when the main authority overseeing investigations is directly dependent on political factors (often involved in crimes) will be more difficult, or even impossible.

In Poland, the question of "grand corruption" is not present in the public discourse or even in public policy (although this might be an effect of adoption of a penal policy that is not geared towards dealing with this type of crime). It makes sense to start using this term, however, as we are already observing typical cases that are perfect examples of this concept. Like in the aforementioned "Srebrna affair", a politicised public prosecutor's office might be reluctant to pursue cases when the interests of the ruling grouping come into play.

**However, a public prosecutor's office dependent on political concerns serves to instrumentalise anti-corruption policy.** Corruption is political by nature, as there is always power involved.<sup>100</sup> Corruption crimes can also easily lead to the delegitimisation of power. Equally, though, they can harm the political opposition. **A public prosecutor's office dependent on the executive will therefore be used as a tool against the opposition, which is why calls to increase its autonomy are important – to avoid it being politically instrumentalised to create corruption affairs and to make it an effective tool in the battle against corruption in the upper echelons of power.**

The United Right government, however, is changing the public prosecutor's office in the opposite direction from that in Western countries and recommended by international institutions. As well as

98 <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Rola%20i%20miejsce%20prokuratury.pdf>, accessed: 23 November 2019.

99 S. Rose-Ackerman, "Democracy and grand corruption", *International Social Science Journal* 2008, no. 48 (149), pp. 365–380.

100 G. Makowski, *Korupcja jako problem społeczny...*

the return to the combined function of justice minister and prosecutor general, mentioned above, it is worth noting a few radical changes reducing prosecutors' autonomy. The minister – who is also the prosecutor general – has gained the right to interfere in any investigation, including the ability to give personal instructions to prosecutors (even without written form) or order the use of operational methods (such as provocations). His interventions might not be visible to the parties in the proceedings and the court. In addition, the prosecutor general has acquired the power to disclose materials from the investigation, at any stage, to anybody. The minister can also transfer investigations to the national prosecutor's office, which is under his supervision. Furthermore, he is free to promote and demote prosecutors (which makes it possible to manipulate investigations and reward compliant prosecutors). In early 2019, another significant element was added, which, in the context of the prosecutor general's extensive powers, provides room for abuses and corruption and is a further example of interference in the separation between the executive and the judiciary.<sup>101</sup> This was a law allowing the prosecutor general to extend the detention of a suspect even when the court deemed bail a sufficient preventive measure. This undermines the constitutional position of courts (as the public prosecutor's office can ignore their decision) and the fundamental civil right to a fair trial. From the point of view of anti-corruption policy, it is another means of instrumentalising corruption as a political tool and an example of a method that can be used to violate fundamental human and civil rights. After all, it is not hard to imagine the extended detention of political opponents against whom an investigation is being launched, not only to prove something or be able to press charges, but to use the detention to create an appropriate image of the government in the media.

**The ruling camp has therefore created a situation in which there are no indications that the public prosecutor's office is working more effectively in corruption cases. Yet prosecutors are almost entirely dependent on a political minister. Meanwhile, we have a separate system of legal and institutional solutions allowing cases that might affect the government to be swept under the carpet and making it possible to engineer penal cases against the opposition or anyone else who might be a threat to the ruling party.** This is a further manifestation of particularism and a significant corruptogenic factor. Like in the previous cases, to reduce the systemic threat of corruption, it is necessary to make systemic changes to how the public prosecutor's office operates.

## Proposals

Detailed recommendations in this respect have been presented by Jarosław Onyszczyk and Katarzyna Kwiatkowska.<sup>102</sup> Their main proposal is to scrap the model where the prosecutor's office is headed by a political minister. This should be replaced by a return to the model of an autonomous prosecutor general, whose selection must be more balanced in terms of the relations between the various branches of power, as well as between the ruling parties and the opposition. For example, the prosecutor general could be selected by the Sejm (perhaps with input from the president of Poland) from among candidates put forward by the prosecutorial governing body, for a statutory six-year term, like the president of the Supreme Audit Office (NIK). The prosecutor general should also be assured a suitable degree of budgetary and functional autonomy (again, NIK could serve as a model). The prosecutor general's competences should be specified precisely in the law to preclude excessive interference in the work of individual prosecutors. It is crucial to minimise the risk of manipulation of investigations. Onyszczyk and Kwiatkowska's study contains a number of recommendations that could make the

<sup>101</sup> <https://www.rpo.gov.pl/content/rpo-sad-nie-prokurator-ma-decydowac-czy-podejrzany-opusci-areszt-po-zaplacie-kaucji>, accessed: 23 September 2019.

<sup>102</sup> <http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Rola%20i%20miejsce%20prokuratury.pdf>, accessed: 23 November 2019.



public prosecutor's office an effective means of combating corruption crime, regardless of the current configuration of the political scene.

## The public administration

### The problem

The final potential corruption flashpoint that we must not overlook is the public administration and, in particular, the civil service. The Polish civil service is meant to be an elite part of the public administration, as well as the most important part of the government administration. It is made up of almost 120,000 officials, mainly employed at ministries and local units of the government administration. The civil service is responsible for preparing and implementing public policy, as well as for many basic public services (the civil service corps includes bodies such as education departments and the veterinary board).

After 1989, the development of the civil service in Poland encountered numerous obstacles. Successive governments, despite declaring a desire to build a professional, neutral state administrative machinery, in practice always weakened the civil service by seeking to place their own people in the highest state offices. As a result, since the first civil service act was passed in 1998, there have been many changes to the law – several more acts and twice as many extensive amendments. The last significant change to the 2008 civil service act was adopted immediately after the United Right government came to power.<sup>103</sup>

Yet despite the traditional efforts to appropriate the civil service by all political sides after 1989, by 2015 only the right-wing parties had gone as far as an overt, radical departure from the principle of open recruitment for the highest posts in the civil service. The obvious objective of this move was to create jobs for party nominees. The intention was to make it easier to fill these posts with people loyal not to the state or to the public interest, but to party concerns. PiS chairman Jarosław Kaczyński did not even attempt to hide this, saying in the media that he needed officials who would loyally implement the party vision.<sup>104</sup> Yet since party loyalty was supposed to be the main consideration when hiring people for official posts, this created a problem with enforcing the rule of open (i.e. non-particularistic) access to the public service (Art. 60 of the Polish constitution), which should be based above all on considerations of merit and competences. **This is a flagrant instance of particularism – redistributing the good that is work in the public service, which is restricted to the supporters of the ruling party line.**

The amendment to the civil service act of January 2016<sup>105</sup> not only established a procedure for filling top administrative posts (from general directors to department directors) based mainly on party nomination, but also reduced the requirements for candidates' competences. It also permitted the near-automatic replacement of officials in more than 3000 posts, making it the first so-called "personnel act" to be passed by the United Right camp. As a result, in the first year after the new regulations, employees in almost one-third of the top administrative posts were replaced.<sup>106</sup> The act also violates the Polish constitution; specifically, articles 153 and 60, which state that the civil service is an institu-

103 K. Gadowska, *Dysfunkcje administracji. Służba cywilna w perspektywie neoinstytucjonalnej*, Kraków 2015.

104 <https://www.gazetaprawna.pl/artykuly/928582,dobra-zmiana-kaczynski-nepotyzm.html>, accessed: 23 September 2019, <https://wiadomosci.dziennik.pl/polityka/artykuly/515983,panstwo-to-ja-jaroslaw-kaczynski-pis-partia-rzadz-wladza-analiza.html>, accessed: 23 September 2019.

105 Dz.U. 2016 [Journal of Laws], item 34.

106 G. Kopińska, *Stanowiska publiczne jako łup polityczny...*

tion established to carry out the state's obligations in an impartial, professional and politically neutral way, and that access to it is open and based on the principle of equality.<sup>107</sup>

**By contravening the law, the ruling camp has set up conditions for the operation of the civil service more reminiscent of the communist-era *nomenklatura* than of modern, Western public administrations.** This assessment is all the more justified as the 1982 act on employees of state offices has been kept in force, while many central institutions have been excluded from the regulations of the civil service act, resulting in even more arbitrary and partisan appointments to administrative posts (such as at the chancelleries of the Sejm and Senate, as well as many other central institutions). This system does not encourage officials to be guided by the criterion of the public interest, but rather by loyalty to the ruling party. It is therefore naturally a significant factor resulting in abuses.

A good illustration of the consequences of this state of affairs is the position of officials working at the Chancellery of the Sejm, which violates the constitutional principle of legalism requiring officials to act in accordance with and within the law. Despite a legally binding judgment of the Supreme Administrative Court ordering the disclosure of the letter of support for candidates for the partisan National Council of the Judiciary, the head of the Chancellery of the Sejm refused to comply, hiding behind a directive of the President of the Personal Data Protection Office, which was in fact issued after the Supreme Administrative Court judgment was issued and in violation of its decision.<sup>108</sup> Politicians – former PiS councillors – were appointed as the heads of both the Chancellery of the Sejm and data protection office.

**A situation was created in which the government administration, guided in its actions above all by the criterion of party loyalty, rather than professionalism, will not only be more susceptible to administrative corruption, but is itself becoming an element of systemic political corruption.** The deep-rooted party influences on the administrative structure generates relations of a clientelistic nature (of the patron–client type, to refer to a category coined by Jacek Tarkowski to describe the communist-era *nomenklatura*)<sup>109</sup> between officials and politicians. These kinds of relations can easily be exploited not only to circumvent the law, as in the example cited above, but also to mask specific examples of corruption and other abuses of power.

## Proposals

To avoid the development and consolidation of a *nomenklatura* system, which favours corruption at the level of the public administration and in relations between officials and politicians, systemic changes will again be essential. Reform of the civil service is also necessary and should extend uniform standards of officials' work to all types of government institutions. The main step would be to repeal the state administration employees act of 1982, as well as many other acts excluding specific institutions from the standards of the civil service. The civil service itself should be strengthened. A new act should be adopted that clearly marks the boundary between the administrative and the political corps. First and foremost, the rules of recruitment for top administrative posts need to be regulated so that party sympathies are no longer the only criterion. A good solution would be a state

107 H. Izdebski, *Opinia w przedmiocie ustawy z dnia 30 grudnia 2015 r. o zmianie Ustawy o służbie cywilnej oraz niektórych innych ustaw* (Dz.U. [Journal of Laws] 2016, item 34), Warszawa 2016, [http://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/Opinia\\_Sluzba\\_cywilna\\_HIzdebski.pdf](http://www.batory.org.pl/upload/files/Programy%20operacyjne/Odpowiedzialne%20Panstwo/Opinia_Sluzba_cywilna_HIzdebski.pdf), accessed: 23 September 2019.

108 <https://www.prawo.pl/prawnicy-sady/listy-poparcia-do-krs-uodo-zdecyduje-czy-mozna-ujawnic,452521.html>, accessed: 23 September 2019.

109 J. Tarkowski, *Socjologia świata polityki: Patroni i klienci*, Warszawa 1994.

personnel resource – a kind of database of candidates for top administrative post, which would only include people who have demonstrated high competences and suitable experience. After coming to power, political parties could use this resource to freely choose people for the top posts at state institutions. Recruitment for all posts below general directors of administrative offices, meanwhile, should be open and competitive. By guaranteeing the core central administration stability and the chance to function without orders from the ruling party – but, instead, according to the ethos of public service – the country can then consider further, detailed reforms.<sup>110</sup>

## Conclusion

Paradoxically, the corruption we should be worried about today is beyond the perception and experience of the average citizen. This is paradoxical because “grand corruption” affects political, administrative and economic elites, is rooted in the system, frequently not punished by criminal laws, and sometimes even legalised. It is easier to perceive and understand this type of corruption if we see it as a manifestation of particularism in public life. Particularism is a system of institutions and concrete actions that privilege a specific group over others in access to public resources. In Poland, the United Right coalition, which came to power in 2015, has proved to be this kind of group.

A remarkably favourable set of presidential and parliamentary election results in 2015 handed the ruling camp a concentration of executive and legislative power that was unprecedented since 1989. It then set about exploiting this situation to undermine the foundations of the rule of law in Poland. A far-reaching reduction of judicial independence ensued. There was a return to the communist-era model of the public prosecutor’s office, bringing it under the direct control of the justice minister (and thus the political factor). Open and competitive recruitment for top posts in the civil service was scrapped, paving the way to the transformation of the government administration into a nomenklatura. These actions do not fit within the traditional, narrow understanding of corruption as a crime. Yet they significantly expand particularism in public life, as they bring entire sectors of the state under the control of the ruling party, giving it almost complete discretion in decision making. At the same time, systemic inequalities are being created; for example, in access to the justice system and the public service, or this access is being reduced.

In the long term, the consolidation of this situation will lead not only to state dysfunction, but also to concrete, criminal forms of corruption and impunity for the government. We can already observe symptoms of this. The best example is the partisan public prosecutor’s office’s dropping of the Srebrna case, which was discontinued despite traces of political corruption and even bribery. The reason was that the main figure in the case was Jarosław Kaczyński, the head of the ruling party. This is just one example. Similar, less momentous cases abound and will continue to multiply with every day if we see the further disintegration of the most important institutions in a country bound by the rule of law – the separation of powers, judicial independence, and the integrity of law enforcement and public administration. These are conditions in which liability and accountability are disappearing, amid the growing impunity of politicians, administrative officials and everyone dependent on them.

For this reason, as systemic factors conducive to corruption have emerged, anti-corruption policy cannot concentrate solely on technicalities – tighter penal regulations or the reform of financial disclosures. First and foremost, the constitutional framework needed to counteract “grand corruption”

110 G. Makowski, *Dla państwa i obywateli. Diagnoza i propozycje reformy służby cywilnej*, [http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Dla%20panstwa%20i%20obywateli\\_Makowski.pdf](http://www.batory.org.pl/upload/files/Programy%20operacyjne/Forum%20Idei/Dla%20panstwa%20i%20obywateli_Makowski.pdf), accessed: 23 September 2019.

must be reconstructed and reinforced. Consideration should be given to the possibility of creating new safeguards to prevent the excessive concentration of power; for example, by incorporating them in the electoral system and regulations concerning operation of political parties – strengthening their internal democracy, pluralism and accountability. The judiciary's independence from the executive and legislature must be strengthened, since only balance between the main branches of public power guarantees them mutual responsibility. It is also essential to abandon the partisan model of the public prosecutor's office; without this, it is impossible to hold those guilty of abuses of power to account, especially in cases of corruption crimes. Finally, there must be a return to the path of reforming and building a professional public administration, and especially civil service. Without this, the administration will become even more characterised by party ties and nomenklatura concerns, resulting in even greater administrative corruption.

Without changes in the most important segments in the state system, particularism will increase, the field of corruption crime will expand and inequalities will grow, including in access to fundamental public goods. For instance, it is not hard to imagine EU funds being distributed on the basis not of merit or public needs, but of political clientelism. If this happens, the effects will also be felt by average citizens, the inhabitants of specific towns and regions. The reality of this scenario is made clear by the experiences not only of developing countries, but also of relatively well-developed EU member states – Czechia, Hungary and Greece. There, systemic grand corruption has managed to take root, bringing about a political and economic crisis and growing social inequalities. Finally, we should also stress that these institutional changes will not happen on their own. To implement them, people who believe in certain values and are capable of first initiating and then sustaining and upholding them are needed.

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