

**Key:** SN – Supreme Court, SA – Appellate Court, SO – Circuit Court, SR – District Court, NSA – Supreme Administrative Court, KRS – National Council of the Judiciary of Poland, PPSN – First President of the Supreme Court, PNSA – President of the Supreme Administrative Court, SSA – Appellate Court judge, SSO – Circuit Court judge, SSR – District Court judge, SNSA – Supreme Administrative Court judge, SSN – Supreme Court judge, WSA – Provincial Administrative Court

NATIONAL COUNCIL OF THE JUDICIARY (KRS)			
No.		BEFORE THE REFORM: <sup>1</sup>	AFTER THE REFORM <sup>2</sup> – MAJOR CHANGES
1.	<b>Tasks:</b> <i>[no changes to the "definition" of the institution]</i>	The KRS is a body appointed to <b>guard the independence of courts and judges</b> . The most important tasks of the KRS are to recommend judge candidates to the President of the Republic of Poland and to recommend judges to be promoted to higher-level courts. Legal ground: Constitution and the KRS Act.	The KRS is a body appointed to <b>guard the independence of courts and judges</b> . The most important tasks of the KRS are to recommend judge candidates to the President of the Republic of Poland and to recommend judges to be promoted to higher-level courts. Legal ground: Constitution and the KRS Act (as amended).
2.	<b>Historical context:</b> <i>[material changes]</i>	The historical aspect is of significance. The first KRS was appointed in 1989 and it comprised judges of common courts, for which they were appointed by the communist Council of State. The subsequent operation of the KRS was based on a <b>corporate intra-group model of the election of KRS members</b> , which made it hard, or even impossible, for years to hold the judges involved in Communism accountable and to introduce any serious reforms of the justice system.	Abandonment of such a model.
3.	<b>Election of members:</b> <i>[material changes]</i>	<b>15 out of the 25 KRS members</b> were elected [+ 2 judges default judges stipulated in the Constitution, i.e. the First President of the Supreme Court and the President of the Supreme Administrative Court] by: <ul style="list-style-type: none"> <li>✓ judges only, in a long, multi-stage procedure, without the participation of any external factor;</li> <li>✓ as a result, the Council was dominated by top-level judges and those who were presidents of courts and of court divisions.</li> </ul>	<b>17 out of the 25 KRS members</b> are [including: the First President of the Supreme Court and the President of the Supreme Administrative Court]: <ul style="list-style-type: none"> <li>✓ independent, non-dismissible judges (they retain a majority of over 2/3 votes – a guarantee that is secured in the Constitution of Poland).</li> </ul>

<sup>1</sup> The need to reform the KRS was also noticed by lawyers. In 2004, changes were proposed by Professor **Andrzej Rzepliński**, who became the President of the Constitutional Tribunal in 2016 (though he has recently been highly critical of the amendments to the statutes regulating the justice system). A. Rzepliński, *Żeby sędziom chciało się chcieć* [If only judges made the effort], *Gazeta Wyborcza*, 6 February 2004, cit.: “For KRS to cease to be substantially a kind of state trade union preserving interests that are bad for the Polish justice system, it must include, as its members, representatives of other legal professions, such as attorneys, notaries, prosecutors and learned lawyers. A bad judge can spoil a good law.” A. Rzepliński, *Żeby sędziom chciało się chcieć* [If only judges made the effort], *Gazeta Wyborcza*, 6 February 2004, <http://docplayer.pl/6485285-Zeby-siesedziom-chcialo-chciec.html> [access: 28/01/2020].

<sup>2</sup> Polish laws after the reform are the closest to Spanish solutions, where judges are also in the majority on the judicial council (in Spain the majority is 13 to 8; in Poland it is **17** (i.e. all the “elected” judges and the 2 “default” judges (First President of the Supreme Court, President of the Supreme Administrative Court) to **8**), and that are also elected by the parliament, for a joint term, by a majority of % of votes.

4.	<p><b>Election process (description):</b></p> <p>[material changes]</p>	<ul style="list-style-type: none"> <li>✓ The process used to favour higher-level judges and “functional” judges:</li> <li>✓ The KRS members who were judges used to be elected in a complicated multi-stage non-transparent process:</li> </ul> <ol style="list-style-type: none"> <li>I. In the first step, general assemblies of Circuit Court judges elected their representatives, who created another assembly, and they elected 8 KRS members from the members of that assembly.</li> <li>II. Concurrently Appellate Courts appointed their respective delegates, and then an assembly of such delegates elected the next two KRS members. Judges of Provincial Administrative Courts also elected their delegates to create one joint assembly together with Supreme Administrative Court judges in order to appoint the next two members.</li> <li>III. The last two KRS members were elected by the General Assembly of Supreme Court Judges.</li> </ol> <p><b>[Conclusion]</b> That process in fact excluded a large group of judges, especially from District Courts, and they are the largest group of judges in the Polish judicial system.</p>	<p><b>Election exclusively from among candidates who first received the support of: at least 25 other judges or 2,000 citizens.</b></p> <p>“Line” judges (especially those from lower-level courts) were given an actual opportunity to co-shape the composition of the KRS – a power that used to be illusory only.</p> <p><b>[Conclusion]</b> Every judge who receives the above support has an opportunity to effectively run for KRS / initiate the election process. The procedure was simplified.</p>
5.	<p><b>Composition (in general):</b></p> <p>[material changes]</p>	<p>KRS used to be dominated by judges:</p> <ul style="list-style-type: none"> <li>✓ of the highest-level courts;</li> <li>✓ functional judges, i.e. ones that held the functions of presidents of courts and of court divisions.</li> </ul>	<p>The KRS consists of:</p> <ul style="list-style-type: none"> <li>✓ representatives of courts of all levels’;</li> <li>✓ no legal (statutory) preferences for judges of the highest-level courts (Supreme Court, Appellate Court, Circuit Court, Supreme Administrative Court);</li> </ul>

			<ul style="list-style-type: none"> <li>✓ no legal (statutory) preferences for “functional” judges;</li> <li>✓</li> </ul>
6.	<p>Statistical analysis (elected judges):<sup>3</sup></p> <p>[material changes]</p>	<p><b>[Quantitative analysis]:</b></p> <ol style="list-style-type: none"> <li>1) 2 judges out of 15 from: Supreme Court (13.33% of KRS judges are Supreme Court judges);</li> <li>2) 3 judges out of 15 from: Supreme Administrative Court (20% of KRS judges are Supreme Administrative Court judges);</li> <li>3) 3 judges out of 15 from: Appellate Court (20% of KRS judges are Appellate Court judges);</li> <li>4) 6 judges out of 15 from: Circuit Court (40% of KRS judges are Circuit Court judges);</li> <li>5) <b>1 judge out of 15: from District Court (6.66% of KRS judges are District Court judges).</b><sup>4</sup></li> </ol>	<p><b>[Quantitative analysis]:</b></p> <ol style="list-style-type: none"> <li>1) 0 out of 15 judges from: Supreme Court (0%).</li> <li>2) 0 judges out of 15 from: Supreme Administrative Court (0%).</li> <li>3) 0 judges out of 15 from: Appellate Court (0%).</li> <li>4) 1 judge out of 15 from: Provincial Administrative Court (6.66%).</li> <li>5) 2 judges out of 15 from: Circuit Court (13.33%).</li> <li>6) 12 judges out of 15 from: District Court (80%).</li> </ol>
7.	<p>Comparison:</p> <p>[material changes]</p>	<p>Headcount – active judges (data after: 2016 GUS – Polish Central Statistical Office):</p> <ol style="list-style-type: none"> <li>1) Supreme Court (1) – 83 (people).</li> <li>2) Supreme Administrative Court (1) – 110.</li> <li>3) Provincial Administrative Court (16) – 504.</li> <li>4) Appellate Court (11) – 475.</li> </ol>	<p>Headcount – active judges (data after: 2018 GUS – Polish Central Statistical Office):</p> <ol style="list-style-type: none"> <li>1) Supreme Court (1) – 110 (people).</li> <li>2) Supreme Administrative Court (1) – 104.</li> <li>3) Provincial Administrative Court (16) – 475.</li> <li>4) Administrative Court (11) – 426.</li> </ol>

<sup>3</sup> All the quoted statistical data: own compilation based on valid official sources: Statistical Yearbooks of GUS (Polish Central Statistical Office) for 2017–2019; statistical data: IWS (Polish Justice Institute).

<sup>4</sup> For almost 30 years of the functioning of KRS, it had only 4 such members (District Court judges), even though District Courts hear almost 95% of cases in Poland. This problem was brought up by District Court and Circuit Court judges as early as in 2014. They adopted a resolution where they claimed that the mechanism was in violation of democratic standards and they required its verification against the Constitution of Poland. Resolution No. 4 of the Meeting of Representatives of General Assemblies of Circuit Court Judges on the regulations governing the KRS election of 26 February 2014. “The Meeting of Representatives of General Assemblies of Circuit Court Judges would like to point out that the multi-stage KRS election process is non-democratic and class-based as it applies a qualification in the form of job title. (...) common court judges, who have been listed in the cited regulation as one group, were divided into two categories for no valid reason. Such division **favours especially Appellate Court judges, which group, consisting of about 500 judges**, has two representatives, while Circuit Court and District Court judges, whose total number is about 9,000, have 8 representatives. In the meantime, no division was introduced for administrative and military court judges, which also have higher and lower courts. Such regulations can divide judges, and they do. And so we wish to express doubt whether Article 11(3) and 11(4) and Article 13(1) through 13(3) of 12 May 2011 of the Polish KRS Act is consistent with Article 187(1)(2) of the Constitution of Poland, wherefore it is to serve in a way as secondary legislation. The Meeting of Representatives expects the KRS to file a motion to have the above regulations reviewed for their conformity with the Constitution.” (author’s own underlining). Source: [https://www.premier.gov.pl/files/files/biala\\_ksiega\\_pl\\_full.pdf](https://www.premier.gov.pl/files/files/biala_ksiega_pl_full.pdf) [access: 28 January 2020].

		<p>5) Circuit Court (45) – 2m759. 6) District Court (318) – 6,633.</p> <p>Total: <b>10,564</b> active judges of all levels, including:  <b>674</b> active judges of special courts (Supreme Court, Supreme Administrative Court, Provincial Administrative Court);  <b>9,890</b> active judges of common courts (District Court, Circuit Court, Administrative Court);</p> <p>Proportions: <b>93.62%</b> are active common court judges;  <b>6.38%</b> are: other active judges.</p> <p>Common court judges (100% – 9,890):  <b>67.11%</b> are active District Court judges (without Assessors).  <b>27.19%</b> are active Circuit Court judges;  <b>4.79%</b> are active Administrative Court judges.</p> <p>Ratio of District Court judges to all judges (common courts + special courts):  <b>62.79% are District Court judges.</b></p>	<p>5) Circuit Court (45) – 2,515. 6) District Court (318)<sup>5</sup> – 6,356 (+302 Assessors).</p> <p>Total: <b>9,986</b> active judges of all levels, including:  <b>689</b> active judges of special courts (Supreme Court, Supreme Administrative Court, Provincial Administrative Court);  <b>9,297</b> active judges of common courts (District Court, Circuit Court, Administrative Court);  (+ 302 Assessors)</p> <p>Proportions: <b>93.10%</b> are active District Court judges (without Assessors);  <b>6.90%</b> are: other active judges.</p> <p>Common court judges (100% – 9,297):  <b>68.37%</b> are active District Court judges (without Assessors);  <b>25.19%</b> are active Circuit Court judges;  <b>4.58%</b> are active Administrative Court judges.</p> <p>Ratio of District Court judges to all judges (common courts + special courts):  <b>63.65% are District Court judges.</b></p>
8.	<p>Conclusion from static analyses:</p> <p>[material changes]</p>	<p>The representation of District Court judges on the KRS used to be only 6.66%, while: 62.79% of all judges were District Court judges.</p> <p><b>93.34%</b> of KRS members were high-level judges (from the Supreme Court, Supreme Administrative Court, Appellate Court, Circuit Court).</p>	<p>The representation of District Court judges on the KRS is 80%, where: 63.65% of all judges were District Court judges.</p> <p><b>20%</b> of the current KRS members are high-level judges (from the Provincial Administrative Court, Circuit Court).</p>

<sup>5</sup> Data (number of courts of particular levels) for 2017.

9.	<p>Who has majority on the KRS (professional group):</p> <p>[changes]</p>	<p>Judges</p> <p>Even though the KRS consisted primarily of judges elected by other judges, undesired phenomena developed in the KRS (and indirectly in the whole justice system), such as: nepotism, focusing on one’s own interests at the expense of the interest of the citizens, unjustified protection of members from the same group, which built a social image of the KRS as a closed extraordinary professional corporation that does not serve the society but feels above it.<sup>6</sup></p>	<p>Judges</p> <p>Judges have the same majority on the KRS as they used to have – this arises directly from the Constitution of Poland.</p>
10.	<p>Who is the main participant of the KRS election process (professional group):</p> <p>[no changes]</p>	<p>Judges</p>	<p>Judges</p> <p>Judges also retain material input in the election process – KRS members will be elected exclusively from among candidates who first received the support of at least 25 other judges or 2,000 citizens.</p>
11.	<p>Which judges (from what levels) have the actual majority on the KRS?</p> <p>[material changes]</p>	<p><b>Higher-level judges, “functional” judges.</b> The participation of lower-level judges (District Courts) is <b>symbolic and illusory</b>, whereas the majority of judges in Poland are judges of the lowest-level courts (District Court judges).</p> <p>The number of District Courts in Poland is much higher than of higher-level courts, i.e. Circuit Courts and Appellate Courts.</p>	<p>No dependence from and preferential treatment for “higher-level” judges or “functional judges.” Actual participation of the largest group of judges (i.e. District Court judges) in the works of the KRS.</p> <p><b>KRS representation system: in principle proportionate to the representation of District Court judges</b> (District Courts) when compared to the remaining judges (from Circuit Courts, Appellate Courts).</p>

<sup>6</sup> Such risk, which arises wherever judicial councils are excessively dominated by judges, have been mentioned by international institutions – **including the Venice Commission** – on numerous occasions. Venice Commission Report of 16–17 March 2007 on judicial appointments. A balance needs to be struck between judicial independence and self-administration on the one side and the necessary accountability of the judiciary on the other side in order to avoid negative effects of corporatism within the judiciary. In this context, it is necessary to ensure that disciplinary procedures against judges are carried out effectively and are not marred by undue peer restraint. One way to achieve this goal is to establish a judicial council with a balanced composition of its members.” As cited in: [https://www.premier.gov.pl/files/files/biala\\_ksiega\\_pl\\_full.pdf](https://www.premier.gov.pl/files/files/biala_ksiega_pl_full.pdf) , p. 61 [access: 28 January 2020].

		<p><b>KRS representation system:</b> <b>inversely proportionate to the representation</b> of District Court judges (District Courts) when compared to the remaining courts.</p> <p><b>Nature of the KRS:</b> elite, limited to “higher-level” judges and “functional judges”.</p>	<p><b>Nature of the KRS:</b> in principle, proportionate shares of particular groups of judges from courts of particular levels, more democratic<sup>7</sup> KRS elections: judges from courts of various types and levels are represented.</p>
12.	<p>Election mechanism:</p> <p>[material changes]</p>	<p>Election:</p> <ul style="list-style-type: none"> <li>✓ used to leave out the lowest-level judges;</li> <li>✓ not for a joint but for an individual term of office, in violation of the Constitution.</li> </ul>	<p>The 15 KRS judges will be elected by the lower chamber of the parliament (Sejm):</p> <ul style="list-style-type: none"> <li>✓ exclusively from among judges; every candidate needs to receive support of at least 25 other judges or a group of 2,000 citizens;</li> <li>✓ the Act also ensures that at least 40% of the judges elected from the KRS come from among the candidates designated by the opposition.<sup>8</sup></li> </ul>
13.	<p>Candidates (term of office):</p> <p>[material changes]</p>		<p>Candidates:</p> <ul style="list-style-type: none"> <li>✓ are appointed for a <b>joint</b> term of 4 years;</li> <li>✓ cannot be dismissed;</li> <li>✓ the Act guarantees independence (once candidates are elected for the KRS, there is no mechanism for the Sejm to put pressure on KRS members).</li> </ul>
14.	<p>Nature of the term of office:</p> <p>[material changes]</p>	<p><b>Individual terms</b> of office of 11 out of 15 KRS members, found to be in violation of the Constitution of Poland.<sup>9</sup></p>	<p><b>Joint term of office</b></p>

<sup>7</sup> **Democratisation of the KRS is necessary** to ensure a certain influence of the society (through the lower chamber of the parliament) on the staffing of the judicial system – but this influence ends once a judge is appointed and receives the guarantees of independence arising from the Constitution and from statutes. As cited in: [https://www.premier.gov.pl/files/files/biala\\_ksiega\\_pl\\_full.pdf](https://www.premier.gov.pl/files/files/biala_ksiega_pl_full.pdf) [access: 28 January 2020].

<sup>8</sup> To ensure proper representation also for candidates of the opposition, the majority of votes is %, and every parliamentary club has a guarantee that at least one of the candidates they supported will be elected. In the current shape of the Polish Sejm, this means that the clubs from the parliamentary opposition have a guarantee **that at least 6 candidates supported by them will be chosen**.

<sup>9</sup> Those regulations were found to be in violation of the Constitution by the Constitutional Tribunal, which determined that the practice of individual terms of office of KRS members was unconstitutional as the Constitution required one joint term of office for all. Namely, the Constitutional Tribunal stated that the challenged regulations violated the Constitution with their unequal treatment of District Court and Circuit Court judges versus Appellate Court judges as well as District Court judges versus Circuit Court judges. **Judgement of the Constitutional Tribunal of 20 June 2017, case no. K 5/17.**

15.	Duration of the term (Constitution): [no changes – Constitution of the Republic of Poland]	4 years	4 years
16.	Independence of KRS judges: [material changes]	[ <b>Problematic</b> ]: Under the Constitution and statutes, judges are independent from other state institutions but the possibility of dismissing them from their office in fact considerably limits that independence (e.g. economic pressure – loss of office / compensation).	[ <b>Stronger than before</b> ]: <sup>10</sup> Under the Constitution and statutes, judges are independent from other state institutions. <b>Non-dismissible</b> before the end of the KRS term (once elected, they cannot be dismissed by anyone). As politicians have no influence over the KRS, there is no mechanism of putting political pressure on the KRS’s decisions as regards judge recommendations for common courts or for the Supreme Court or on the judgements subsequently entered by such judges.  The independence of elected KRS members stems from the fact that they <u>cannot be dismissed from office</u> .

<sup>10</sup> The influence of the legislative and executive authorities on the judge election process is much smaller in Poland than in many other European Union countries with established democratic traditions. Their equivalents of the KRS consist mainly of people who are not judges but are representatives of other authorities or legal professions. In Denmark, the 11-member council has 5 judges, in France there are 7 of them versus the total 22 members, and in Portugal – 8 versus 1,746. In the Netherlands, the current division is 2–2 but the law permits a 3–2 majority for non-judges. As a result, judges in those countries are not the only ones to decide about appointments and promotions and nobody accuses them of breaking the rule of law... As cited in: [https://www.premier.gov.pl/files/files/biala\\_ksiega\\_pl\\_full.pdf](https://www.premier.gov.pl/files/files/biala_ksiega_pl_full.pdf), p. 67 [access: 28 January 2020].