

“Gradual Erosion of the Rule of Law in the Shadow of Transitional Justice.”

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## 1. Introduction

Transitional Justice (TJ) comprises the set of procedures that are designed by a country recovering from conflict or authoritarian rule to come to terms with its past (Kaminski et.al., 2006). Many scholars consider acts of transitional justice to be foundational undertakings for a new democracy on a par with the ratification of a new constitutional order (Teitel 2003, Elster 2004). From this standpoint, particularly noteworthy are personnel transitional justice mechanisms, which include lustration, purges, and---to some extent---truth commissions. Truth commissions are bodies appointed by the government of a newly democratic state---or a state that has recently recovered from civil strife---to disclose the nature of atrocities committed during wartime or under a dictatorship (Kaminski et. al., 2006). Lustration vets candidates for public office for ties to the former authoritarian secret police. It reveals information that was previously kept secret. In contrast, purges remove from public office known collaborators of the ancien regime.

In South Africa, coming to terms with the past took place through Truth and Reconciliation hearings that extended all over the country. The success of the South African TRC sparked a renewed interest in this TJ mechanism, which then proliferated around the world, as illustrated below:

[Figure 1 about here]

Figure 1 shows the number of progressive truth commission events, that is events moving the process of implementing a truth commission forward at the institutional level in all countries that since 1946 transitioned to democracy or away from civil war.<sup>1</sup> The only countries omitted from this figure are those that did not have any truth commission events at all.<sup>2</sup>

In post-Soviet countries, however, truth commissions were rare. Instead, the most common approach involved “lustration” and “purges.” Figure 2 illustrates this trend from Eastern Europe very clearly.

[Figure 2 about here]

Figure 2 shows the total number of progressive purge and lustration events, that is events that moved the forward the implementation of lustration and purges. These data, as the data from the previous figure, come from the Personnel Transitional Justice Dataset (Bates, Nalepa, and Cinar 2018).

To the extent that truth commissions reveal embarrassing information that has the potential of ruining a politician's career, they have a very similar effect on the quality of representation as lustration. A comparison of the two figures above suggests even a substitution effect between lustration and truth commissions. At the same time, there are a few countries in Eastern Europe that were late comers to adopting lustration and at the same time did not fill the void left by lack of lustration with truth commissions. Glaring examples of this personnel

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<sup>1</sup> Specifically, following Bates, Cinar and Nalepa, I refer to a progressive TJ event as as the submission of a TJ proposal to the floor of the legislature, the passage of such legislation, the upholding of such legislation as constitutional by a supreme court, or the overturning of a presidential veto against such legislation. In the case of truth commissions, the publication of the commission’s report(s) and the extension of the commission’s mandate are also considered to be progressive TJ events.

<sup>2</sup> They are Ukraine, Turkey, Slovakia, Senegal, Sao Tome and Principe, Russia, Romania, Pakista, Niger, Naicaragua, Montenegro, Mongolia, Mali, Macedonia, Kosovo, India, Hungary, Haiti, Guinea Bissau, Greece, El Salvador, Dominican Republic, Cyprus, Croatia, Comoros, Cape Verde, Bulgaria, Benin, and Albania.

transitional justice deficit are Poland and Hungary---the focus of this chapter. And within sectors that can be affected by personnel transitional justice, the judiciary in both these countries stands out as almost entirely lustration-free.

The argument I set out to make in this article is that reluctance to engage in transitional justice by the liberal governments in office and particularly reluctance to personnel transitional justice have provided their populist successors (PiS in Poland and FiDeSz in Hungary) with an easy pretext to undermine judiciary independence and to use their broadly defined decommunization project to tighten their grip on power. The rhetoric of the populists in Poland and Hungary has been successful. These countries' electorates are supporting PiS and Fidesz, respectively, not because voters have low commitments to the rule of law and democracy, but because they genuinely believe the incumbents' intentions to reform the judiciary are sincere. At the same time, Hungarian citizens appear to be expressing voter regret already and Polish citizens are likely to express it at some point in the future if and when it becomes apparent that the closet autocrats in Poland, as in Hungary, are engaging in actual authoritarian power grabs. Analysis of survey evidence from Poland and the literature describing field experiments in Hungary conducted around the time Fidesz was reelected into office in 2014 (Alquist et. al 2018) corroborate this theory.

The next section, drawing largely on legal theory explains how the trade-off between rule of law and transitional justice played out in Poland and Hungary. Section 2 draws on the literature on the political economy of authoritarian backsliding to propose an explanation for how Polish and Hungarian governing parties have been successful at convincing their respective electorates that they are in fact abiding by the rule of law. Section 4 draws on original survey data from Poland to illustrate these theories and section 5 concludes.

## 2. The costs of “doing nothing.”

The principle of *nulla poene sine lege* (no punishment without a crime) questions whether those who committed human rights violations in the past in accordance with the law at the time ought to be held criminally responsible. It is largely on the grounds of violating this principle that Poland and Hungary’s courts struck down Transitional Justice legislation. Before the populist Law and Justice (PiS) party came to power, Poland had largely forgone coming to terms with its former authoritarian elites (Nalepa 2010) and even when lustration bills were passed, the sharp conflict with the principle of judicial independence led the Constitutional Tribunal to strike down parts of lustration legislation that dealt with the courts (Nalepa 2010, David 2003, Horne 2009, Magalhaes 1999). The Tribunal’s justification for these decisions was that as a new democracy, Poland cannot reconcile the principle of rule of law and non-retroactivity in particular with any effort to expose judges as having collaborated with communists at a time when communism was the ideological backbone of the Basic Law. Likewise, in Hungary the Constitutional Court shielded the judiciary and other elites from lustration and barred the return of property which was expropriated by the communist party to its rightful owners. (Poganyi 1997)

The liberal governments of Poland and Hungary that ruled these countries through the 1990’s and early 2000s prioritized returning these former communist countries to the European community over launching full-scale transitional justice programs. Moreover, out of fear of creating an appearance of undermining rule of law, they especially avoided extended extending

transitional justice programs to the judiciary.<sup>3</sup> This move earned both Poland and Hungary praise from the international legal community. Yet, as this article argues, the unsettled scores with the judiciary's "ghosts of the past" have given the governments who succeeded the liberal cabinets--PiS in Poland and Fidesz in Hungary---a pretext to embark on a series of judiciary reforms that many argue undermine principles of the rule of law.

### ***2.1. Hungary***

In 2010 Victor Orbán's party, Fidesz, was elected into office with a majority large enough to change the constitution. Fidesz, had originated in the youth section of the Free Democrats' Party (SzDSz), the most prominent dissident organization that had negotiated the terms of democratic transition with the communists in 1989. When members of Fidesz became too old to call themselves a youth organization, they created a new party changing the spelling of the organization from an acronym FiDeSz (which stood for "Youth Organization of SzDSz) to Fidesz, which in Hungarian means "loyalty." At the same time, the new party also began experimenting with conservative values. The final push towards abandoning liberal ideology was the competition for power between Fidesz and JOBBIK, a radical anti-Semitic and anti-Roma organization that was rapidly gaining traction in the polls, particularly in peripheries of the country. To capture JOBBIK's electorate, Fidesz moved even further to the right.

Upon winning the elections, Orbán blamed liberal policies and failing to hold the communists accountable for the rise of chauvinistic parties like JOBBIK. The weakening of the

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<sup>3</sup> But see for alternative interpretation of keeping the former authoritarian judiciary intact Popova (2012).

Constitutional Court was the result of the first pieces of legislation that came out of the Fidesz-controlled legislature. Within the Post-Communist region, The Hungarian Constitutional Court had more autonomy and authority than any other court<sup>4</sup>, enjoying powers of abstract review, allowing the court to issue decisions on the constitutionality of the law while bills were still in the legislative process. The court could also review any bill after its passage provided it had an impact on the country's budget. Through these two channels, the Court had repeatedly struck down any but the mildest transitional justice laws.

Orban's legislation first increased the number of judges on the bench so that he could staff it with his own supporters. Next, he did away with the prerogatives of abstract review and budget impact review. Finally, Fidesz severely restricted the rights of ordinary citizens to initiate the process of constitutional review. But even after passing ten amendments to the constitution, Fidesz was still not satisfied with the amount of checks on its power that remained in place. Shortly, Orban started work on drafting an entirely new constitution. The pretext for changing the constitution was that the current Hungarian basic law had been negotiated during the Roundtable talks with the communist government and thus was agreed to under duress, as the communist regime was still in power. Given that these reforms could be interpreted as “doing transitional justice right”, many Fidesz supporters believed that Orban has remained “unchanged from the anti-communist rabble-rouser of the past and that charges of incipient dictatorship are left-wing fantasies.” Five years ago, Zoltan Kovacs, his international spokesman described him as “the same guy he used to be 25 years ago [who] wants to get rid of the attitudes, the remnants of the former system and get rid of the attitude that people live on social aid rather than work.” (NYT Nov 224, 2014.)

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<sup>4</sup> I am using the terms “autonomy” and “authority” in line with the theory presented by Brinks and Blass (2019), where they argue that these two dimensions better capture what conventionally passes as judiciary independence.

In April 2018, Orban's FiDeSz yet again emerged victorious in the parliamentary elections. This time, with only a plurality of the vote, the party cleared the two thirds supermajority necessary to amend the constitution to bring the judiciary under the control of the executive. The effects are already visible. One month following the election a flurry of judges from the National Judiciary Council started resigning just days before announcing a verdict against one of Orban's oldest cronies (NYT, After Orban's Victory, Hungary's Judges Start to Tumble, May 1, 2018). The intimidation of a large number of judges that are part of the body that is supposed to ensure judicial independence in Hungary is an ominous sign for the future of rule of law in Hungary. Orban's authoritarian tendencies did not end with the judiciary. Since passing the new constitution, his government has brought all free print media to close or transfer their operations online (Nolan 2019) and driven out of Hungary the Central European University, the bastion of liberal education founded by Philanthropist and Open Society promoter, George Soros.

## ***2.2. Poland***

An unfinished decommunization project was also the pretext Jaroslaw Kaczynski used to weaken the judicial branch upon coming into office in 2015. And in doing so, he followed largely Orban's playbook. Just like Fidesz, PiS accused the liberal wing of the Solidarity trade union (Adam Michnik, Tadeusz Mazowiecki, Jacek Kuron and others) who had negotiated the transition during the roundtable talks as a deal with the communists that failed to hold them accountable for the wrongdoings committed in the past. The accusations were partially true. Poland's initial transitional justice project was indeed very mild. Lustration for one, never reached the judiciary, because at every attempt to lustrate judges, the Constitutional Court would strike down the legislation. Unsurprisingly, when Kaczynski started replacing liberal judges on

the Constitutional Court (by sending them to to early retirement staffing the with PiS-sympathetic judges who, he framed the move in a language of decommunization.

PiS came to power in 2015 when it succeeded the liberal government of Civic Platform (PO) led for almost two complete terms by Donald Tusk. Tusk had stood at the helm of PO until 2014, when he became President of the European Council, at which point Ewa Kopacz replaced him. Kopacz led the government until the elections of November 2015. It is hard to speculate what contributed to PO's downfall in the parliamentary elections of 2015, as there were several significant crises that struck PO that year. First, in the midst of the Syrian refugee crisis, Ewa Kopacz promised the EU that Poland would be willing to take in 12, 000 refugees. In a country approaching 40 million this seemed like a drop in the bucket. Yet in the context of terrorist attacks in Europe, PiS managed to spin the commitment as a threat to national security. In the end, PO was forced to walk back its promise, causing irreparable damage to its perceptions of resolve at home and abroad. A second defeat came with the Presidential elections in the summer of 2015, which the incumbent, Bronislaw Komorowski of PO took for granted. Although executive power in Poland is wielded by the Prime Minister who is typically the leader of the party coming out victorious in parliamentary elections, the result was interpreted as the public's loss of confidence in PO under the Kopacz leadership. Only 5 years earlier Komorowski had won the Presidency in a landslide against Kaczynski.<sup>5</sup> However, in 2015, instead of Kaczynski, PiS put up Andrzej Duda, a young conservative from the South of Poland (the PiS stronghold). Duda, a Warsaw outsider, was able to dissociate himself from the political mainstream and won

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<sup>5</sup> Komorowski ran as an incumbent even though he had never been elected into office. However, as a result of a tragic plane crash where Lech Kaczynski, President at the time and twin brother of Jaroslaw Kaczynski, perished, Komorowski who at the time was House Speaker, became president, per the 1997 Constitution.



the presidency. Following his victory, the popularity of PO took another turn for the worse.<sup>6</sup> The “straw that broke the camel's back,” however, was the outcome of an eavesdropping operation carried out in a handful of restaurants neighboring the Sejm, the Polish parliament. A series of private conversations recorded by the serving staff revealed top PO politicians discussing sensitive issues pertaining to privatization, foreign affairs, and even national security. Following the publication of a year's worth of transcripts from the conversations, the PO's Ministry of Internal Affairs swiftly shut the operation down. But the investigations revealed no links to any political parties, even though none of the embarrassing conversations involved PiS politicians. As a result of the three crises in rapid succession, PO's support declined substantively.

Following eight years in the opposition benches, PiS emerged victorious in the October 2015 parliamentary election. Even though it won only a minority of the vote, it took an absolute majority of seats in the legislature. The success allowed PiS to establish Poland's first single-party majority cabinet since 1989. It began its rule with undertaking several changes that could be perceived as heading away from democratic norms. A prominent example echoing the scandal with wiretapping PO conversations was a national security bill permitting wiretapping and granting government access to phone records and electronic data. The legislation was promptly sent to the Constitutional Tribunal (Poland's constitutional court) for an evaluation, but the authors of the bill defended it stating that its aim was to preempt criminal activity.

Two other bills---including one restricting public gatherings---were upon passages sent to the Constitutional Tribunal for review. But instead of waiting for what the Court decides, PiS started tinkering with the Court. First, President Andrzej Duda refused to swear in three justices

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<sup>6</sup> To be clear, Poland is a parliamentary regime, with a directly elected president, whose role is very symbolic. His only opportunity to affect policy is through vetoing legislation. The legislative veto, however, can be overturned with a supermajority of 3/5.

who had been elected by parliament in the previous term (so a parliament still controlled by PO) to replace judges whose terms were running out. That move was appealed to the Constitutional Tribunal itself, which upheld the constitutionality of the election of the three justices.

Next, PiS Cabinet Chief of Staff refused to publish the Constitutional Tribunal's verdict, hoping to invalidate it that way. But after the Supreme Court ruled that the Constitutional Tribunal's verdicts had full force of the law from the moment they are handed down, regardless of publication, the three justices joined the bench.

PiS continued to deny the new judges legitimacy and elected its own three candidates. These judges (referred to as “extras”) also joined the bench. But when the Constitutional Tribunal’s Chief Justice, Andrzej Rzeplinski, refused to appoint them to sit on panels, PiS decided to take further action against the Court and appointed Julia Przylebska, a PiS loyalist, to replace justice Rzeplinski. In the next step, PiS passed two bills that shortened the terms of the judges of the Constitutional Tribunal (see below). This was a controversial choice for at least two reasons. First, Poland's National Council of the Judiciary had evaluated---and rejected---Przylebska as lacking qualifications for a post in the Appellate Court, that is a lower level court relative to the Constitutional Tribunal. What is more, she began her judicial career in communist Poland, making her *exactly* the kind of judge PiS promised to get rid of.

In order to better understand the succession of judicial reforms that followed, a brief primer on the Polish court system is in order. The system of courts is complex and made up of four levels: the regional, district, appellate, and the Supreme Court. Lower level courts are surprisingly influential due to peculiarity of the Polish constitution: Article 178 of the Basic Law allows lower-level courts to engage in interpreting the constitution when the Constitutional

Tribunal is incapable of doing so. Consequently, Article 178 puts plans of any Polish closet authoritarian in jeopardy. Even if a ruling party replaced key constitutional justices of the Constitutional Tribunal with its supporters it could only count on their effectiveness in upholding unconstitutional legislation if it could prevent judges of every single court entitled to rule on the basis of article 178 from acting upon it. In order to influence these lower court judges incentives PiS had to also control the Supreme Court---the court of appeal for lower-level decisions. With the Supreme court on PiS's side, any judge interpreting the constitution at odds with the ruling party would risk having the decision reversed by a PiS-controlled Supreme Court. Since frequent reversals undermine judicial careers, few lower-court judges would take this risk.

The Supreme Court is not only the court of appeal for lower-level courts. The constitution makes it also responsible for determining the validity of all nationwide referenda, as well as elections to the Sejm and Senate. Hence, it is within the powers of the Supreme Court to rule an election invalid should an incumbent lose. Another Supreme Court task is to review reports from parties seeking reimbursement for electoral expenditures. Poland, in contrast to the United States, has a public system of financing electoral campaigns. Upon clearing the threshold of 3% of the national vote, parties seek reimbursements for campaign expenditures up to 4.04 PLN per vote from the state treasury. Yet to be reimbursed, the applicant's books must be deemed "in order" by Supreme Court judges. Denying compensation to opposition parties by an autocrat-controlled Supreme Court could thus be interpreted as a "slow-bleed" strategy to bankrupt the opposition and eliminate electoral competition.

The lateral institution to the Supreme court is the Constitutional Tribunal, the equivalent of the Supreme Court in the US and constitutional courts in other countries, except that it only deals with the constitutionality of legislation passed in the Sejm and the constitutionality of legal norms applied in decisions of lower level courts.

Finally, there is the National Council of the Judiciary. This is an independent body which makes recommendations on who should be appointed as a judge and also initiates disciplinary action against members of the judiciary. The final disciplinary decisions are then carried out by a special Ombudsman for Discipline.

The next set of judicial reforms initiated in the beginning of 2016, eliminated the middle layers of the court system, the regional and appellate courts, forcing judges over 65 to retire, unless they received an exemption from the Minister of Justice. Permission would only be granted following vetting by a special commission. The reforms also made it easier for the government to impose disciplinary actions on all judges, by-passing the National Council of the Judiciary. This has been accomplished giving parliament the authority to appoint members of the National Council of the Judiciary.<sup>7</sup>

In July, 2017 the PiS controlled parliament approved legislation to drastically change the composition and functioning of the Polish Supreme Court. The Justice Minister was handed discretion over who among the judges of the Supreme Court remained in office and who was forced into retirement. Effectively, this reduced the number of judges from 87 to 31.<sup>8</sup> The

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<sup>7</sup> In light of Brinks and Blass (2019), this move could be interpreted on the surface as broadening the coalition entitled to recall judges and hence a move towards increasing not decreasing the court's autonomy. Yet, in the specific Polish context, where the overwhelming parliamentary majority is from PiS, the autonomy of the court was likely to decrease rather than increase.

<sup>8</sup> Technically, the number was 43, but 12 would sit in a newly created "disciplinary department", so there would be 31 judges doing the work of 87.

prerequisites for holding a Supreme Court seat were lowered to a minimum of 12 years of experience in a regional court. Since the Minister of Justice already simultaneously holds the position of Prosecutor General, the reforms have allowed the ruling majority to choose both the prosecutor *and* the judge in every single court case. The bill was not implemented immediately as the speed with which PiS guided it through the legislative agenda invited public outcry. After tens of thousands of Poles in over 100 cities protested the rapid and radical reform, Andrzej Duda---PiS's President---vetoed the bill, ostensibly to protest the fact that he had not been consulted at the time of its preparation and because it transferred too much power into the hands of the Minister of Justice. Nevertheless, following some compromises which distributed control over the selection of judges between the Ministry of Justice and the Presidency, Duda conceded and the final set of judiciary reforms was passed in December 2017.

Experts concluded that this most recent bill alone potentially conflicted with at least two articles of the constitution (181 and 182), but the measure was not struck down because PiS sympathizers already occupied a majority of the Constitutional Tribunal bench. Hence, so far, nothing that PiS has done is unequivocally against the constitution. Yet at the same time, there are at least a few reasons why a closet autocrat would want to take control over Poland's Supreme Court, the National Council of the judiciary, and lower level courts in this way.

First, the Supreme Court could invalidate elections lost by PiS. Second, by using the “slow-bleed” strategy described above, it could deny reimbursements to opposition parties. Third, the most influential opposition party to date---Civic Platform-- could take a blow if Donald Tusk, its former leader, and current Council of Europe president, were put on trial before the State Tribunal. The State Tribunal is a special judiciary body for assessing the constitutional liability of persons holding the highest state rank. This process could result in criminal

punishment and a loss of civil rights. The chief justice of the Supreme Court serves, *ex officio*, as the justice presiding over the state tribunal. Tusk's alleged crime is the murdering Jaroslaw Kaczynski's twin brother Lech, who was Poland's president at the time he perished in a plane crash over Smolensk, Russia. According to Jaroslaw Kaczynski, Tusk sabotaged the investigation into the catastrophe and allowed for declaring it an accident much sooner than it was warranted to do so. Finally, gaining steering control over the Supreme Court would allow Kaczynski to pardon a close ally and associate, Mariusz Kaminski. In a 2015 case, a regional court sentenced of Kaczynski and former head of the Central Anticorruption Bureau, to three years in prison for abuses of power. In November of 2015, within days of assuming office, President Andrzej Duda pardoned him. But the Supreme Court annulled the pardon in March 2017. Barring a reversal, Kaminski would go to prison. While pundits are speculating about the true intentions behind judiciary reforms, the EU is evaluating the status of rule of law in Poland and deciding whether to invoke procedure number seven, which would strip Poland of voting rights in the EU.

### **3. Closet authoritarians or ideologues?**

In short, in Poland, as in Hungary, policies that some interpret as dismantling checks and balances and undermining the rule of law can be interpreted as settling scores with the communist past. Similarly, in Turkey, which has had a less strong standing on democratic principles than Poland and Hungary, Erdogan's attempts to change the regime from parliamentary to presidential could be interpreted as coup-proofing or as an attempt to concentrate power in the hands of a single politician (Cinar 2018).

What these cases have in common is that both Orban and Kaczynski have been reelected into office, while Erdogan won a popular referendum changing the regime from parliamentary to

presidential and allowing him to tighten his grip on power. Second, these leaders are implementing policies that at least on the surface in accordance with the constitution. Therefore, the reforms cannot be interpreted as decidedly authoritarian.

Around the time of the Hungarian election of 2014, a team of researchers conducted a survey experiment where it assigned respondents to random pieces of information regarding changes made to the electoral law on the eve of the 2014 election (Ahlquist, et.al. 2017). Then they were asked about the legitimacy of FiDeSz rule. Following the election, respondents were provided with the same treatments and had a chance to reevaluate their evaluation of FiDeSz rule. The team found that new FiDeSz voters---that is people who supported other parties in 2010, but switched their vote to support FiDeSz in 2014 upon hearing about the electoral heresthetics<sup>9</sup> conducted by FiDeSz prior to the election changed their view of the election's legitimacy. This evidence is suggestive of the fact that there was genuine uncertainty related to the type of incumbent Hungarian voters were deciding to reelect in 2014.<sup>10</sup>

The political events from Poland in the last couple of years suggest that there exist alongside each other very conflicting interpretations of PiS's actions. While for some, it is a party of ideological conservatives which promises to complete once and for all Poland's transitional justice program, to others, it is a party of closet autocrats. This idea comes from theory advanced in a recent paper by Nalepa, Vanberg and Ciopris (2018), who argue that whether or not citizens reelect an incumbent who they are uncertain as to whether he is a closet

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<sup>9</sup> I use the term heresthetics consistently with (Riker 1986).

<sup>10</sup> Whereas this uncertainty was present in 2014, a majority of experts believe that by 2018, the true nature of the incumbent (Orban) was known and using the terminology to Nalepa, Vanberg and Ciopris, he could be regarded as an autocrat "out of the closet." CITES

autocrat or an ideological conservative depends on elite polarization (reelection is increasing in polarization), the ideological distance between the representative citizen and the alternative candidate from the opposition (reelection is increasing in societal polarization); and the probability that the incumbent is in fact a closet authoritarian (lower probability increases chances of voting for closet autocrat). In addition, these authors allow for the citizens tolerance for an authoritarian regime to be very low. This last condition is an important point of departure from existing theories, most prominently illustrated by Milan Svoboda. In a 2018 working paper he formalizes a scenario in which polarization of the elites is so high that citizens prefer to elect an autocrat who is ideologically closer to them than a democratic politician who is ideologically further away (Svoboda 2018). In Svoboda's model, polarization in elites drives voters to knowingly elect an openly autocratic incumbent into office. In contrast to the Nalepa-Vanberg-Ciampi model, however, there is no uncertainty about the identity of the incumbent.

Contrasting these two models allows to develop two contrasting hypotheses about the kinds of beliefs Polish citizens hold in regard to PiS. Both models predict that voting for PiS ought to increase with polarization. However, additionally, the Nalepa et. al. requires societal polarization accompany elite polarization and that there be negative effect of beliefs regarding policies implemented by PiS. Specifically, voting for PiS is more likely when respondents believe that judicial reforms are non-other than the continuation of a transitional justice program that should have reached the judiciary, but somehow did not.

Critically, whereas both models underscore polarization as a leading cause for reelecting the autocrat, the latter model is compatible with voters exhibiting as a strong aversion to



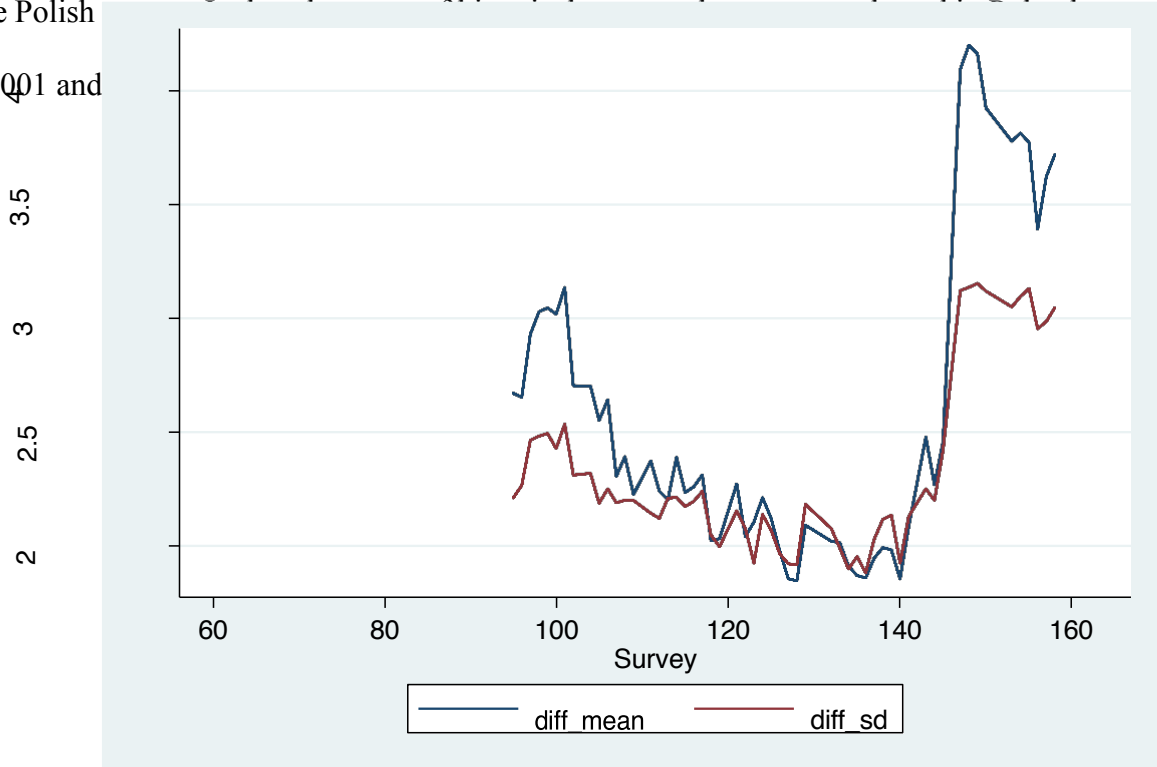
authoritarian rule. In the next section I first present evidence in support of both models and next, in support of the theory of closet authoritarians impersonating ideological candidates.

**4. Survey evidence**

In this section, I first present historical survey data illustrating the increasing levels of polarization between political elites in Poland in the 21<sup>st</sup> century. This can be used to support either the model of Svulik or the model of Nalepa et. al. Following this, I provide evidence from two contemporary surveys that allows to adjudicate between the two theories.

*4.1. Elite polarization in historical surveys*

In order to show that the polarization condition necessary for democratic backsliding has taken hold in the Polish between 2001 and



**Figure 3: Elite Polarization between 2001 and 2011. In order to measure the polarization between elites I used the absolute value of the trust differential between PiS leader Kaczynski and current PO leader, Tusk:  $|\text{TrustPiSi}-\text{TrustPOi}|$  .**

The polling company CBOS has been around for over three decades and has been the primary source of information about political preferences and citizen attitudes for researchers studying Poland. It uses nationally representative samples and face-to-face interviews.<sup>11</sup>

First, I make use of historical CBOS polls conducted on representative samples of Poles using the same sampling technique between 2001 and 2011 to measure elite polarization. January 2001 (survey 92) is the first date when CBOS included among their feeling thermometer questions, items about trust towards Kaczynski and Tusk, the leaders of PiS and PO, respectively. This is something that is hard to measure at the level of individual respondents, as the perception of the extent to which the political elite is polarized ought to be similar across respondents. To create this variable, I first calculate the trust difference for each respondent and next, take its absolute value. Finally, for each survey, I recorded the mean and the standard deviation of this absolute value. Note that the absolutization of the difference is necessary, because if one respondent awarded full trust to Kaczynski and complete mistrust towards Tusk, while another respondent awarded full trust to Tusk and complete mistrust to Kaczynski, their mean difference would be zero. Yet such preferences are consistent with the highest elite polarization admitted by the survey questions. Figure 3 shows trend in elite polarization measured as the mean absolute difference between the trust to each of these leaders, a variable

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<sup>11</sup> Details of this sampling method as well as full descriptions of the variables we use and summary statistics are provided in the empirical appendix.

that I call *PiSmPO*. The trend starts with the 92 survey conducted by CBOS (around 2001) and ends in 2011.

2001 marks the year when PiS and PO---the two parties vying for power over the last decade--- appeared on the political scene. Both parties were created following the crisis of the Action Election Solidarity (AWS), the umbrella party organization uniting former anti-communist dissidents against the successor communist Democratic Left Alliance (SLD). The breakup of AWS and the crisis of SLD have been considered by scholars studying the region the end of the so-called “regime divide” in Poland (Grzymala-Busse 2001). Beginning with 2003, the main cleavage dividing Polish voters was no longer allegiance to the former communist autocrats or their opposition, but a more classical conservative-liberal cleavage (Bernhard and Jasiewicz 2015).

2011 marks the beginning of the second term in office of a government led by PO's leader Donald Tusk. During this time, PiS was led first by Lech Kaczynski and following the 2010 tragic accident in which Lech Kaczynski perished, by his twin brother, Jaroslaw.

Figure 3 shows that around 2005, the year in which PiS won a plurality in the parliamentary elections for the first time (and entered into a cabinet coalition with two other parties: Samoobrona and the League for Polish Families) there is a dramatic increase in elite polarization. Both the absolute distance between trust to the government and opposition leader and the standard deviation of this measure increase. This result suggests that conditions for both the Svolic and the Nalepa-Vanberg-Ciopris models started holding. An increase in polarization increases the chances of voters electing authoritarian candidates according to Svolic or--- according to Nalepa-Vanberg-Ciopris--of voters reelecting incumbents because they are uncertain if they are dealing with an ideologue or with a closet autocrat.

#### ***4.2.Polarization in Society: contemporary surveys***

Next, in order to discriminate between the predictions from Svolik's and the Nalepa-Vanberg-Ciopris, I make use of two contemporary surveys that took place in 2017. As all CBOS surveys, these two also ask respondents two questions "If the elections were held this Sunday, would you participate in them?" and, if the respondent answers assertively, "Which of the following parties would you cast your vote for?" Thanks to this question I can predict *PiS* voting by coding with a dummy variable the value "1" for voters who voted and voted for PiS and with a "0" voters who did not vote for "PiS", although they voted.<sup>12</sup>

The first of the surveys I use below was conducted in February 2017, around the time that PiS was proposing a bill that would allow parliament to select members of the National Council of the Judiciary. In reference to this event, one of the questions in this survey allowed the respondents to indicate their support for the statement "It is a good idea for judges of the National Council of the Judiciary to be selected by the parliament and not by the judiciary community." I used this question to create the variable *KRSpol* that I use to measure a representative citizen's beliefs as to whether he is facing a closet autocrat or an ideological candidate. Higher values of this variable represent dissatisfaction with the politicizing Polish courts. Hence we anticipate this variable to have a negative effect on PiS voting.

This survey also offers two ways of measuring polarization in the electorate. The first builds on one of the questions used to measure sympathy towards the opposition party Chairman (in 2017,

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<sup>12</sup> All the regressions are run only on voters, hence the small number of respondents than 1000, which is roughly, what a representative sample requires.

this was Grzegorz Schetyna). This variable, *TrustGS*, varies from 1 to 11, with 11 representing higher values of trust. Hence, I expect this variable to have a negative effect on PiS voting.<sup>13</sup>

The second variable that can be used to measure the polarization in the electorate is based on a question asking each respondent to place him or herself on a left-right scale running from general left leaning ideology to general right leaning ideology. Although this general Left-Right scale (*LR*) does not correspond unequivocally to the cleavage separating PO from PiS, it does serve as a relatively good measure of polarization in the electorate. Moreover, the discrepancy between the results based on these two measures can serve as an indication of the misalignment between the main cleavages of division in the electorate and among political elites in Poland in 2017.

Since higher values on this self-placement scale represent more conservative values, I expect this variable to have a positive effect on voting for PiS. The results of 2 models corresponding to the two measures of polarization in the electorate (*TrustGS* and *LR*) are presented below in Table 1.

In addition to main variables of interest, I include in the regressions demographic controls for sex, employment, education, religiousity, Age, and dwelling (with medium size city being the default category). Except for education, all these are measured as dummy variables. Education spans 12 categories from lowest to highest, but rather than reflecting years of education, it represents type of degrees, with various mid-level vocational degrees occupying the middle categories.

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<sup>13</sup> To estimate polarization in the electorate, we need to know how ideologically far the citizen is relative to the opposition candidate. To measure this distance I use the following feeling thermometer question: "Persons in public life---in their behavior, in what they say, and what they try to achieve---can arouse more or less trust. We will show you now a list of persons active in public life and ask you to what extent this person is trustworthy. -5 means that you associate great distrust towards this person, 0 means you are indifferent and 5 means that you trust them completely. And of course, you can make use of any numbers between -5 and 5 to express your trust towards this person. Please let us know if you do not know this person." This scale was then converted to 0 to 10, for greater ease of manipulation.

**Table 1: Logit regression of PiS voting on variables operationalizing elite polarization (PiSmPO), respondent beliefs regarding whether (s)he is dealing with a closet autocrat (KRS pol) and polarization in the electorate (LR or TrustGS); Data Source CBOS “Przeglądówka\_Luty” survey, conducted on February 2, 2017.**

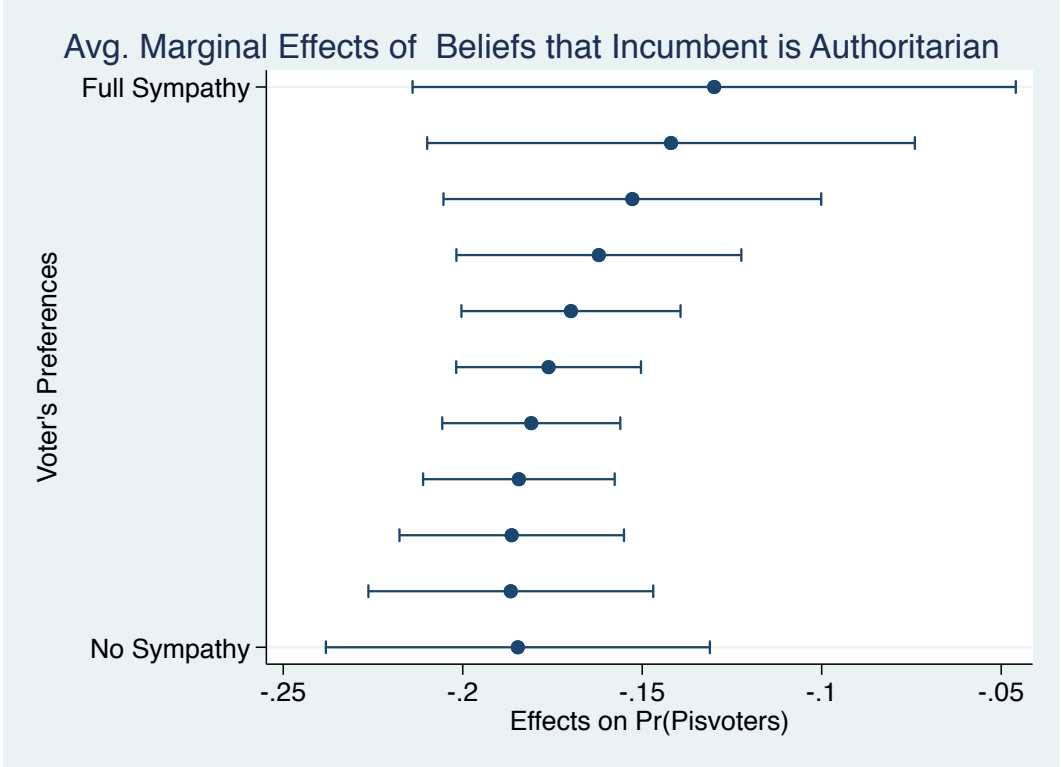
VARIABLES	(1) Using Trust GS	(2) Using L-R
krspol	-1.183*** (0.386)	-1.656*** (0.560)
Polarization in electorate	-0.272 (0.167)	0.384 (0.282)
c.krspol#c.LR	-0.0213 (0.0658)	0.0809 (0.117)
PiSmPO	0.0913 (0.0597)	0.120** (0.0543)
Male	-0.738** (0.303)	-0.599* (0.318)
Employed	0.318 (0.343)	0.384 (0.363)
Education	-0.108** (0.0549)	-0.0720 (0.0576)
Village	0.423 (0.369)	0.413 (0.398)
City	-0.464 (0.361)	-0.791** (0.383)
Age	0.00267 (0.0103)	0.0132 (0.0112)
Religiosity	0.426 (0.288)	0.227 (0.308)
Constant	4.249*** (1.374)	0.345 (1.588)
Observations	484	433

First, since these are the results of a logit model, the coefficients cannot be interpreted as the effect on the dependent variable of a unit change in the independent variable, though we can interpret the sign and significance of the effects. The table above shows that, indeed voting for PiS increases with polarization of elites (though significantly only in the second model), and

significantly decreases with beliefs that the incumbent is a closet autocrat (*krspol* is negative).

Polarization in the electorate is not significant, though in the expected direction.

Key for the predictions of the Nalepa-Vanberg-Ciopris model, however are the effects of beliefs of citizens in conjunction with polarization in the electorate. Figure 4 below shows average marginal effects respondent beliefs (measured with *krspol*, that is the question asking respondents to evaluate the polarization of the National Council for the judiciary) for different values of respondent self-placement. We see from the figure that although beliefs have a strong and negative effect on PiS voting, respondents' preferences do not moderate that effect.



**Figure 4: Average marginal effects of the belief that the incumbent is a closet autocrat of difference preferences of voter respondents.**

This is not in line with the expectation from the Nalepa-Vanberg-Ciopris model. Yet an important limitation of the March 2017 survey is the lack of operationalization for the anti-

authoritarian sentiments among the respondents. The second survey from 2017 offers here a considerable advantage.

The second survey was fielded in August of 2017, directly following the unexpected presidential veto of two of the three judiciary reform bills the President was supposed to sign into law (the bill on the National Council of the Judiciary and on the Supreme Court, were vetoed but the bill reforming lower level courts was signed into law). This survey also includes the same standard questions about voting intentions and questions about sympathy towards the leaders of PO and PiS, allowing me to construct the dependent variable PiS voting, as well as the variables measuring polarization: *TrustGS* for polarization in the electorate and *PiSmPO* for elite polarization. The August survey offers two different ways of measuring the representative citizen's beliefs as to whether he is facing a closet autocrat or an ideological candidate. The first is “Do you agree that PiS intends to improve the Polish judiciary with its reforms?” and the second is “PiS is using the reform of the judiciary to take over power in Poland.” Because the first question can be used as an indicator of belief that the incumbent is an ideological incumbent, whereas the second question can be used as an indicator of belief that the incumbent is a closet autocrat, we can subtract the answer to the second from the answer to the first to create a variable *type*, which ranges from -3 to 3 and after normalization, from 0 to 6. Higher values on the *type* variables indicate stronger beliefs that the incumbent is closet authoritarian. A second way relies on the question asking respondents about their support for the summer of 2017 protests that swept across Poland during the week and a half between the passage of the judiciary bills in the Sejm and the Duda veto. Respondents could express “full support for the protests” (a score of 5) to “full condemnation of the protests” (a score of 1). In the regressions below, I will focus on this second way of measuring beliefs.



Critically, the August 2017 survey also has the advantage of providing questions allowing to measure how much voters care for avoiding authoritarian rule. Respondents in the August 2017 survey were asked to what extent they agree with each of the following four statements in turn:

- 1) Democracy is superior to any other form of rule (*Democracy Superior*)
- 2) For people like me, it does not matter whether the regime is authoritarian or democratic (*Indifferent*)
- 3) Sometimes Non-democratic rule is better than democratic rule (*NonDemocracy Superior*)
- 4) Government by a strong leader is decidedly better than democratic rule (*Strong Leader*)

Voters could “agree strongly,” “agree somewhat,” “rather disagree,” “strongly disagree” with the above statements. Higher values of these variables represent stronger disagreement. The assumptions of the Nalepa-Vanberg-Ciopris model require that we control for anti-authoritarian sentiments, but that they not be significant predictors of voting for PiS. Svulik’s model, in the meantime, would lead us to expect respondents with weaker anti-authoritarian attitudes to be more willing to vote for PiS. In the models below, I use the variable *Indifferent*, as it captures most literally the anti-authoritarian sentiment that political economy literature indicates should be significant for voting behavior.

The results of seven models, where I progressively add covariates to make sure that the coefficients are stable are presented in Table 2.

[Table 2 about here]

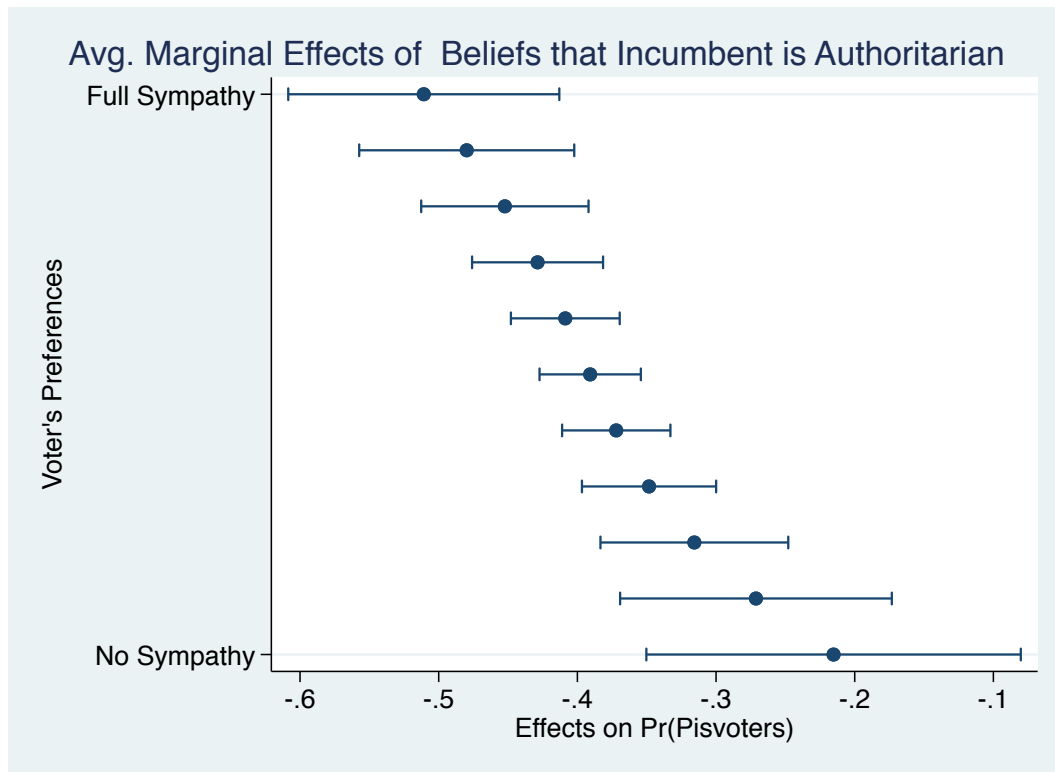
Note, that the variables responsible for polarization—both at the elite level and in the electorate are now significant and in the predicted direction. The coefficients are also very stable across the

different models (note that in Model 7 the interaction effect between polarization in and beliefs takes up some of the effect expressed in the previous models for Support for Anti-PiS protests and for polarization in the electorate). The effect of anti-authoritarian beliefs is not significant at all. This suggests that there is evidence supporting the Nalepa-Vanberg-Ciopris model, but not the Svulik model.<sup>14</sup>

The final model in Table 2 presents all variables that correspond to the parameters that according to Nalepa-Vanberg-Ciopris predict voting to PiS by voters who are confused as to whether they are facing a closet autocrat or an ideologue (elite polarization, polarization in the electorate, and citizen beliefs). Critically, it also includes an interaction term between beliefs and citizen participation, which in this instance is indeed significant. This can be seen clearly and in a way allowing for the interpretation of the magnitude of the coefficients in Figure 4 below which shows the average marginal effects of citizen beliefs that they are dealing with an closet autocrat for different citizen preferences. The figure shows that the effect of beliefs is weaker the closer ideologically the citizen is to the incumbent. That is, for citizens who are close ideologically to the opposition candidate, a unit change on the belief scale makes the citizen 50 % less likely to vote for PiS. But for a citizen with preferences as far as possible from the opposition candidate, a unit increase in beliefs that the incumbent is closet authoritarian decreases his probability of voting for PiS only by 20%.

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<sup>14</sup> None of the other variables that could potentially be used to measure sensitivity to authoritarian rule appeared significant in any of the combinations of variables with the exception of Strong Leader, which was borderline significant in the model with support for anti-PiS protests.



## 5. Conclusion

In light of the evidence presented above, I believe that there are strong reasons to believe that transitional justice policies are in part to blame for the undermining the rule of law in Poland and Hungary. Because the judiciary was in large part shielded from purges and lustration, PiS and Fidesz, the ruling parties on the right have been able to convince the electorate that packing courts and bringing courts under political control is part of its decommunization program, which will ultimately make the courts more efficient. I argue that voters that reelected PiS did so not because they hate the opposition so much that they were willing to replace the PO with an autocrat. The evidence presented here suggests that beliefs matter and given the choice, PiS voters too want to avoid voting for someone they believe to be a closet autocrat. This argument is different from alternative models of authoritarian backsliding, such as Svoboda's, in which the ideological distance between the voter and the opposition incumbent is precisely what induces voters to cast their support for the candidate they know to be authoritarian.

**Table 2: Logit regressions predicting PiS voting using the August 2017 survey**

VARIABLES	(1) Model 1	(2) Model 2	(3) Model 3	(4) Model 4	(5) Model 5
Polarization in elector. (TrustPO)	-0.416*** (0.0372)	-0.369*** (0.0376)	-0.258*** (0.0447)	-0.257*** (0.0460)	-0.101 (0.0632)
Elite Polarization		0.177*** (0.0344)	0.204*** (0.0413)	0.187*** (0.0420)	0.255*** (0.0469)
Support for Anti-PiS protests			-2.454*** (0.254)	-2.466*** (0.259)	-0.886* (0.520)
TrustPO # Sup. Anti-PiS protests					-0.358*** (0.105)
Indiff. between Dem & Auth.				-0.0556 (0.144)	-0.0629 (0.147)
male	-0.0745 (0.191)	-0.0666 (0.197)	-0.0951 (0.232)	-0.0506 (0.237)	-0.149 (0.241)
employed	-0.268 (0.227)	-0.157 (0.234)	-0.358 (0.278)	-0.262 (0.284)	-0.238 (0.288)
Education	-0.147*** (0.0367)	-0.159*** (0.0378)	-0.136*** (0.0439)	-0.127*** (0.0464)	-0.106** (0.0468)
Village	0.486** (0.240)	0.514** (0.248)	0.254 (0.295)	0.293 (0.303)	0.295 (0.308)
City	-0.0852 (0.251)	-0.121 (0.260)	-0.329 (0.309)	-0.299 (0.313)	-0.336 (0.318)
Age	0.00559 (0.00636)	-0.00108 (0.00671)	4.93e-05 (0.00781)	0.00230 (0.00808)	-0.000115 (0.00816)
religiosity	1.678*** (0.515)	1.618*** (0.525)	1.106* (0.608)	1.109* (0.603)	1.179* (0.605)
Constant	0.618 (0.741)	-0.0221 (0.763)	0.951 (0.881)	0.941 (0.982)	-0.00940 (1.029)
Observations	670	666	628	603	603

**Data Source CBOS “Przeглядówka\_Sierpien” survey, conducted on February 2, 2017 August, 18, 2017.**

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