Appointment of judges to the Norwegian Supreme Court

Safeguarding judicial independence in light of recent political attacks on the Polish judiciary

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Table of contents

1. Introduction

1.1. Research topic

In September 2020, the Norwegian Commission of the Courts delivered a report to the Ministry of Justice concerning the independence of Norwegian courts.[1] It emphasised that Norwegian courts enjoy significant independence, but simultaneously warned against tendencies in various European countries where elected bodies undermine judicial independence through reforms. In Poland, extensive statutory safeguards of judicial independence provided very limited protection against efforts by the ruling party to seize control of the courts. The consequent debates about judicial reform and ongoing article 7-proceedings against Poland illustrate that judicial independence has renewed actuality.[2]

This thesis will examine a factor of great importance for judicial independence, namely appointment of judges, and assess to what degree the report's suggested changes are necessary and sufficient for safeguarding judicial independence in changing societal circumstances. The choice of appointment mechanism varies greatly across jurisdictions, and there seems to be no clear consensus on which is most successful in securing independent courts.[3] The situation in Poland demonstrate that judicial independence is fragile against political attacks if the appointment procedure does not sufficiently balance independence with other core values, especially democratic legitimacy. The delicate balancing act necessary for judicial independence to remain resilient during political turmoil will be a recurrent issue throughout the thesis.

The focus of the research is how various government branches and external bodies are involved in the selection of appointees and formal appointment. Understanding this mechanism will require an analysis of current legal norms and the considerations on which the choice of selection mechanism is founded. A comparative approach will then be applied with the objective of understanding the significance context has on appointment procedure and, consequently, judicial independence in a legal culture. Comparative studies of Norwegian law often discuss other Nordic countries due to similar traditions, but I find that comparing one's

[1] NOU 2020: 11.
[2] European Commission (2017); European Parliament (2020a); European Parliament (2020b).
[3] See Akkas (2004).

own jurisdiction to one very different in many respects makes for interesting observations and insights. Poland is currently triggering debates all over Europe due to rather rapid backsliding of the rule of law and judicial independence, occurring in real-time. The new Courts Commission report on reform is at least partly a product of these circumstances,[4] and Poland is therefore, in my opinion, an especially interesting and relevant object of comparison.

1.2. Terminology

1.2.1. Judicial Independence

The overarching research theme relates to the effect of appointment procedures on judicial independence. Judicial independence is considered a cornerstone of the rule of law and the right to an independent tribunal, enshrined in supranational instruments such as the European Convention on Human Rights. Independence involves "the ability of individual judges and the judiciary as a whole to perform their duties free of influence or control by other actors",[5] and the focus will be the collective independence of the institutions in the judiciary. In this context, independence provides a certain level of autonomy in daily operations, freedom from instruction prior to a judgment and from sanctions afterwards.[6] The independence or impartiality of the individual judge from parties and other judges falls outside the scope of this thesis.

Judicial independence is built on the principle of a separation of powers. It is widely held that in order for the judiciary to be independent, there ought to be a distinction between the powers attributed to the judiciary, the executive and the legislative branches.[7] Such a separation in its modern form is more accurately described as a system of checks and balances rather than absolute separation, which is neither possible in its pure form nor necessarily desirable.[8] These checks and balances can be viewed as shields and swords used by each branch of government in the inevitable tension between these powers, as tools for necessary intervention and

[4] NOU 2020: 11 at 2.2, p. 212 mentions Poland specifically.
[5] Swart (2019) para. 7.
[6] See Möllers (2019) p. 237.
[7] Shetreet (2012) p. 51.
[8] Barber (2013).

protection.[9] This requires that core principles be secured in a constitutional and legislative framework.

A distinction should be made between *de facto* and *de jure* judicial independence. According to Ríos-Figueroa and Staton, *de jure* judicial independence describes "formal rules designed to insulate judges from undue pressure, either from outside the judiciary or from within".[10] Such rules relate to how judicial appointments are organised in formal legal sources. The concept of *de facto* independence is "behavioral" and refers to autonomy in adjudication and that "decisions are enforced in practice".[11] When these concepts are identified as separate, increasing *de jure* independence through legislative measures does not necessarily cause an equivalent rise in *de jure* independence. As will be demonstrated, these might even be negatively correlated in certain contexts.

1.2.2. Democratic legitimacy

Judicial independence does not necessarily go hand in hand with total autonomy of the judiciary. Autonomy and self-regulation could even be contrary to certain principles of democracy. Two core values commonly cited as necessary modifications are democratic legitimacy and accountability. Accountability demands that "the judiciary as a whole maintain some level of responsiveness to society, as well as a high level of professionalism and quality on the part of its members".[12] However, the most important in the context of Norwegian appointments is democratic legitimacy, which is legitimacy derived from the democratic principles of governance. Democratic legitimacy is strongest when judicial appointments are conferred on democratically elected bodies, whose members represent the public.

The Norwegian parliamentary form of government requires accountability to Parliament.[13] Judicial self-governance[14] thus reduces democratic legitimacy, as it allows the judiciary to run its own affairs without restriction by the democratically elected branches.[15] When the judiciary has the power to review legislation and executive actions, legitimacy demands that the other

[9] Ibid.
[10] Rios-Figueroa and Staton (2012) pp. 106-107.
[11] Ibid. p. 107.
[12] Garoupa and Ginsburg (2008) p. 57.
[13] Art. 15 of the Norwegian Constitution.
[14] I use "self-governance" in a broad sense, see Kosař (2018).
[15] NOU 1999: 19 at 7.5.1.1 emphasises the need for democratic control in appointments.

branches can influence judicial selection.[16] But full control by the politically elected branches is not desirable, as it risks political influence over judicial functions. A certain counterbalance by judicial independence is therefore required to ensure that the courts adjudicate legal disputes autonomously.[17]

1.2.3. Appointment procedure

Judicial appointment procedures are amongst the most important statutory tools for improving judicial independence.[18] An assessment of the Norwegian procedure requires addressing the role of the state branch with formal decisive authority over judicial appointments, but also the independence of the body that selects and recommends candidates to judicial positions. When such a body appears non-independent, it casts doubt on the independence of the judges appointed by this authority.[19] This body's composition, member selection, representation of judges and amount of actual influence on the final appointment will therefore also be examined in some depth. Administrative authority is briefly discussed, but promotions and discipline will not be addressed.

Judicial independence is difficult to measure empirically, and comparative research on appointments therefore discuss the merit of various procedures' impact on independence on a theoretical level.[20] Appointment procedures vary greatly between jurisdictions, depending on the chosen balance between judicial independence and democratic legitimacy. Judicial self-governance and autonomy arguably provide maximum *de jure* judicial independence. This enables courts to exercise more effective checks and balances, especially in a parliamentary system where government and Parliament are closely connected (such as when the ruling party has legislative majority). The drawback is that wide-ranging autonomy risks isolation, cronyism and lack of democratic legitimacy.

On the other end of the spectrum is appointments that are political, exercised either by the executive or legislative branch or both in combination. Such a system maximizes democratic control and legitimacy but risks politically influencing judges in their decision-making. In

[16] Shetreet (2012) pp. 47-48.
[17] NOU 1999: 19 chapter 5.
[18] Melton and Ginsburg (2014).
[19] The Committee of Ministers of the Council of Europe (2010), Recommendation CM/Rec(2010)12; *A.K. and Others v. Sąd Najwyższy* [GC] C-585/18, C-624/18 and C-625/18 para. 137.
[20] See Garoupa and Ginsburg (2009); Rios-Figueroa and Staton (2012); Jackson (2012).

between these polar extremes exist a variety of selection mechanisms, with an increasing tendency towards separating appointment of judges from political branches.[21] Changes to judicial selection tend to "reflect a dialectic tension between the need to de-politicize the judiciary and the trend toward judicializing politics".[22] A popular solution is different variations of judicial councils,[23] aimed at avoiding both polar extremes. How the procedure is designed in Norway and Poland will be the topic of chapters 2 and 3, respectively.

1.2.4. Prerogative

Both Norwegian and Polish scholars refer to appointment power in their country as a prerogative. In a modern Parliamentary context, the term 'prerogative' refers to a power bestowed on the head of state that does not require Parliamentary approval.[24] Prerogatives therefore reference the constitutionally provided power of the Norwegian and Polish head of the executive branch. Norway is a Parliamentary constitutional monarchy, which means the power is conferred on the King in Council, exercised by the Government and symbolically signed by the Monarch. [25] Poland is a semi-presidential constitutional republic with a president and a prime minister.[26] Judicial appointments being a constitutionally provided prerogative for the President therefore mean that appointments do not require approval from the Prime Minister or Parliament. Despite appearing similarly regulated in the two constitutions, widely different interpretation of the extent of the prerogative reveals large practical differences between the two countries' judicial appointments.

1.3. Methodology

1.3.1. Comparative methodology

In chapter 4, I will address at the Norwegian appointment procedure in light of a few selected features of the Polish appointment procedure. Using Polish appointments as reference point requires a comparative approach and method that establishes a common frame of reference. The scope of the thesis does not allow for a discussion on the merits of various comparative

[21] Seibert-Fohr (2012) p. 11.
[22] Garoupa and Ginsburg (2008) p. 61.
[23] Ibid. p. 3, estimating that 60 % of countries have such councils. See also Garoupa and Ginsburg (2009).
[24] Bradbury (2018).
[25] See Art. 15 of the Norwegian Constitution.
[26] McMenamin (2008); Sadurski (2019a) p. 45 ff.

approaches, so recognising functionalism as an apt starting point for a comparative study of appointments will have to be sufficient.[27]

The functional comparative method is based on the premise that legal systems face similar problems, for which different measures are applied.[28] In order to analyse and compare two legal systems, it is necessary to formulate a problem based on function, present how the problem is solved and assess various similarities and differences. In this research, the problem is how appointment of judges to the court of final instance of the ordinary courts is solved in Norway and Poland. The objects of comparison are institutions with comparable roles in judicial selection according to constitutional and statutory provisions. This means that the focus will be the branches of government and the composition, selection and influence of bodies with similar functions in selection of appointees. The latter requires looking at the Norwegian Judicial Appointments Board, to some extent the Norwegian Courts Administration and the Polish National Council of the Judiciary, whose role functionally overlap the two Norwegian bodies in certain areas. Furthermore, the functional analysis must examine the extent of the executive discretion vis-à-vis the external bodies.

A purely functional approach certainly has its limitations. Rules that on surface-level appear similar may have quite different functions, which is why comparative law increasingly recognises the significance of legal culture as a context.[29] A legal cultural approach recognises that a legal system and its laws does not operate in a vacuum, but that external "socio-historical, sociological, cultural and historical frameworks" influence reception of law.[30] I will therefore complement the analysis with a legal cultural perspective, which requires identifying and comparing functionally equivalent cultural criteria.[31] Sunde describes legal culture as "ideas of and expectations to law made operational by institutional(-like) practices".[32] His model (LCM) differentiates between a legal culture's institutional structure (conflict resolution and norm production) and intellectual structure (ideals of justice, legal method, degree of professionalisation and character of internationalisation), and thus allows comparison of equivalent elements of legal culture.[33] My intention is to apply the factors that researchers has

[27] See Koch (2020) p. 48 ff with further references; Zweigert and Kötz (1998).
[28] Zweigert and Kötz (1998) chapter A no. 3.
[29] In this direction Nelken (2014); Husa (2018); Koch (2020); Sunde (2020).
[30] See also Husa (2018).
[31] See Koch (2020) p. 51.
[32] Sunde (2020) p. 27.
[33] Ibid. p. 38.

identified as crucial to the Polish crisis to the LCM, with the objective of better understanding the interplay between judicial selection mechanisms and legal cultural context in order to assess whether proposed changes to the Norwegian procedure is necessary and sufficient.

1.3.2. European Framework

Both Norway and Poland have obligations to supranational bodies and international instruments. Especially important in this regard is the right to independent courts enshrined in article 6 ECHR and article 47 in the EU Charter on Fundamental Rights. Additionally, there are several soft law legal instruments that have influenced European countries. For the purpose of this research, a brief account of the obligations to the ECHR, the EU and recommendations by the Council of Europe will have to suffice.

Norway and Poland have ratified the ECHR, [34] which makes it binding on the same level as national statutes. The right to an "independent (…) tribunal" is codified in article 6, and according to case law by the ECtHR, a tribunal's independence depend partly on "the manner of appointment of its members".[35] Assessment of the "existence of procedural safeguards" is done on a case-by-case basis, as the court is reluctant to prescribe any "theoretical constitutional concepts regarding the permissible limits of the powers' interaction".[36] Generally, the court finds it acceptable that the executive has authority over selection of judges provided that "appointees are free from influence or pressure when carrying out their adjudicatory role".[37]

Furthermore, European Union law is relevant for both countries. The EU requires its members to ensure judicial independence,[38] but rather than prescribe standards it applies an appearance of independence-test.[39] This is binding on Poland, as the principles of direct applicability and primacy of EU-law has been codified in the Polish Constitution.[40] Norway is a signatory to the

[34] See the Human Rights Act section 2 and Art. 9 of the Polish Constitution, respectively.
[35] *Ramos Nunes de Carvalho e Sá v. Portugal* [GC] 2018, nos. 55391/13, 57728/13 and 74041/13 para. 144.
[36] *Kleyn and Others v. the Netherlands* [GC] 2003, nos. 39343/98, 39651/98, 43147/98 and 46664/99 para. 193.
[37] *Flux v. Moldova (no. 2)* [J] 2007, no. 31001/03 para. 27.
[38] Article 19 TEU and Article 47 of the EU-charter; Judgment C-216/18 PPU para. 66.
[39] *A.K. and Others v. Sąd Najwyższy* [GC] C-585/18, C-624/18 and C-625/18.
[40] Art. 91 paras. 1, 2 and 3 of the Norwegian Constitution.

EEA-agreement, [41] which does not include article 19 TEU or the EU Charter of Fundamental Rights Article 47.[42]

Both Norway and Poland are members of the Council of Europe.[43] It recommends primarily that an independent authority, half of which consisting of "judges chosen by their peers", appoints judges.[44] When appointments are conferred on the executive branch, an independent body (preferably a judicial council) comprised "in substantial part" from the judiciary should make recommendations that the executive in practice ought to follow.[45] The European Commission for Democracy through Law (the Venice Commission), an advisory body on constitutional matters for the Council of Europe, has developed guidelines for judicial appointments.[46] Although its opinions have no legally binding force, they are commonly followed and referred to by various European institutions.[47] The VC recommends conferring "decisive influence" of appointments on the independent judicial council,[48] because this will insulate the judiciary from undue pressure from the executive and legislative branches.[49] The judicial council's composition should be pluralistic with "a substantial part, if not the majority, of members being judges".[50] The discussion of both the Norwegian and the Polish appointment procedure will therefore have to be examined in light of obligations and expectations from these organisations and institutions.

1.3.3. Sources of Norwegian law

Relevant sources for this thesis are the Norwegian Constitution, ordinary statutes including incorporated international law (*lover*),[51] preparatory works (*forarbeider*), administrative practice (*andre myndigheters praksis*), soft law recommendations, literature by legal science

[41] The EEA Agreement Art. 1 (2), 3 and 7, cf. the EEA Act.
[42] Bårdsen (2015) para. 21.
[43] List of members available at: <https://www.coe.int/en/web/portal/47-members-states> accessed 25 November 2020.
[44] The Committee of Ministers of the Council of Europe (2010), Recommendation CM/Rec(2010)12 para. 46.
[45] Ibid. para. 47.
[46] European Commission For Democracy Through Law (Venice Commission) (2010), Report CDL-AD(2010)004-e; Ibid. (2007), Report CDL-AD(2007)028-e.
[47] Helgesen (2014) p. 107.
[48] European Commission For Democracy Through Law (Venice Commission) (2007), Report CDL-AD(2007)028-e para. 49.
[49] Ibid. (1999), Opinion CDL-INF(1999)005-e para. 28.
[50] Ibid. (2010), Report CDL-AD(2010)004-e para. 32.
[51] Art. 76-79 of the Norwegian Constitution.

and considerations or value-based assessments (*reelle hensyn*).[52] Case law by the Supreme Court (*høyesterettsrettspraksis*) is a source of significant weight,[53] but I did not come across any Supreme Court cases directly relevant for judicial appointments.

A general principle of Norwegian legal method is that sources are not formally ranked hierarchically but balanced against one another and weighted following certain principles of weight.[54] However, the Constitution and Acts of Parliament are natural starting points due to their democratic legitimacy. Furthermore, written norms such as the Constitution, statutes and administrative regulations internally follow rules of competence.[55] In this hierarchy, the Norwegian Constitution is *lex superior* to other sources. Both constitutional provisions and ordinary statutes are often fragmentary and formulated in short and abstract terms, with details concerning organisation commonly addressed in administrative regulations.[56] Statutes are also complemented by preparatory works, intended to have approximately the same function as commentaries on legislation in other European countries.[57] These documents contain discussions and explanations by expert commissions and representatives from ministries and Parliamentary committees, and therefore have a certain degree of democratic legitimacy.[58] This research will therefore extensively reference preparatory works when discussing current and proposed legislation. Administrative practice, legal science and important considerations will also be referenced where applicable. Their weight as legal argument bases depend on how convincing they are balanced against other sources, which usually limit their role to supporting arguments and interpretative factors.[59]

1.3.4. Sources of Polish law

The functional comparative approach requires application of legal sources that are comparable in function.[60] Poland have certain categories of relevant argument bases that resemble that of Norway. These are defined in the Polish Constitution's third chapter, which provides that the

[52] For an overview over legal argument bases, see Kjølstad, Koch and Sunde (2020) pp. 126-135; Helland and Koch (2014) p. 120 ff.
[53] No principle of *stare desisis* exists, but precedent has a great deal of weight. See Kjølstad, Koch and Sunde (2020) pp. 119-121 with further references.
[54] Ibid. pp. 126-135; Helland and Koch (2014) p. 108 ff.
[55] See Helland and Koch (2014) p. 108 ff; Kjølstad, Koch and Sunde (2020) p. 131-132 with further references.
[56] Kjølstad, Koch and Sunde (2020) p. 118.
[57] Ibid.; Schei p. 10 ff.
[58] Helland and Koch (2014) pp. 121-123.
[59] Ibid. pp. 125-127.
[60] For a comparative approach to legal method, see Henninger (2014).

Constitution, statutes, ratified international agreements and regulations are relevant sources of law.[61] It is therefore mainly law as set by the legislator that is considered binding, and the internal ranking resembles the Norwegian.[62] The application of sources has legal positivism as the guiding principle,[63] implying that formal law is intended to be interpreted using grammatical interpretation. Case law is not a formally binding source,[64] but will be referenced to illustrate that the Supreme Court has expressed an opinion. Unlike Norwegian law, the use of preparatory works in interpretation of legislation is uncommon in Poland.[65] It is more common for courts to reference opinions of legal scholars and I therefore consider it appropriate to rely on the interpretation by Polish scholars where applicable.

Naturally, a large portion of legal sources on Polish law is in Polish. This language barrier will be dealt with using English versions of documents published by the Polish institutions where available. Where references are made to the Polish Constitution, the official English version published by Parliament have been used. A portion of the study requires looking at amendments to relevant Polish statutes, which is not available in official translations. In these cases, unofficial translations by the Venice Commission will have to suffice. Furthermore, there will be an extensive use of secondary sources by legal scholars. I find this approach acceptable because Polish statutory regulation of judicial appointments is used as a subject of comparison to shed light on the resilience of particular regulations and not examined on equal footing with Norwegian law, which does not require in-depth understanding of Polish material law or legal method.

[61] Art. 87 para. 1 of the Polish Constitution.
[62] The Constitution is the supreme source of law, cf. Article 8 no. 1. See Klimaszewska, Machnikowska and Koch (2020) chapter 3.
[63] See Klimaszewska, Machnikowska and Koch (2020) chapter 4 and pp. 300-301.
[64] Ibid. p. 291, p. 302.
[65] Ibid. pp. 302-303.

2. The Norwegian appointment procedure

2.1. Introduction

The topic of this thesis is appointment of judges to the Norwegian Supreme Court (*Høyesterett*), the court of final instance in a three-tier single hierarchy to safeguard judicial independence.[66] This requires a presentation of the current selection mechanism, focusing on the involvement of the government branches and external bodies in the selection of candidates and formal appointment. The earlier stages of recruitment, such as advertising vacant positions, finding qualified applicants and interviews, is beyond its scope.

Until recently, the Constitution did not contain an explicit provision on the independence of the judiciary, although the principle clearly existed in Norwegian constitutional law.[67] A 2014-amendment marking the 200th anniversary of the Constitution introduced a chapter on human rights that include provisions on the independence of judges.[68] A key provision is Article 95, which in first paragraph provides that everyone has the right to have their case heard by an independent and impartial court ("en uavhengig og upartisk domstol"). The term "independent" is meant to have the same requirements as article 6 and must therefore be interpreted in light of ECtHR case law.[69] Furthermore, article 95 holds the state responsible for securing the independence of courts.[70]

This chapter will present the current legislative provisions regarding judicial appointments, hereunder the roles and influence of the King in Council, the Judicial Appointments Board and its relation to the Norwegian Court Administration. Important aspects are limitations on the executive's discretion, composition of the board and selection of its members. The main objections to the current system will then be presented, before I address the most relevant suggestions in the latest report.

[66] The Courts of Justice Act section 1. For an overview of the Norwegian court system, see Aarli and Arntzen (2021).
[67] Innst. 186 S (2013–2014) p. 24.
[68] Chapter D of the Constitution.
[69] Dok.nr.16 (2011-2012) p. 122; Case Rt. 2014 p. 1292 para. 21.
[70] Rt. 2014 p. 1292 para. 21; see also Art. 95 para. 2; Art. 92; Innst. 186 S (2013–2014) p. 24.

2.2. Current law

2.2.1. Constitutional provisions

The legal basis for the procedure for appointments is partly found in the Constitution, partly in other statutes and partly in practice. In the Constitution, Article 21 states that the power to choose and appoint "all senior and military officials" (including judges[71]) is conferred on "[t]he King … after consultation with his Council of State". Because Norway is a constitutional monarchy, the King (*Kongen*) is referenced in relation to executive power.[72] When Article 21 requires the King to sit with "his Council of State", this points to the council consisting of the Prime Minister and at least seven government members.[73] Even though the appointment authority secured in article 21 is considered a prerogative of the King,[74] the fact that the appointment occurs "after consultation" with the council indicates that the Monarch routinely appoints the candidates selected by the Government. The appointed judge can then hold the position until reaching the statutory age limit of 70.[75]

The Constitution therefore confer formal appointment authority on the executive branch, without involvement of Parliament. From a separation of powers point of view, the fact that the executive has influence on who is performing checks on it could be considered problematic. There are also problematic aspects concerning political influence on the judge after appointment. The question to be discussed going forward is thus whether Article 21 provides the King in Council full discretion over judicial appointments or whether this power is subject to restrictions by other branches or bodies.

2.2.2. Provisions of the Courts of Justice Act

Ordinary Supreme Court judges

Under the Courts of Justice Act section 55, Supreme Court judges are appointed according to Article 21 in the Constitution (i.e. by the King in Council). The preparatory works emphasise that appointments are the constitutional responsibility of the King in Council, who is expected

[71] Judges are senior civil servants, see section 1 para. 2 of the Civil Service Act; NOU 1999: 19 p. 172.
[72] See Art. 3 of the Constitution.
[73] Ibid. Art. 12.
[74] NOU 1999: 19 p. 229.
[75] Art. 22 para. 3 of the Constitution; cf. Act Relating to Age Limits for Civil Servants and Others section 2.

to assess the candidates.[76] As a result of a reform in 2002, the appointment procedure requires the influence of an independent body dedicated to the appointment of judges.[77] According to sections 55 a and 55 b, the Judicial Appointments Board (JAB) gives an "innstilling" concerning appointments, to be collected by the King in Council prior to appointment. The term "innstilling" in sections 55 a and 55 b could be understood as a formal nomination, proposition or recommendation. As the phrase "recommendation" is used in the English summary in the preparatory works,[78] it will also be applied here. It is meant to have its own specific meaning in the context of judicial appointments that differs from related legislation.[79] The JAB is intended to be a new, strong, external body that limits executive powers and provides for a broader and more transparent assessment of applicants.[80] It is authorised to present the King in Council with three candidates and an explanation of the choices, sorted in order of priority.[81]

Chief Justice of the Supreme Court

The Chief Justice of the Supreme Court is asked to give a written or oral statement on judicial appointments directly to the ministry after the Board's recommendation is received,[82] which gives the judiciary influence on the decision. The appointment procedure described in statute does not apply to appointment of Chief Justice, who is appointed by the King in Council according to practice.[83] In the preparatory works it was considered desirable with a more active involvement of the democratically elected executive branch due to the 'special character' of the position.[84] Involvement of Parliament was considered common and there was no discussion whether this was problematic. Consequently, the head of the Supreme Court is subject to a certain risk of political influence. When the Chief Justice expresses opinions on candidates to the Ministry, a potential for political bias is not limited to the Chief Justice alone. Furthermore, it could be problematic that the procedures of a position with such 'special character' is largely based on practice and not secured in legislation.

[76] NOU 1999: 19 p. 188.
[77] See Amendments to the Act Relating to the Courts of Justice etc.
[78] NOU 1999: 19 p. 565.
[79] Ot.prp. nr. 44 (2000-2001) p. 189.
[80] NOU 1999: 19 p. 194.
[81] The Courts of Justice Act section 55 b para. 3.
[82] Court of Justice Act section 55 para. 4.
[83] Ibid. section 55 b para. 7 states that the section does not apply to appointments of Chief Justice of the Supreme Court. See also Ot.prp. nr. 44 (2000-2001) p. 149.
[84] Ot.prp. nr. 44 (2000-2001) p. 105. However, Parliament is reluctant to get involved, see Thommessen (2016).

2.2.3. The Norwegian Courts Administration

The appointment procedure confers responsibility for judicial appointments and administrative tasks on different bodies. In the 2002-reform, managerial operations were moved from the Ministry of Justice to the newly established Norwegian Courts Administration (NCA).[85] The justification was a desire for clearer separation between the courts and ministry to increase judicial independence and minimise the risk of undue politicization.[86] Chapter 1A of the Courts of Justice Act presumes that the NCA has secretarial functions for the JAB, including budgeting, but no authority to instruct the Board.

In addition, the NCA is involved in the initial phase of the appointment procedure,[87] has a superior employer function and has an active role in promotion of public confidence.[88] The democratic legitimacy of the NCA is maintained through guidelines in the draft budget and government instructions by Royal Decree.[89] Consequently, appointments and administrative tasks are separated between two different bodies. The details of their roles vis-à-vis each other appear complex and unclear in certain areas, [90] but the details concerning this interaction is beyond the subject of this research.

2.2.4. Is the King in Council bound by the recommendation?

The Constitution clearly provides the King in Council formal authority over appointments, whilst the Courts of Justice Act requires that a recommendation is obtained prior to appointment.[91] The question is to what degree the executive is bound to follow these recommendations once received. Section 55 c requires the King in Council to ask the JAB for an assessment or statement ("*uttalelse*") of any applicant it considers appointing if that applicant has not been recommended by the board ("*søker som ikke er innstilt*"). None of these provisions explicitly state that the King in Council is legally bound to follow the recommendation, and the option to deviate from the recommendation seems to imply the opposite.

[85] See the Courts of Justice Act Chapter 1A.
[86] Rosseland (2007); Schei (2014) pp. 15-16.
[87] Innstillingsrådet for dommere (2020) p. 39.
[88] Description available at: <www.domstol.no/en/Norwegian-Courts-Administration/> accessed 24 November 2020.
[89] Rosseland (2007) pp. 610-611.
[90] NOU 2020: 11 pp. 108-109.
[91] The Courts of Justice Act Section 55 b para. 1.

According to preparatory works, the Ministry of Justice is expected to perform a review of the recommended applicants, in which the recommendations "carry a great deal of weight".[92] It was believed that the balance between democratic legitimacy and judicial independence was best achieved by giving the King in Council discretion to choose freely amongst the recommendations and an opportunity to appoint someone else entirely if the JAB could review the candidate first. This is based on the principle that the executive is parliamentary and constitutionally accountable for appointments.[93] Importantly, it is emphasised that increased external influence does not in practice constitute a legal restriction of the constitutional prerogative of the executive.[94] There also seems to be consensus among legal scholars that the recommendations are non-binding and that parliamentary responsibility require freedom of choice.[95]

It is, however, assumed that the King in Council usually appoints the highest ranked recommended candidate. The recommendation has been followed for the past 10 years,[96] and the option to ask that someone other than the recommended candidates be assessed has not been used.[97] A deviation from the recommended order of priority has occurred in only 9 cases.[98] It is worth noting that the JAB has never been offered a justification,[99] and it could therefore be argued that the process lacks transparency and grounds for verification. Interviews suggest a reduction in meetings and dialogue between the Ministry and JAB the last couple of years due to changing national and international attitudes towards the judicial independence.[100] But it is clear from legislation, preparatory works and legal literature that previous practice does not bind the executive in future appointments. An option to directly influence the work of the JAB through administrative regulations exists,[101] but has not yet been used.[102]

[92] NOU 1999: 19 at 15.6. The Norwegian term is "meget stor vekt" (at 7.5.3.3).
[93] Ot.prp. nr. 44 (2000-2001) p. 188.
[94] NOU 1999:19 at 7.5.5; Ot.prp. nr. 44 (2000-2001) p. 103 ff.
[95] Smith (2017c) p. 267; Fliflet (2014) p. 69; Bøhn (2013); interpretation by Oslo District Court (TOSLO-2010-7432).
[96] Direktoratet for forvaltning og økonomistyring (2020) p. 22.
[97] Innstillingsrådet for dommere (2020) p. 5; Schei (2011).
[98] Innstillingsrådet for dommere (2020) p. 59.
[99] Ibid. p. 59, assuming that in 7 out of 9 cases, the justification was gender-based quotas.
[100] Direktoratet for forvaltning og økonomistyring (2020) p. 23; NOU 2020: 11 p. 122, recommending it be revoked.
[101] The Courts of Justice Act section 55 b para. 6.
[102] Innstillingsrådet for dommere (2020) p. 4.

2.2.5. The Judicial Appointments Board

Composition

Where a separate judicial board recommends appointees to the executive, the composition of that board has implications for to which degree it promotes the independence of the judicial branch. The Judicial Appointments Board is comprised of three judges from the ordinary courts, an advocate,[103] a legal professional/lawyer from the public service[104] and two non-lawyers/lay members.[105] The Equality and Anti-Discrimination Act provides that the Board maintain gender balance.[106] As the provisions indicate, the Board consists predominantly of members with legal background. However, having both private and public sector and two non-lawyers represented ensure a broader range of competency.[107] The text does not specify whether all three tiers of the court hierarchy must be represented, but preparatory works imply that selection of members is based on qualification alone, regardless of tier.[108] At present, the first two tiers are represented.[109] The two lay members represent the general public and function as counterweights to the judges and other legal professions, and the only requirement is that the person does not have legal training or background.

The Council of Europe recommends that its members should be "drawn in substantial part from the judiciary".[110] The required ratio for an amount to be "substantial" is not defined in the recommendation, but it is presumably less than 50% due to the explicit recommendation of 50 % representation for members of a Judicial Council.[111] According to ECtHR case law concerning judicial councils with disciplinary powers, three out of sixteen[112] (18,8 %) and eight out of eighteen[113] (44,5 %) suggested lack of independence. Considered in isolation, the ratio in these cases could indicate that having three out of seven members (42,9 %) to represent the judiciary is problematic according to the ECHR. However, the case law refers to councils with

[103] An "advokat" is a person authorised by the Supervisory Council for Legal Practice to practice law in Norway.
[104] A "jurist" is a person with a master's degree in law.
[105] The Courts of Justice Act section 55 a para. 1 second sentence.
[106] Section 28.
[107] NOU 1999: 19 at 7.5.3.1.1.
[108] Ot.prp. nr. 44 (2000-2001) p. 189.
[109] Description available in Norwegian at their website: <https://www.domstol.no/innstillingsradet/om-innstillingsradet/innstillingsradets-medlemmer/> accessed 24 November 2020.
[110] See The Committee of Ministers of the Council of Europe (2010); Recommendation CM/Rec(2010)12 paras. 46 and 47; CDL-AD(2010)004-e.
[111] The Committee of Ministers of the Council of Europe (2010); Recommendation CM/Rec(2010)12 para. 46.
[112] *Oleksandr Volkov v. Ukraine* [J] 2013, no. 21722/11.
[113] *Denisov v. Ukraine* [GC] 2018, no. 76639/11 para. 70.

disciplinary functions, which the JAB does not have.[114] It is therefore unclear to which degree the mentioned standards are applied equally to a body without such functions.

Selection of members

The manner in which members of judicial councils or boards are chosen has also been considered relevant for judicial independence by the ECtHR.[115] Consequently, it matters whether the judiciary participates in selecting members or it is conferred on political bodies. The phrase "chosen by their peers" is often used in reference to judicial councils with wider authorities than only appointments,[116] but does not expressly limit its application so as to exclude a board that primarily recommends appointees. When the point of such bodies is to reduce executive dominance, allowing the executive branch to choose judicial members freely would make such a reduction illusory.

Members of the JAB are appointed by the King in Council for a term of four years,[117] and the Ministry of Justice clearly wanted the head of state to have full discretion in this matter. Although it is assumed that the NCA is consulted prior to appointment and that courts and the Norwegian Association of Judges can suggest members, the King can ultimately choose freely.[118] The potential of political influence that is emphasised in case law of the ECtHR regarding such arrangements is undoubtedly present in the Norwegian system.[119] Selection of members allows political influence indirectly through the King in Council's choice of members, potentially risking the function the JAB has been given to promote judicial independence.

2.3. Debate preceding the 2020-report

Politicians and legal scholars have argued both for increasing and decreasing involvement by the legislature or the executive in appointments. A common argument against involvement of

[114] Judges are reported to the Supervisory Committee for Judges (*Tilsynsutvalget for dommere*), cf. the Courts of Justice Act section 236 para. 1.
[115] See *Oleksandr Volkov v. Ukraine* [J] 2013, no. 21722/11 para. 112.
[116] The Committee of Ministers of the Council of Europe (2010) Recommendation CM/Rec(2010)12 para. 46 refers to such councils, whereas para. 47 discuss a Norwegian form of model.
[117] Courts of Justice Act section 55 a para. 2.
[118] Ot.prp. nr. 44 (2000-2001) p. 102. Note that the Board of the Courts Administration is also predominantly selected by the King in Council.
[119] The Committee of Ministers of the Council of Europe (2010) para. 109 ff.

Parliament is politicization, perhaps because the process arguably already allows for undue political involvement.[120] An appointment based on political views could make the appointed feel a sense of obligation in return for the appointment.[121] The same arguments have been used to criticize the authority of the King in Council. In a recent note to the Court Commission, the Norwegian Association of Judges calls for establishing an independent judicial council comprised predominantly of judges.[122] Such suggestions often reference Norway's international obligations, which notably often have a primary objective of maximising judicial independence.

The other end of the spectrum is characterised by general scepticism towards increasing judicial influence. Some have argued that the appointment process is not democratic enough and insisted on strengthening the involvement of the Parliament (Stortinget). A recent bill suggests requiring a two-thirds majority of votes in the Storting prior to appointment of Supreme Court judges.[123] However, this could suggest that judicial appointments are partisan.[124] It has been argued that the ratio of judicial representatives on the JAB is problematic due to the Supreme Court's involvement with constitutional matters and political questions, and that judges of a court actively involved in the development of law should not be appointed by the judiciary itself.[125] This relates to the question of democratic legitimacy, lack of which is feared to result in self-recruitment and a 'state within a state'.[126]

Concerns has also been expressed regarding appointments of Chief Justice of the Supreme Court, including by the Ombudsman.[127] By not including the JAB or a similar, independent body, the selection mechanism fails to comply with international recommendations. Arguably, the problematic nature of providing the Government full discretion is even worse when considering the lack of transparency surrounding the position.[128] Eventually, the public debates demonstrate that the issue has renewed relevance. It also shows an apparent lack of consensus amongst Norwegian legal scholars on how judicial independence and democratic legitimacy should be balanced.

[120] Holmøyvik and Kierulf (2016); Schmidt (2018); Kolsrud (2018).
[121] See Fliflet (2016).
[122] Den norske dommerforening (2020).
[123] Dokument 12:3 (2019-2020).
[124] See NOU 2020: 11 p. 125.
[125] Smith (2017a) p. 23 ff.
[126] NOU 1999: 19 at 7.5.2.
[127] Sivilombudsmannen (2016).
[128] Ibid.

2.4. The Court Commission's recommendations

2.4.1. Introduction

The Commission's report does not involve any radical changes to current law, but mainly subtle changes aimed at strengthening judicial independence. In the following, I will present the recommended changes as concerns the King in Council's discretion, the composition and selection of the JAB and appointment of Chief Justice, and discuss suggested changes compared to current law in light of judicial independence and democratic legitimacy.

2.4.2. The discretion of the King in Council

Unsurprisingly, the Commission does not recommend revoking the King in Council's appointment authority.[129] Instead, the report suggests codifying the requirement for a recommendation from an independent Board in chapter D of the Constitution.[130] The proposed text, roughly translated, requires that "judges are appointed by the King after recommendation from an independent council/board".[131] Consequently, any appointment that fails to follow this procedure would be unconstitutional. The existing practice would therefore have constitutional protection that signals limitations to the executive's discretion and reduces the ability to misuse appointment power. The provision would also have to be interpreted in a way that is compatible with Article 95 and the requirement for judicial independence would make any instructions from the other state branches unconstitutional.

Other changes to ordinary legislation were proposed that would formally reduce executive discretion and therefore political influence. The King in Council is not allowed to deviate from the Board's recommendation, but has the option to reject it once.[132] This would require revoking the current option to choose a different candidate.[133] The option to diverge from the ranking keeps the prerogative from appearing hollowed out. A decision not to appoint the highest ranked candidate requires that the Board be notified and that a public justification is provided. Increased transparency is meant to provide democratic control with judicial appointments.

[129] NOU 2020: 11 pp. 125-126.
[130] Ibid. p. 227.
[131] Ibid. p. 354, suggested as Art. 90 para. 1 in the Constitution.
[132] Ibid. p. 114, suggested as section 55 c of the Courts of Justice Act.
[133] The Courts of Justice Act section 55 c.

Compared to current law, the suggestion tilts the balance towards increased judicial independence by reducing the executive's choices in practice.

2.4.3. The Judicial Appointments Board

Another suggested change is increasing the Judicial Appointments Board from seven members to eleven, of which ten participate in the selection of appointment to the Supreme Court.[134] The members consist of three judges from ordinary courts and a land consolidation judge, two lawyers, a legal professional from public service and three lay-members. The number of judges would therefore increase slightly, but the ratio in total would be lowered. Whilst acknowledging international recommendations, the largest fraction of the Commission believed that a board with a judicial majority would lack sufficient democratic legitimacy.[135] The power Norwegian judges have to adjudicate on constitutional matters demand democratic control, and it was feared that public confidence could be weakened by increased judicial self-regulation.[136] When the discretion of the King in Council is suggested decreased compared to current formal law, ensuring that judges are not in a majority on the Board could be a fair compromise between independence and legitimacy.

Allowing the executive branch an exclusive right to choose members of the Board could be problematic for judicial independence. The Commission recommends that the King in Council continues to select members, but there are some alterations.[137] The NCA would select the judicial members, and at least one of the lawyers will be chosen by the Norwegian Bar Association (*Advokatforeningen*).[138] This reduces direct executive influence in favour of the judiciary compared to current law, although the NCA's board members are still predominantly chosen by the executive branch. Influence by political branches is therefore still prevalent.

2.4.4. Chief Justice of the Supreme Court

A very clear change compared to current law involves the appointment of Chief Justice of the Supreme Court. The exclusive authority that the current mechanism confers on the executive, and potentially Parliament, undoubtedly allows for political influence on a very important

[134] NOU 2020: 11 p. 126.
[135] Ibid. p. 119.
[136] Ibid. p. 95.
[137] Ibid. pp. 125-126.
[138] Ibid. p. 115.

position and fails to comply with international standards. The Commission did not believe Parliament should be formally involved, but instead recommended the establishment of an ad hoc council.[139] It would be composed of three members, chosen by the Ministry of Justice, the JAB and Norwegian Bar Association, respectively. Democratic legitimacy would be maintained as formal appointment is still conferred on the King in Council.

Codification of procedures for appointment of Chief Justice would strengthen the democratic legitimacy and transparency of the process.[140] The recommendation also reduces the exclusive authority that the executive branch has, especially considering that the ad hoc council is not exclusively or mostly selected by the executive. However, the suggested provision does not specify whether the recommendation formally binds the King in Council.[141] The explicit option to reject the recommendation once in ordinary appointments (section 55 c) could suggest it does not apply to the position of Chief Justice. On the other hand, the Commission's statement that the rules regulating the ad hoc council would follow the ordinary procedure of appointments as far as possible could suggest an analogical interpretation of section 55 c.[142] The answer is not clear, and perhaps not that practical given the ministry's participation in selecting the council.

2.5. Summary

The current discretion provided for the King in Council allows for some political influence on judicial appointments, both in the appointment itself and through selection of members to the JAB. The proposed changes formally shift the balance of power slightly away from the executive,[143] but mostly involve clarification and codification of existing norms and practices. The report also gives the impression that the state of judicial independence in Norway is good and that the 2002-reform has yielded the desired results, in line with general consensus.[144]

However, it is worth remembering that this does not justify relying on the status quo to remain unaffected, and the courts need to be resilient against potential societal changes in the future. Despite long democratic traditions, Norway is certainly not immune to the rise in populist

[139] Ibid. pp. 127-130.
[140] See Sivilombudsmannen (2016).
[141] The Courts of Justice Act section 55 b para. 7; NOU 2020: 11 p. 357.
[142] NOU 2020: 11 p. 129.
[143] Ibid. pp. 352-353. Amendments include codification of the court hierarchy, maximum number of Supreme Court judges, requiring the state to ensure independent administration, and revoking section 55 b para. 6 on administrative regulations.
[144] NOU 2020: 11; Aarli and Arntzen (2021) p. 73; Fliflet (2014) p. 71.

sentiment around the world. Additionally, there might be some correlation between the Government that has appointed a judge and the appointed judge's tendency to vote in favour of the state.[145] A close link between executive and judicial branches thus have practical implications even in times of political stability.

Before further evaluations of the proposed changes, I wish to look at the ongoing constitutional crisis in Poland by discussing its effect on selection of judges. The objective is to grasp the effectiveness and resilience of constitutional as well as legal protection of judicial independence towards political attacks to better evaluate whether proposed amendments to the Norwegian selection mechanism are sufficient.

[145] See Grendstad, Shaffer and Waltenburg (2010); Shaffer, Grendstad and Waltenburg (2014); opposite: Føllesdal (2013); Schei (2011).

3. The Polish appointment procedure

"As history demonstrates, a democracy without values
easily turns into open or thinly disguised totalitarianism." [146]

Pope John Paul II speaking to the Polish Parliament in June 1999 about the new Constitution.

3.1. Introduction

It is often beneficial to look beyond one's own legal system to gain new perspectives and insights. On the topic of judicial independence, Poland is particularly interesting at this point in history. Statutory amendments since 2015 has affected the independence of all tiers of the court system, resulting in what has been dubbed an "anti-constitutional populist backsliding"[147] and a "constitutional crisis"[148], leaving Polish democracy as "illiberal with strong authoritarian overtones".[149] The Polish Supreme Court is comparable to the Norwegian, as it acts as the court of final instance in the ordinary courts.[150] Poland has a Constitutional Tribunal separate from the judiciary, but for the purpose of comparison with the Norwegian Supreme Court the Supreme Court is a better parallel as only a limited portion of the Norwegian Supreme Court's caseload concerns constitutional questions.

The intention with this chapter is to add to the assessment of appointments to the Norwegian Supreme Court by using Polish selection mechanism only as a reference point. This leaves little room for detailed presentation of the Polish legal system or of all relevant legal sources on judicial independence and appointments, nor of all statutory changes between 2015 and 2020 that affects judicial independence.[151] The focus will be on a few main features of the appointment process, starting with an outline of the most important statutory provisions on

[146] John Paul II, Address to the Polish Parliament, 11 June 1999, available at <http://www.vatican.va/content/john-paul-ii/en/speeches/1999/june/documents/hf_jp-ii_spe_19990611_warsaw-Parliament.html> accessed 4 December 2020.
[147] Sadurski (2019a) p. 14.
[148] Bodnar (2018).
[149] Bugarič and Ginsburg (2016) p. 71.
[150] Art. 175 of the Polish Constitution.
[151] See Sadurski (2019a) for a thorough analysis. See also Sadurski (2019b); Gajda-Roszczynialska and Markiewicz (2020).

appointment of Supreme Court judges. Then, I will present the composition of and selection to National Council of the Judiciary.

3.2. Statutory provisions

The appointment procedure is secured in the Polish Constitution. According to Article 179, judges of the Supreme Court (*Sąd Najwyższy*) are appointed by the President of the Republic. The President is the head of state of Poland,[152] and the Constitution therefore confers decisive authority of judicial appointments on the executive branch. Prior to the appointment, the Constitution requires a motion from the National Council of the Judiciary (*Krajowa Rada Sądownictwa*, NCJ).[153] The NCJ is explicitly tasked with safeguarding the independence of courts and judges,[154] which includes the authority to examine, assess and submit requests for appointments to the President.[155] The wording of article 179 leaves it open to which degree the President is bound to appoint the requested candidates.

3.3. Is the President of the Republic bound by the recommendation?

It seems to be a matter of controversy in Polish constitutional law whether the President can deviate from the suggested candidates.[156] Until 2008, the executive had accepted the proposals that the 1997-Constitution provides for. When President Kaczyński that year refused to appoint the Council's nominated candidates, he started what has been dubbed a "long judicial saga" regarding the President's prerogative in appointments.[157]

The question has been challenged in court, but without reaching any conclusions.[158] Some legal scholars believe that the President lacks the power to reject proposals,[159] whereas others claim that the nature of the prerogative provides discretion to reject candidates without justification.[160] If the latter is true, judicial appointments rests on the mercy of the executive branch and the

[152] Art. 126 of the Constitution.
[153] Ibid. Art. 179 and Art. 144 para. 3 subpara. 17.
[154] Ibid. Art. 186 para. 1.
[155] Art. 3 para. 1. of the Law on the NCJ.
[156] Sadurski (2019a) pp. 99-100.
[157] Ibid. p. 100; Bodnar and Bojarski (2012).
[158] See Constitutional Tribunal judgment SK 37/08; National Administrative Court judgment I OSK 1891/12.
[159] Zoll (2011) p. 303; Sadurski (2019a) p. 100.
[160] I understand Śledzińska-Simon (2018) p. 1844 in this direction.

constitutional role of the NCJ seem to be somewhat hollow. But as will be made evident, changes to the NCJ itself makes the prospect of a rejection less pressing.

Another criticised amendment concerns lack of involvement of the judiciary in the appointment process. Prior to recent amendments, judges of the Supreme Court participated in the selection and assessment of candidates before the Council's formal motion to the President,[161] thus having substantial influence on the decision. The recent amendments mean that the Supreme Court is circumvented, as applications now go to the Council directly.[162]

The highest position of the court, the First President, is also appointed by the executive branch, based on suggestions by the General Assembly of the Judges of the Supreme Court.[163] The involvement of the Assembly on the surface seem to imply a certain degree of judicial influence. However, an amendment in 2017 increased number of candidates for the President to choose amongst from two to five, [164] increasing his influence vis-à-vis the judicial community.[165] In practice, the likelihood of receiving a candidate sharing the President's values has increased greatly as each judge holds one vote. The changes could appear to be a way to increase the President's powers without having to change the Constitution.

3.4. The National Council of the Judiciary

3.4.1. Composition

Another controversial reform raises concerns about politicisation of the National Council of the Judiciary. The council was established in 1989 and exist outside both the executive and the judiciary branches.[166] In total, 15 of its 25 members are judges,[167] which is in line with international recommendations. The remaining members are the First President, the Minister of Justice, the President of the Supreme Administrative Court, an individual appointed by the President of the Republic and 6 members of Parliament. The composition is therefore aimed at distributing influence to all branches of government. All 15 judges are now replaced jointly at

[161] Filipek (2018).
[162] Ibid. p. 184.
[163] Art. 183 para. 3 of the Constitution.
[164] Art. 12 no. 1 of the New Law on the Supreme Court; European Commission For Democracy Through Law (Venice Commission) (2020), Joint Urgent Opinion CDL-AD(2020)017-e.
[165] Sadurski (2019a) p. 110.
[166] Bodnar and Bojarski (2012) p. 670.
[167] Art. 187 para. 1 of the Constitution.

the end of each four-year term,[168] which arguably prompted an unconstitutional joint replacement of the sitting members in 2018.[169] Although statutes require a broad range of professional representation, a widely boycotted 2018-election with only 18 applicants have left the Council with an overrepresentation of lower level courts.[170]

3.4.2. Selection of members

The selection of the judicial component of members is not explicitly regulated in the Constitution, but judges were traditionally elected by their peers and there seems to be consensus that this is implied by Article 187.[171] An interpretation in light of other constitutional provisions seems to indicate the same,[172] and this has also been accepted by the Constitutional Tribunal.[173] A controversial bill was passed in 2017, providing that all fifteen judges are to be selected by the Sejm (lower chamber of Parliament) by a three-fifths majority.[174] Candidates must be proposed by 2000 citizens or 25 judges, [175] which is the only remaining influence the judiciary has on selection of the Council's judicial members. A total of 23 out of 25 members of the Council either belong to or is elected by political authorities.[176] Consequently, the balance between the three branches has shifted in favour of political organs and total control over the NCJ now reside with the Parliamentary majority. The result seems to be that the candidates that the NCJ eventually request to be appointed have affiliations with the ruling party.[177] This indicates that having a majority of a judicial council be judges is not a sufficient guarantee for judicial independence as long as the appointment is based on political grounds.

3.5. Summary

A series of amendments since 2015 has increased executive influence over judicial appointments, and the council tasked with safeguarding judicial independence has been subject

[168] Ibid. Art. 187 para. 3; Art. 9a of the Law on the NCJ.
[169] Sadurski (2019a) pp. 99-106.
[170] Filipek (2018) p. 180; Granat and Granat (2019).
[171] Ibid. p. 101, p. 254; Matczak (2020) at 5; Filipek (2018) p. 179; Granat and Granat (2019) p. 123 with further references; Zoll (2011); *A.K. and Others v. Sąd Najwyższy* [GC] C-585/18, C-624/18 and C-625/18 para. 143.
[172] See Art. 187 section 1 (1) and (3), Art. 186 section 1 and Art. 10, cf. Matczak (2020) at 5; Filipek (2018) p. 179.
[173] Filipek (2018) p. 179 points to the Judgment of 18 July 2007 (K 25/07) para. III 4 in note 11.
[174] Art. 9a of the 2017 Amending Law on the NCJ.
[175] Art. 11a (2) of the Law on the NCJ.
[176] *A.K. and Others v. Sąd Najwyższy* [GC] C-585/18, C-624/18 and C-625/18, para. 143.
[177] Filipek (2018) p. 189.

to amendments that ultimately proved damaging to the principle it was set to protect. It has been argued that recent amendments constitute a breach of the constitutional provisions that secures separation of powers and judicial independence.[178] Article 10 provides for "the separation of and balance between the legislative, executive and judicial powers", whilst Article 173 states that "courts and tribunals shall constitute a separate power and shall be independent of other branches of power". These articles give the judiciary both organisational and functional separation from the executive and legislature.[179] Amendments such as enabling Parliament to select members to the NCJ instead of judges therefore challenge the principles that these provisions are intended to protect. And when checks on political power are removed, it becomes difficult to rightly claim that the status quo contains anything resembling the "separation", "balance" and "independence" prescribed by the Polish Constitution.

[178] Ibid. p. 180; Matczak (2020).
[179] Judgment of the Constitutional Tribunal K 34/15.

4. The resilience of the Norwegian appointment procedure

4.1. Introduction

So far, I have presented procedures for appointment to the Norwegian and Polish Supreme courts separately. But the most interesting aspect of this research is assessing the Norwegian mechanism in light of one formally better equipped to ensure independence but nevertheless suffering from a constitutional crisis.

Firstly, a functional comparative method will be used to explore how different appointment procedures may succeed or fail in ensuring formal judicial independence in Norway and Poland, focusing on the involvement of government branches and external bodies as regulated in Norwegian and Polish constitutional and statutory law. Secondly, I will use a legal cultural approach to explore the relationship between appointment procedure and some core values of importance to independence and public confidence in legal institutions and legal enforcement in the two countries. The analysis will hopefully provide valuable perspectives on whether statutory changes are needed in order to minimise the risk of a similar political attack on the judiciary in Norway as recently experienced in Poland.

4.2. Assessing the proposed amendments through a functional comparative approach

4.2.1. Formal appointments compared

The recommendation in the 2020-report that the King in Council keeps decisive appointment authority means that both Norwegian and Polish procedures confer such authority on the same branch. In Poland, the constitutional requirement for motions by the NCJ is unclear regarding limitations on the President's discretion, which has enabled interpretations that in practice make the motions optional to follow.

The suggested new article 90 of the Norwegian Constitution has a similar formulation that leaves it open to interpretation. This would be clarified in the suggested new section in the

Courts of Justice Act providing the option to reject the recommendation,[180] whereas I have found no such modification in Polish legislation. However, the frequency of recent Polish amendments suggests that supplementary statutes would provide little protection in any system in political crisis. The fact that the President has blatantly rejected proposals from the NCJ without consequences demonstrate e.g. a widely different view of the prerogative than the Norwegian King in Council. The Commission found the use of ordinary statutes sufficient until the new rules have had a chance to work in practice,[181] but the suggested requirement for a public explanation for rejecting the recommendation increases transparency and raises the threshold to do so in the first place, at least until the statute is changed.

Formally, both constitutionally provided prerogatives are modified by the requirement for a recommendation from an external body. The suggested changes in ordinary statute reduces the discretion of the King in Council compared to the powers that the Polish President has in practice given himself, making the Norwegian procedure perhaps slightly better equipped to secure judicial independence. The Norwegian judiciary is also to a larger extent involved through the Chief Justice's written or oral statement to the ministry after the Board's recommendation is received.

4.2.2. Comparing the new Judicial Appointments Board to the "neo-NCJ"[182]

Organisation of judicial governance varies greatly throughout Europe, depending on the chosen balance between judicial independence and democratic legitimacy. In a 2014 study, Bobek and Kosař classifies five models based on the organisation of administrative tasks and judicial appointments.[183] According to the authors, Poland adopted a judicial council model, namely a *"*separate institution for judicial governance that has at least certain powers – even if limited – over the careers of judges."[184]

The Norwegian system was classified as a courts service model, in which an independent organization handles administration whilst another separate body manage judicial

[180] Ibid. p. 114, p. 357.
[181] NOU 2020: 11 p. 221.
[182] Phrase used by the Polish legal community to separate the post-2017 NCJ from the previous. See Gajda-Roszczynialska and Markiewicz (2020).
[183] Bobek and Kosař (2014); and Kosař (2018) p. 1585 adding some nuance to this simplification.
[184] Bobek and Kosař (2014) p. 1266.

appointments.[185] Although such categorisation to some degree simplifies complex systems, it helps highlight how these legal systems administrate judicial tasks differently and that the Polish NCJ formally encompasses more powers in one single body.[186] When tasks are separated between several bodies it helps prevent any single one from becoming too dominant and requires more effort to seize control. Given the current reach of the Polish President's appointment powers, it could be argued that the independence of the NCJ has become illusory.[187]

With 15 out of 25 members, the NCJ has a higher ratio of judge-members than the suggested 4 out of 10 by the Norwegian Court Commission. In theory, the composition of the Polish council is supposed to be better equipped to secure an independent judiciary. Having judges in a minority on the board, even decreasing the ratio compared to current law, is an intended choice by the Commission based on Norwegian Parliamentary traditions and emphasis on democratic legitimacy. The Polish model of judicial appointments does not seem to emphasise Parliamentary considerations to the same degree in this regard. Instead, the ratio of judges follows European recommendations' emphasis on number of judges as a key factor for securing their independence. The ratio of judicial members of the NCJ has nevertheless proven less important as a safeguard against illiberal developments.

The former Polish practice of involving the judicial community in the selection of judge-members gave the judiciary a voice in appointments. Now that Parliament has full authority to choose these members, the NCJ has effectively been brought under the influence of the Parliamentary majority. The conditions for securing an independent judiciary have therefore changed for the worse. When the proposed amendments in Norway goes in the other direction, namely providing that the judicial members are chosen by the NCA, this constitutes a formal improvement that better secures an independent judiciary than current Polish law. Involving the executive branch, judicial community and lay participants provides broader range of influence. The ratio also considers the JAB's increased formal influence over appointments vis-à-vis the executive branch.

[185] Ibid.
[186] Art. 3 of the Law on the NCJ.
[187] Castillo-Ortiz (2019) pp. 503-520, calling the current model a "pseudo-courts service model".

4.2.3. Suggested changes to appointment of Supreme Court president

One of the most notable suggested changes to the Norwegian appointment procedure is the codification of appointment procedure to the highest position in the Supreme Court. Appointment authority will still be conferred on the executive branch as in Poland, but according to detailed statutory provisions, the Polish President appoints First President of the Supreme Court upon proposals from the judiciary itself.[188] Even though the actual judicial influence has been decreased by increasing number of candidates for the President to choose from, Polish judges enjoy a constitutionally guaranteed influence. The Commission's suggested inclusion of an ad hoc council would remove the Norwegian selection of Chief Justice from the exclusive sphere of the King in Council.

4.3. The implications of legal cultural context

4.3.1. The politicization of a seemingly ideal selection model

This functional comparison has demonstrated that the Norwegian and Polish judicial appointment mechanisms are both similar and different. It is remarkable how a formally strong Polish appointment procedure, secured in the country's supreme source of law, failed to safeguard judicial independence. This chapter aims to uncover how legal cultural differences could explain why the Polish system was susceptible to political manipulation and assess whether the suggested changes will sufficiently protect the Norwegian judicial independence. Analysing all cultural elements of the LCM[189] would be too extensive a task, and I have therefore made a limited selection based on what research publications identify as most influential to the Polish constitutional crisis.

The analysis will start by contrasting Norwegian and Polish constitutional history, which provides background to the current framework. Within the institutional framework of the LCM, the focal point is the courts' right and duty to perform constitutional review, which is an essential check on the executive and legislative branches. Within the model's intellectual structure, the emphasis is on the impact of method, judicial career and the fundamental

[188] Art. 183 para. 3 of the Polish Constitution.
[189] See 1.3.1 above.

importance of public confidence for judicial independence. It is also necessary to address implications of the apparent tension between democratic legitimacy and judicial independence reflected in Norwegian and Polish appointments. The objective is to utilize the insight into contributing factors in the assessment of the proposed statutory changes to Norwegian appointment procedure.

4.3.2. Constitutional history

Executive control over judicial appointments is not considered problematic by European recommendations if "restrained by legal culture and traditions, which have grown over a long time."[190] This clearly applies to Norway, with the world's second oldest Constitution and tradition of separation of powers that predate even its drafting.[191] The country has not experienced much external political pressure after the Second World War, which has allowed the legal culture to develop uninterrupted.

In contrast to this, Poland is a relatively new, post-communist democracy where respect for institutions and the Constitution lack sufficient time to develop.[192] In fact, some argue legal constitutionalism has made the Constitution an "elite instrument".[193] Furthermore, periodic totalitarian rule and communist leadership seems to have created a tendency to gravitate towards centralised power.[194] Over time, the lack of tradition and support for separation of powers affected the mindset and intentions of the executive branch and created an expectation that courts function as an extension of the political leadership.[195] This is interchangeably connected to other factors addressed in this chapter, such as public confidence, which is not achieved overnight by judicial reform. Such lack of respect for the Constitution makes it easier to perform indirect changes to its principles through ordinary statutory amendments.[196]

These differences might imply that the Polish crisis has limited relevance to Norwegian policy on judicial appointments. Indeed, the long tradition of separation of powers and parliamentarism provides a more robust framework for judicial independence. However,

[190] European Commission For Democracy Through Law (Venice Commission) (2007), CDL-AD(2007)028-e paras. 5 and 45.
[191] Sunde (2012) pp. 497-498.
[192] See Zoll and Wortham (2019); Halmai (2019) p. 320.
[193] Halmai (2019) with further references.
[194] See Kosař, Baroš and Dufek (2019); Halmai (2019).
[195] Kosař, Baroš and Dufek (2019) p. 459.
[196] Klimaszewska, Machnikowska and Koch (2020) p. 317; Drinóczi and Bień-Kacała (2019).

populist parties have gained ground in countries with a variety of traditions. To not take notice and learn which factors could increase the likelihood of a similar constitutional crisis is an opportunity missed.

4.3.3. Judicial review of constitutionality

Indirect and informal changes of the Constitution is easier when there is no effective mechanism for reviewing the constitutionality of changes with binding effect.[197] Formally, judicial independence had strong protection in both the Polish Constitution and ordinary statutes. But despite widespread consensus among legal scholars that the amendments affecting the judiciary contradicts fundamental constitutional principles,[198] attempts at blocking these developments have been unsuccessful. According to legal scholars, the principles of the Constitution has been indirectly altered through ordinary statutes and narrow constitutional interpretation.[199] Additionally, nonconformity is countered using other statutory provisions to make such acts appear legal.[200] Unfortunately, any conflict between the Constitution and ordinary statutes is largely left unchecked or indeed legitimised due to a disarmed Constitutional Tribunal.[201]

The implications for this research could be that constitutional and statutory provisions are ineffective safeguards, open to misuse through interpretation and amendments. However, the Norwegian judiciary has a wider arsenal of 'swords' than its Polish colleagues. Without a separate constitutional tribunal, the Supreme Court has authority to review the constitutionality of legislation and administrative acts.[202] In fact, courts on all tiers of the court hierarchy can (and are obligated to) do so.[203] Despite having a similar option, Polish judges outside the Constitutional Tribunal have traditionally been very reluctant (and arguably, lacking in culture and training) to consider a statute unconstitutional and refuse its application.[204] Some argue that options of direct review provided by article 8 of the Constitution remains unused,[205] indicating

[197] Sadurski (2019a) p. 58 ff; Gersdorf and Pilich (2020) p. 10 ff; Halmai (2019) p. 322; Langford and Berge (2019) on the influence of review on constitutional design.
[198] Bodnar (2018) pp. 648-649.
[199] Drinóczi and Bień-Kacała (2019); Bernatt and Ziółkowski (2019) refers to "statutory anticonstitutionalism".
[200] Bernatt and Ziółkowski (2019) pp. 500-501.
[201] See Bodnar (2018) p. 641 ff.; Pap and Śledzińska-Simon (2018); Halmai (2019); Gajda-Roszczynialska and Markiewicz (2020), claiming that "nobody in their right mind would see the Constitutional Tribunal as a guardian of the Constitution".
[202] Smith (2017b).
[203] Art. 89 of the Norwegian Constitution; Schei (2014) p. 5 ff.
[204] See Sadurski (2019a) p. 86.
[205] Ibid. p. 86; Klimaszewska, Machnikowska and Koch (2020) pp. 293-294.

a reluctance to question legislation's presumption of constitutionality. Norwegian courts need constitutional provisions against which to exercise judicial review, which supports the suggested further codification of the appointment procedure, at least in part on constitutional level.

4.3.4. Weaponizing legal positivism and formalism

Some suggest that Polish legal method and ideals of justice has been contributing factors in the constitutional crisis.[206] For a country battling foreign occupation for decades, codes became an expression of both legal identity and political control.[207] A formalistic, text-focused interpretation of acts has therefore provided protection against oppressive forces. Even after transitioning to democracy, "the cult of the statutory law and its literal interpretation" has remained a defining characteristic of Polish legal method.[208]

This seems to have been weaponised by the Government using a "legalistic smokescreen" to veil unconstitutional amendments as constitutional.[209] For instance, the constitutional requirement that members of the NCJ are chosen "amongst the judges" in a strictly formalistic interpretation does not mean chosen *by* judges.[210] The phrase "constitution-hostile interpretation" has been used, describing a way of emphasising the importance of observing the constitution whilst simultaneously pointing to internal contradictions and calling it a "constitution for elites".[211] The Norwegian legal method would complicate such argumentation, as it requires a more contextual and principle-focused interpretation. Statutes are intentionally fragmentary and abstractly formulated, aimed at pragmatism and unification of law by courts.[212] This provides an extra barrier where the wording of the Constitution does not explicitly forbid certain illiberal changes, and could make the courts more capable of fighting unconstitutional amendments.

This could indicate that extensive codification that restrict judges' room for interpretation is pointless. If the Norwegian Constitution had a provision stating that judicial members of the JAB are chosen from "amongst the judges", the legal method would require courts to consider

[206] Matczak (2020); Zoll and Wortham (2019) p. 930 ff; Bernatt and Ziółkowski (2019).
[207] Klimaszewska, Machnikowska and Koch (2020) pp. 294 – 300.
[208] Gersdorf and Pilich (2020).
[209] Matczak (2020); Śledzińska-Simon (2018); Bernatt and Ziółkowski (2019).
[210] See Art. 187 para. 1 (2) of the Polish Constitution; Matczak (2020).
[211] Zajadło (2018) p. 8.
[212] Helland and Koch (2014) p. 108 ff.

other provisions, preparatory works, case law, practice and consensus amongst legal scholars. Longstanding practice and consensus like in Poland would resist an interpretation that allows Parliament to choose all members. However, the text of a statute is also the clearest expression of the intentions of the legislator. If there is a desire to secure judicial independence in appointments, a codification as suggested by the Commission would instruct the courts to enforce this if needed and limit the scope of interpretation. The current statutory silence regarding the discretion of the King in Council leaves it open for courts to rely on other sources, such as preparatory works, which could also be used to support an argument in favour of wide-ranging executive discretion.[213] Although Norwegian legal method could provide extra protection of judicial independence, it is primarily the role of the legislator to shape the direction of the law.

4.3.5. The effect of public confidence on *de facto* and *de jure* judicial independence

Low public confidence in the judiciary arguably makes it easier to cloak amendments as democratisation, as they "reinforce negative impressions that already exist".[214] Public confidence concerns the public's attitude towards the judiciary, and high levels thus imply an optimistic attitude towards judges' conduct.[215] For Poland, surveys reveal that perceived independence of courts and judges is relatively low. According to the Eurobarometer, 24 % and 31 % perceived the independence of the judiciary as very bad and fairly bad, respectively. [216] In comparison, surveys consistently show high levels of public confidence in Norway.[217]

Countries with high degrees of *de facto* independence often have high public confidence.[218] However, this does not necessarily require high levels of *de jure* judicial independence: Based on the 2016 EU Justice Scoreboard, Gutmann and Voigt found a negative correlation between *de jure* and *de facto* judicial independence.[219] *De facto* judicial independence actually correlated

[213] NOU 1999: 19 at 7.5.3.3 emphasises that the executive has the option to reject candidates.
[214] Gersdorf and Pilich (2020) p. 33. See also Śledzińska-Simon (2018) p. 1866 ff; Sadurski (2019a) p. 9 describes low trust in institutions in general.
[215] The terms "confidence" and "trust" are often used interchangeably, but I find "confidence" more suitable in this context. See Urbániková and Šipulová (2018) pp. 2114-2115.
[216] European Commission (2020), Flash Eurobarometer FL483.
[217] In 2019, 83 % of participants had high or very high confidence in the courts. Available in Norwegian at: <https://www.domstol.no/arsrapport-2019/nokkeltall-2019/#tiltro>, accessed 25 November 2020.
[218] Garoupa and Magalhães (2020).
[219] Gutmann and Voigt (2018).

better with the public's attitude towards the judiciary than formal rules and regulations.[220] Another factor worth noting is the negative effects that overemphasis on *de jure* judicial independence could have on public confidence. Garoupa and Magalhães warns that an overemphasis on securing formal judicial independence could actually create "an accountability problem", and points to the importance of balancing judicial independence and accountability to secure public confidence.[221] Poland had a strong focus on *de jure* judicial independence during transformation from communism, but the resulting lack of accountability seems to have affected public confidence negatively.[222] Low public confidence make democratisation claims easier to justify, and short-term reforms fails to visibly improve public confidence and *de facto* judicial independence.

Norway has high levels of public confidence and *de facto* judicial independence despite limited statutory protection, in line with Gutmann and Voigt's hypothesis. But emphasis on *de jure* independence is often a response to already unsatisfactory conditions for the judiciary and does not mean that increasing *de jure* independence would negatively affect *de facto* independence where public confidence and *de facto* independence is already high.[223] However, the potential risk of negatively affecting public confidence by overemphasising *de jure* independence is worth noting, and maintaining public confidence is highly prioritised by both court commissions and the ministry.[224] In the recent report, public confidence and democratic legitimacy are grouped together as considerations to balance against judicial independence,[225] which demonstrates the strong link between public confidence and parliamentary traditions in Norwegian legal culture. The studies therefore serve as a caution against overemphasising formal protection of judicial independence to such a degree that accountability or legitimacy, and therefore potentially public confidence, is impacted negatively.

4.3.6. Judicial education and career

Judicial education and career have been identified as factors that might affect the risk of political influence at the time of appointment. It is common to differentiate between civil and common law systems of judicial careers, where the former is characterised by a separate judicial

[220] Rios-Figueroa and Staton (2012).
[221] Garoupa and Magalhães (2020).
[222] Śledzińska-Simon (2018); Urbániková and Šipulová (2018).
[223] Urbániková and Šipulová (2018).
[224] NOU 1999: 19 at 5.2; Ot.prp. nr. 44 (2000–2001) at 5.5; NOU 2020: 11 at 4.2.
[225] NOU 2020: 11 pp. 37-38.

career path right out of law school and the latter bases appointments on more senior lawyers with previous professional experience.[226] In a system where judges are appointed based on experience, the risk of political influence is largest at the initial appointment as promises of advancement has less impact once appointed.[227]

Poland has a civil law form of judicial career path. Future judges are enrolled in a separate school (National School of Judiciary and Public Prosecution) and could become judges without previous work experience.[228] It is possible but difficult for legal professionals to get into the judicial environment, which indicates a very closed system and potential for lack of internal independence.[229] Furthermore, this educational model seems to lack political accountability and democratic legitimacy.[230] A system like the Polish could therefore isolate the judiciary to a larger extent than in a common law judicial career and contribute to the public distrust.[231]

These circumstances might have made it easier for the ruling party to justify increased political influence on appointments through media smear-campaigns, which includes comparing judges to fascist collaborators[232] and pejoratively dubbing them a "special caste" of people needing increased legitimacy.[233] The judicial career system has implications on diversity, transparency, public confidence, accountability and democratic legitimacy. It is an advantage that Norwegian judges have a diverse background resembling the common law tradition,[234] where judges in all three tiers should be recruited amongst legal professionals with varied professional background.[235] The recent Court Commission used the absence of a separate judicial career-path and constitutional tribunal as arguments against having judges in a majority on the JAB, emphasising that judges' powers of review require strong democratic legitimacy.[236]

A lesson from the Polish crisis is the importance of securing transparency and a sufficient degree of political influence in the appointment process, even in a system with a career judiciary and a constitutional tribunal. The arguments of the Polish Government and the Court

[226] See career models in Gee (2012).
[227] Garoupa and Ginsburg (2009) p. 11; Gee (2012) p. 134.
[228] Klimaszewska, Machnikowska and Koch (2020) p. 307; Zoll (2011).
[229] See Bodnar and Bojarski (2012).
[230] Zoll (2012) p. 308.
[231] Kühn (2012).
[232] See list of Government-led campaigns in Pech and Wachowiec (2020).
[233] Zoll and Wortham (2019); Bodnar (2018) p. 650.
[234] Aarli (2021) p. 77.
[235] The Courts of Justice Act section 55 para. 2 (2).
[236] NOU 2020: 11 p. 119.

Commission highlights an important factor in the constitutional crisis that needs to be further deliberated: an overemphasis on judicial independence vis-à-vis democratic legitimacy.

4.3.7. Balancing democratic legitimacy and judicial independence

Prior to 2015, some Polish legal scholars worried that the judiciary had been allowed too much autonomy to the detriment of democratic legitimacy.[237] As feared, recent reforms were framed as democratisation of the judicial branch. Evidently, the procedure of appointments should reflect that both judicial independence and democratic legitimacy are considered.

Maximising democratic legitimacy creates a risk of politicising judicial appointments.[238] To confer appointment authority on political branches allows those branches to choose who performs checks on them and potentially select judges with political biases. Whilst recognising this, both Court Commissions recommended that the King in Council keep authority over appointments due to Norwegian constitutional and historical traditions and their requirement of legitimacy.[239] A worry with increasing *de jure* judicial independence and self-governance was that the judiciary could lose touch with society, become isolated and lack diversity. Such fear seems justified considering post-communist reforms in Poland, where the remedy against centralised state power was "extreme depoliticization", "one-sided checks on the elected branches" and "empowering [of] technocratic elitist institutions (especially the judiciary)".[240] Consequently, overemphasis on judicial independence seems instead to have harmed it, and lack of legitimacy, low public confidence and history of centralised power made dismantling checks and balances on the political branches easier to justify.

To completely remove political aspects from appointments seems unrealistic and overlooks the fact that parliamentary traditions like the Polish and the Norwegian require mutual checks and balances.[241] Upholding democratic legitimacy is particularly important for courts that review the constitutionality of acts and has a role in developing law, rather than functioning as a mouthpiece of it.[242] Whilst briefly addressing increased focus on judicial independence

[237] See Zoll (2012) p. 305, referring to a "cloning system".
[238] NOU 1999: 19 at 5; Ot.prp. nr. 44 (2000-2001) at 8.8.2.; NOU 2020: 11 p. 115; see also Garoupa and Magalhães (2020) on accountability vs. independence.
[239] NOU 1999: 19 at 7.5.2-7.5.4; Ot.prp. nr. 44 (2000-2001) at 8.8.3 and 8.5; NOU 2020: 11 pp. 114-115.
[240] Kosař, Baroš and Dufek (2019) p. 430.
[241] See Smith (2012); Jackson (2012) p. 73; Zoll (2012); Garoupa and Ginsburg (2009) p. 17.
[242] On the political functions of the Supreme Court, see Smith (2012); Schei (2011).

internationally,[243] the Commissions tackle the gap between Norwegian appointments and international recommendations by citing other similar systems, distinguishing the role of the Supreme Court from jurisdictions with constitutional tribunals and emphasising parliamentary requirements for legitimacy.[244] The latest Commission has gone a bit further towards acknowledging the risks associated with strong executive influence, as the balance is shifted slightly towards independence.[245]

The cautious choice not to transfer powers to a council of judges but keep a broadly composed board, in which no group has majority, does not sacrifice legitimacy on the altar of judicial independence. This ensures a balance between democratically elected representatives of the executive branch and representatives of legal professions, including judges with a broad professional background. Keeping other tasks relating to judicial governance, such as administration and discipline, spread across several bodies and persons accountable to political branches reduces vulnerability for undue influence.

4.4. Conclusions on the comparative study

The aim of the comparative approach was to use lessons about the ongoing Polish crisis to assess changes to Norwegian appointment procedure. Comparing very different jurisdictions has its challenges, one of which is demonstrating how a legal culture so different than one's own has relevance for future policies. I found that both countries face similar problems of allocating appointment authority amongst government branches, and in similar ways due to their parliamentary systems. Differences in the extent of statutory protection is culturally dependent, with the Polish functioning as a line of defence against relapse into authoritarianism and the dismantling of checks and balances. When this defence broke down, it did so due to the fragile nature of a separation of powers that lacked tradition, exposed to external pressure to conform in ways that caused culturally dependent factors to overreact.

In most of these cultural factors Norway and Poland differ greatly, which will provide the Norwegian judiciary more resistance against a similar attack. High public confidence might make the Norwegian public less susceptible to such ideas, and the long tradition of separation of powers is probably better suited to withstand increased judicial self-governance. Others are

[243] NOU 1999: 19 at 4.2.
[244] See NOU 1999: 19 chapter 5; NOU 2020: 11 p. 119, p. 215 ff.
[245] NOU 2020: 11 pp. 95-96, recognising the negative consequences of autonomy in some European countries.

similar and offer interesting insights into potential challenges for judicial independence in the long run, such as the importance of holding an increasingly powerful judiciary accountable, democratically legitimate and maintaining public confidence. An important lesson is that public confidence can work against judicial independence fairly quickly once populist governments use their control of the public narrative to target the judiciary as enemies, not protectors, of democracy.

5. Final reflections: looking back to find a path forward

5.1. Summary of the findings

Ensuring an independent judiciary is a continuous process in all modern democracies, in both post-communist nations in transition and older, established democracies facing new challenges. Independence depends not only on the country's constitutional and statutory framework, but on legal cultural factors, tradition and historical context. The interplay between such factors creates challenges for the organisation of judicial appointment procedures.

A study of the current Norwegian procedure revealed that the quite extensive formal authority conferred on the King in Council does not accurately reflect the more nuanced balance of powers in practice. The Court Commission suggested changes aimed at increasing the formal judicial independence of the judiciary beyond this practice. The functional comparative research demonstrates that the suggested changes as a whole make the procedure formally better equipped to safeguard judicial independence than the Polish. However, after including legal cultural factors in the discussion and looking at the consequences of increased self-governance in a new democracy like Poland, it does not seem to be sufficiently documented that mere formal improvement in itself is capable of ensuring a lasting, *de facto* independent judiciary. The Norwegian judiciary is supported by the existence of a deep-rooted culture of judicial independence that has grown over time through cooperation between the three branches. It benefits from public confidence, broad representation of legal professions and shared legal method, which provide a promising barrier against potential political attacks.

However, I find the Polish crisis relevant. The ECtHR's future interpretation of the requirement for a tribunal to be "independent" could have implications for Norwegian law. Furthermore, Norway is part of an international community, and international recommendations tend to recommend more judicial self-governance as a general solution to ensure judicial independence in old and new democracies alike.[246] Such instruments have to some extent acknowledged traditions and culture in older democracies, but apparently less so for new democracies.

[246] See European Commission For Democracy Through Law (Venice Commission) (2010), Report CDL-AD(2010)004-e para. 32, recommending that "states which have not yet done so consider the establishment of an independent judicial council or similar body" with judges in a majority.

Experiences by judiciaries currently battling for their independence demonstrate how too much autonomy could give the impression that the judiciary is beyond democratic control and risk it becoming a political target.[247]

It is unclear from the scope of this thesis which long-term effects political attacks like those experienced in Poland could have in a legal culture where public confidence and *de facto* independence is already high, but developments in more fragile democracies is worrying. The legitimacy-problem that comes from a failure to acknowledge and account for growing judicial powers has relevance for a Norwegian Supreme Court with quite extensive normative authority. The Polish judiciary quickly lost both independence and checks on the political branches due to statutory changes that were beyond judicial review. This shows how formal changes is not only insufficient but could actually be counterproductive if they fail to consider legal cultural factors and historical context. Public confidence is key: if the public loses confidence that the judiciary is independent from the other branches, it could become a self-fulfilling prophecy.

5.2. Are the proposed amendments necessary or sufficient?

The question that remains is what the implications of these insights are for the report delivered by the Norwegian Commission of the Courts in September 2020. The long-term consequences of statutory amendments are always difficult to foresee and predict, but lessons from other countries such as Poland could be an indication of what one should keep in mind when planning for the future.

The suggested amendments concern both the appointment itself and the composition and selection of members of the Board. The King in Council's discretion is restricted to such a degree that judicial independence is formally strengthened vis-à-vis democratic legitimacy. The Board's limited powers and broad composition compared to many European judicial councils limit the consequences of such a shift. Codification of existing practice helps avoid a similar unclarity regarding the executive's prerogative as seen in Poland. Democratic legitimacy is maintained primarily through executive influence over the Board, and the cautious choice not

[247] For critical views on the use of judicial councils, see Kosař (2018); Kosař, Baroš and Dufek (2019) p. 443; Müller (2012) p. 940; Urbániková and Šipulová (2018). For an analysis of various models, see Garoupa and Ginsburg (2008).

to have judges in a majority. Empirical studies concerning the effects that composition of councils or boards has on judicial independence is scarce, but experiences from other countries suggest that neither a majority of political appointees nor of judges guarantee sustainable judicial independence.[248] Opting for a balanced and pluralistic composition, avoiding either extreme, therefore seems rational. Improving transparency in the process and having clear qualification criteria both increase democratic accountability and raise the threshold for exerting undue pressure. The suggestions primarily amend ordinary statutes and could go a bit further in securing the Board's role and composition in constitutional provisions. In Poland, the Constitution remains formally unamended whilst its principles are altered through interpretation and other statutes, facilitated by lack of judicial review. Norwegian legal method and judges' ability and confidence to review legislation helps safeguard their independence, but constitutional codification provides better weapons for such review and protects against short-term statutory changes.

NOU 2020: 11 offers a balanced approach to the tension between judicial independence and democratic legitimacy, and the Commission's reluctance to blindly follow international recommendations to increase judicial autonomy seems well-founded and indeed sensible. The goal should not be to achieve the highest possible level of judicial independence of the kind often hailed as the golden standard by international instruments. The Polish situation demonstrates that judicial independence and democratic legitimacy are not mutually exclusive, as the former seems to be better secured by checks and balances than it would by isolation of the judicial branch. Laws can be amended to fit the whims of political leaders given sufficient time. A more realistic objective might therefore be to make courts resilient against short-term statutory changes and delay the process, whilst maintaining public confidence and respecting legal cultural and historical traditions.

[248] See Müller (2012) p. 953 ff., discussing problems with judicial corporatism versus political influence using country examples.

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