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REPORT ON THE STATE OF RULE OF LAW IN POLAND IN 2018

This report, prepared by the Polish Bar Council and the National Bar of Attorneys-at-Law, provides a general overview of the rule of law situation in Poland in 2018.¹ It focuses on actions taken by the ruling Government resulting in: reduction of independence of the Supreme Court, paralysis of the National Council of the Judiciary, reduction of independence of judges of ordinary courts (mainly in relation to disciplinary proceedings), resulting in several protests within the judiciary, the amendments to the Criminal Procedure Code and last but not least the persistent decline of the Constitutional Court.

This report refers to the European Commission Reasoned Proposal prepared in accordance with article 7(1) of the Treaty on European Union regarding the rule of law in Poland and supplements it by relevant events of 2018.²

The Supreme Court

1. The new law on the Supreme Court was adopted on 8 December 2017 and is in force since 3 April 2018. The main issue in this act was that it lowered the retirement age of Supreme Court judges from 70 to 65, forcing 27 out of 72 current judges to retire. The only possibility to avoid a forced retirement was to request prolongation of their mandate. A decision on the approval of such request lied within the sole discretion of the President of the Republic, who in his decision-making did not need to follow any clear criteria. Also, no judicial review was available for challenging such a decision.
2. In the Reasoned Proposal the European Commission indicates that lowering the retirement age and applying it to the Supreme Court judges currently in office would influence the rule of the separation of powers, especially when considered in combination with the simultaneous reform of the National Council of the Judiciary. Moreover, this change violated the principle of irrevocability of judges. From a practical perspective, lowering the retirement age would inevitably lead to retirement of the significant number of the Supreme Court judges in office. Therefore, this change would have a particularly strong impact on the Supreme Court, which is generally composed of judges who are, by nature, at the end of their career. Procedure of prolongation of the mandate of Supreme Court judges who wanted to adjudicate, even though they were over 65 years old, was also questioned by the European Commission. The Commission pointed specifically to the lack of any assessment criteria for considering such requests and to the lack of time frame for the President of the Republic of Poland to make decision on extension of the mandate.
3. The Reasoned Proposal also draws attention to the issue of the six years mandate of the current First President. The Commission notes that appointment of an acting First President took place through an *ad hoc* procedure without involvement of the judiciary, what raised serious concerns as regards the principle of separation of powers. It should be highlighted that the President, the governing party, the Prime Minister and the Government held that Ms. Małgorzata Gersdorf, who had been the First President before the new law on the Supreme Court entered into force, has retired *ex lege* and no longer held this position. At the same time, the President had not appointed a person acting as a the First President on the basis of art. 111 § 4 of the law on the Supreme Court.
4. The European Commission expresses also concerns about extraordinary appeal procedure which enabled review of final and binding judgements and decisions delivered by Polish courts in the past 20 years. This procedure is perceived dangerous for stability of legal order and finality of judgements. This new form of review required creation of a new chamber in the Supreme Court which would deal specifically with motions to review judgements and decisions pursuant to this new extraordinary appeal procedure. It was indicated that this chamber would consist only of newly appointed judges, what raised serious doubts. Since December 2017, there were generally no amendments to provisions regulating extraordinary appeal. Only an additional requirement for submission of an appeal was introduced – the amendment came into force on 16 July 2018. It states that an appeal can be submitted only if it is necessary to preserve rule of democratic state governed by law and implementing the principles of social justice. According to the legislator, as the changed wording refers strictly to the wording of the Constitution, it is aimed at avoiding potential doubts as to the meaning of this requirement. It should be pointed out that in practice this procedure has not been abused. Polish Human Rights

¹ See also: text of Adam Bodnar speech at the Public Hearing : “The situation of the Rule of Law in Poland, in particular as regards the independence of the judiciary” which took place on 20 November 2018, available at:

<https://www.rpo.gov.pl/en/content/adam-bodnar-public-hearing-%E2%80%9C-situation-rule-law-poland-particular-regards-independence-judiciary%E2%80%9D>

A. Sledzinska-Simon, The Rise and Fall of Judicial Self-Government in Europe edited by David Kosař (Masaryk University) , German Law Journal, Issue 7/2018, available at: https://papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID3216482_code2736718.pdf?abstractid=3216482&type=2;

Helsinki Foundation for Human Rights report from December 2017: New threats to the rule of law. The reform of the judiciary in Poland, available at: <http://www.hfhr.pl/wp-content/uploads/2017/12/New-threats-to-the-rule-of-law-brief-12-2017.pdf>.

² Brussels, 20 December 2017, COM(2017) 835 final, 2017/0360 (APP) (hereinafter “Reasoned Proposal”).

Commissioner lodged 4 extraordinary appeals,³ and second entitled institution – Prosecutor General – lodged 2 extraordinary appeals.⁴

5. Last but not least, changes introduced to disciplinary liability of judges also raise concerns. It is described in the Reasoned Proposal that the disciplinary chamber would consist only of newly appointed judges as current Supreme Court judges were not allowed to be transferred to this chamber. Moreover, the European Commission points out that the President of the Republic of Poland may appoint extraordinary disciplinary officer to an ongoing disciplinary proceedings. In such instances, the regular disciplinary officer of the Supreme Court would be excluded. Furthermore, the Reasoned Proposal indicates that procedural guarantees concerning gathering of evidence were removed in proceedings against judges and Supreme Court judges. The provision of art. 131 of the law on the Supreme Court stated previously that the Supreme Court judges must not be transferred to adjudicate in the disciplinary chamber. Following recent amendments, the Supreme Court judges generally can be transferred to adjudicate in the disciplinary chamber. However, if a Supreme Court judge wants to be transferred to adjudicate in the disciplinary chamber before the first set of judges of the disciplinary chamber is appointed, he or she has to obtain consent of the First President of the Supreme Court, the President of the Disciplinary Chamber and the President of the Chamber in which he or she works. Subsequently, he or she must submit a motion to the National Council of the Judiciary. The National Council of the Judiciary gives its opinion on such candidate and the decision is made by the President of the Republic of Poland. The rest of the provisions described in the Reasoned Proposal concerning evidence proceedings were not changed.
6. On 2 August 2018, the Supreme Court referred questions to the European Court of Justice about whether or not the forced retirement of most of its senior judges and other infringements of judicial independence are compatible with EU law.⁵
7. In a preliminary interim measure issued on 19 October 2018,⁶ CJ EU ruled that 22 retired judges have to come back to work. The new law on the Supreme Court which implements preliminary interim measure was adopted on 21 November 2018 and has been in force since 1 January 2019. This law confirmed that retired judges of the Supreme Court have power to adjudicate cases, as well as that Mrs Małgorzata Gersdorf, the President of the Supreme Court, continues her term of office.
8. However, the abovementioned amendments do not refer to the rest of the mechanisms introduced by the legislator and questioned in the Reasoned Proposal.

The National Council of the Judiciary

9. The amendments to the law on the National Council of the Judiciary from December 2017 raised several problems regarding the rule of law in Poland. Firstly, the Reasoned Proposal describes termination of mandates of all judges who were members of the National Council of the Judiciary as violation of the rule of separation of powers. This rule is also violated by the new procedure of appointment of judges – members of the National Council of the Judiciary. Members of the Council are now chosen by *Sejm* what gives the Parliament a decisive influence on composition of the National Council of the Judiciary. The described changes are important as the National Council of the Judiciary is aimed to protect the independence of judges, in particular, as regards their promotion, transfer, disciplinary proceedings, dismissal and early retirement.
10. Since December 2017 the rules concerning appointment of the members of the National Council of the Judiciary have not changed. The newly elected members of the National Council of the Judiciary were appointed and were involved in the process of electing candidates for the Supreme Court judges to be presented and appointed by the President of Poland.
11. Five of the current members of the National Council of the Judiciary were nominated by the Minister of Justice Mr. Zbigniew Ziobro for presidents of common courts; two were put up by the Institute of Judiciary at the Ministry of Justice. It should be noted that it was discussed whether the lists of persons who presented candidates to the National Council of the Judiciary should be made available to public as the *Sejm* did not want to reveal them. On 29 August 2018 the Provisional Administrative Court decided over this matter and obliged the *Sejm* to reveal the lists under the law on the access to the public information.
12. As long as the procedure of nomination of the Supreme Court judges is concerned, the National Council of the Judiciary scheduled additional session in August 2018 to expedite the procedure. The current President of the National Council of the Judiciary – Mr. Leszek Mazur – commented on this additional session and confirmed that time is of the essence. In this regard it is important to note also that the National Council of the Judiciary continuously ignored opinions concerning possible invalidity of the notices on vacancies for the Supreme Court judges.
13. During the August 2018 sessions of the National Council of the Judiciary, 40 candidates for judges were elected. Among the chosen candidates were 6 prosecutors, five of whom became judges in the disciplinary chamber of the Supreme Court. Moreover, the Director of the National School for Judiciary was elected. It should be noted that although the Minister of Justice, Mr. Zbigniew Ziobro, is a member of the National Council of the Judiciary, he usually does not appear at its sessions. However, he took part in the session concerning election of candidates for the Supreme Court judges in the civil law chamber. At this session, candidacy of one of his

³ <https://www.rpo.gov.pl/pl/tagi/skarga-nadzwyczajna>.

⁴ <https://pk.gov.pl/aktualnosci/aktualnosci-prokuratury-krajowej/kolejna-skarga-nadzwyczajna-prokuratora-generalnego-zostala-zlozona-do-sadu-najwyzszego/>

<https://pk.gov.pl/aktualnosci/aktualnosci-prokuratury-krajowej/skarga-nadzwyczajna-prokuratora-generalnego-zostala-zlozona-do-sadu-najwyzszego/>.

⁵ S. Biernat, M. Kawczyńska, Why the Polish Supreme Court's Reference on Judicial Independence to the CJEU is Admissible after all, *Verfassungsblog*, 23 August 2018, available at:

<https://verfassungsblog.de/why-the-polish-supreme-courts-reference-on-judicial-independence-to-the-cjeu-is-admissible-after-all/>.

⁶ See: Order of the Vice-President of the Court in Case C-619/18R *Commission v Poland*.

subordinates was discussed and he took part in discussion concerning objections to this candidacy. Furthermore, he stated that he has a letter of this person explaining his views which were initially not accepted by one of the members of the National Council of the Judiciary. This person was eventually chosen as a candidate for the Supreme Court judge. The described situation was perceived as a conflict of interests and an example of influence of the executive power on the judiciary. It should be reminded here that Mr. Zbigniew Ziobro is both the Minister of Justice and the General Public Prosecutor, as these two functions are currently combined.

14. Moreover, the media revealed that one of the candidates recommended by the National Council of the Judiciary for the newly created disciplinary chamber in the Supreme Court was herself previously punished disciplinarily. According to the information from the press officer of the National Council of the Judiciary, it is unclear whether the Council was provided with this information and whether it took it into account when deciding upon this candidacy. This situation showed that the National Council of the Judiciary with regard to the election of judges was acting hastily and under pressure what may have serious negative consequences reflected in the composition of the Supreme Court.
15. To conclude, the National Council of the Judiciary was elected on the basis of the law adopted in 2017 which was discussed in the Reasoned Proposal. The Council is fulfilling its duties without addressing the concerns pertaining to the law passed by the Parliament in 2017. Despite the concerns raised, amongst other, by the European Commission, the newly chosen National Council of the Judiciary does not see any threats to the rule of independence of the judiciary. To the contrary, in its view, current provisions underlying its activities do not pose a threat to the rule of law or to the separation of powers principle in Poland. The uncertain status of the newly selected judges to the National Council of the Judiciary led the Supreme Court to refer preliminary questions to the CJEU – one regarding the procedure of selecting members to the Council and second concerning the status of the judges who would be elected in the proceedings in which this unconstitutionally appointed organ took part.

Disciplinary proceedings against judges and prosecutors

16. The Minister of Justice performs external administrative control over the ordinary courts. As noted in the Reasoned Proposal, provisions regulating the administrative supervision of the Minister of Justice over the courts which have been in force since August 2017 *de facto* give the Minister a possibility of applying *quasi* disciplinary punitive measures, e.g. the Minister may issue to the President of an Appellate Court a written notice, if he finds weaknesses in the field of court administration, internal administrative supervision or other administrative activities.
17. Moreover, it is important to note that following the amendments introduced to the law on Ordinary Courts Organisation by the law on the Supreme Court of 8 December 2017 (Journal of Laws of the Republic of Poland of 2018, item 5), the Minister of Justice enjoys important powers in relation to the disciplinary proceedings of judges. These are, among others, the power of the Minister of Justice to set the number and appoint disciplinary judges for ordinary court judges, to personally control disciplinary cases conducted against ordinary court judges through disciplinary officers and an extraordinary disciplinary officer of the Minister of Justice. Moreover, the law on the Supreme Court of 8 December 2017 removed certain procedural guarantees in disciplinary proceedings concerning judges. Concerns raised with regard to these issues in paragraph 134 of the Reasoned Proposal have not been addressed and remain valid under the legal framework currently in force.
18. In this regard it is important to note that media revealed information on many disciplinary cases that were initiated against judges in 2018. Many of these cases were targeted against judges who criticized activity of the Parliament or the Government representatives in relation to judicial independence in Poland.⁷ What's particularly dangerous to the rule of law principle, some judges are disciplinary prosecuted for their critical comments presented in reasonings of their judgments. All of these activities serve to create a chilling effect on courts activities, as well as limit the independence of judges.⁸
19. The Prosecutor's Office plays fundamental role in the operation of administration of justice. However, this institution – contrary to courts – doesn't have a guarantee of independence. What is more, since 2015 position of the Prosecutor General which heads the Prosecutor's Office has been legally combined with the political position of the Minister of Justice. In the current circumstances, this merge seriously threatens the observance of the division of powers principle in Poland. The same person who heads the Prosecution services exercises also considerable supervision powers over the judiciary. There are many cases of criminal proceedings initiated due to political reasons, and on the other hand, cases which were not initiated or discontinued due to such reasons. Prosecutors who do not follow instructions of their superiors tend to be degraded or face threat of being degraded from their office to lower level of Prosecutor's Office.⁹ Some prosecutors were also subjected to disciplinary proceedings for critical remarks on political involvement of the Prosecutor's Office.¹⁰ A well-known case of a prosecutor against whom disciplinary proceedings were initiated for his involvement in lessons about Polish Constitution organized in primary schools serves as a good example here.¹¹

⁷ M. Strzelecki, Poland Starts to Discipline Judges Criticizing Court Reforms, "Bloomberg" 11 September 2018, available at: <https://www.bloomberg.com/news/articles/2018-09-11/poland-starts-to-discipline-judges-who-criticized-court-reforms>.

⁸ See case of Sławomir Jęksa: K. Sobczak, Poznański sędzia będzie miał "dyscyplinarkę" za wyrok, 10 October 2018, available at: <https://www.prawo.pl/prawnicy-sady/dyscyplinarka-dla-sedziogo-za-uniewinnienie-zony-prezydenta,311900.html>.

⁹ See report: „Raport: Prokuratura pod specjalnym nadzorem. Kadry i postępowanie <dobrej zmiany>”

¹⁰ TVN24, "Z prokuratury uczynili narzędzie polityczne". Prokuratorzy chcą ustąpienia Ziobry i Świączkowskiego, 28 January 2019, available at: <https://fakty.tvn24.pl/ogladaj-online,60/stowarzyszenie-prokuratorow-lex-super-omnia-chce-rezygnacji-ziobry,904568.html>.

¹¹ TVN24, Poprowadził lekcję o konstytucji, grozi mu sprawa dyscyplinarna, 13 September 2018, available at:

<https://www.tvn24.pl/wiadomosci-z-kraju,3/prokurator-wzial-udzial-w-zajeciach-o-konstytucji-interesuje-sie-nim-rzecznik-dyscyplinarny,868155.html>.

Protest of court and prosecutors' offices administrative employees

20. In December 2018, a protest of administrative employees of courts and of prosecution' offices began, involving the use of sick leave. The protesting employees demanded a salary increase. The Ministry of Justice concluded an agreement with trade unions associating court employees regarding wage increases for court employees in the same month. However, court employees – against the decision of the trade unionists – do not agree to this agreement. The agreement concerns wage increases for court employees. Prosecution employees continue their strike in January 2019.

Draft amendment to the Criminal Procedure Code

21. In December 2018 draft law amending the Criminal Procedure Code was published and made available on the Government Legislation Process website.¹² The draft raised concerns of both academics and law practitioners due to the fact that some of the proposed changes significantly limit the right to defense.¹³
22. One of the major changes is an addition allowing the court under certain circumstances to carry out the evidence proceedings in the absence of the accused or the defense counsel. If it occurs, the accused or defender may not at the next date of the hearing, while there were no procedural obstacles to their appearance, submit an application to carry out evidences supplementary to those carried out during such absence. This does not appertain if it turns out that the accused or the defense counsel was duly notified about the date of the hearing at which the evidentiary proceedings were conducted and his absence was unjustified. If the application is not filed within the referred period, the right to submit it expires and in the further proceedings it is not permissible to raise a plea of breach of procedural guarantees, in particular the right to defense.
23. In addition, there are also changes that may be aimed at limiting the principle of material truth. For example, according to the proposed art. 170 § 1 point 6, another ground for dismissing the evidential application is to be introduced, providing for the possibility of its dismissal if the request for evidence is filed after the deadline set by the trial body for its submission.

The Constitutional Tribunal

24. Since 2015 continuous changes have been introduced to the functioning of the Constitutional Tribunal. Personal shifts, including the appointment of the new First President of the Constitutional Tribunal, as well as the significant amendments to legal regulations concerning the Tribunal, resulted in its factual destruction, enabling the executive power to influence the proceedings of the Tribunal.¹⁴ These changes have severely undermined the legitimacy of the Tribunal, which *de facto* lost its authority as the instance deciding upon the compliance of laws with the Constitution.¹⁵
25. The implementation of the aforementioned changes has deprived citizens, courts and several constitutional organs of a possibility to refer to the Tribunal, which would have the authority to control the conformity of legal acts with the Constitution, to oppose to the regulations introduced by the Parliament, violating not only the fundamentals of the democratic state, i.e. concerning the rule of law, but also fundamental rights and freedoms.
26. Throughout 2018 no significant changes to the functioning of the Tribunal could be observed. The problems evoked by the previous regulations continued, eg. making it possible to change the composition of panels of judges ascribed to a particular case.¹⁶ Although no further-fetching regulations were proposed, the restraint of the Tribunal was sufficient to disable any autonomous decisions. The reluctance of the constitutive organs, such as the Ombudsman, as well as courts and private entities, to refer to the Tribunal can be observed. Given the concerns raised in the Reasoned Proposal and discussed in this report, abstract constitutional control could have been theoretically performed with regard to the law on the Supreme Court, the law on the National Council of the Judiciary or the law on Ordinary Courts Organization in relation to the provisions which might lead to unwarranted influence of the executive on the judiciary. However, in the context of the constitutional crisis and its immediate effect on the legitimacy of the Tribunal raised, among other, in the Reasoned Proposal, it is unlikely that any of the entities – other than those politically aligned with the current parliamentary majority and entitled to initiate such abstract control – would do so.
27. In the view of the constitutional crisis among scholars and judges the concept of the distributed control of constitutionality has been proposed. The main assumption is to emphasise the authority of ordinary courts to perform the control of constitutionality, in particular by means of a pro-constitutional interpretation of the law. It leads to the increase of the role of parties, especially of advocates and attorneys at law as representatives of legal profession, to raise substantiated doubts regarding the constitutionality of relevant legal act in court proceedings.

¹² Draft law No. UD465, available at: <https://legislacja.rcl.gov.pl/docs//2/12318806/12554721/12554722/dokument370939.pdf>.

¹³ <http://obsil.pl/wp-content/uploads/2018/12/Opinia-OBSiL-z-17.12.2018-r.-projekt-zmian-KPK.pdf>;

<https://www.rpo.gov.pl/pl/content/uwagi-rpo-do-projektu-zmian-kodeksu-postepowania-karnego>;

https://www.ora-warszawa.com.pl/wp-content/uploads/2019/01/opinia_KL_przy_NRA.pdf.

¹⁴ Opinion on amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, adopted by the Venice Commission at its 106th Plenary Session (Venice, 11-12 March 2016); Poland - Opinion on the Act on the Constitutional Tribunal, adopted by the Venice Commission at its 108th Plenary Session, (Venice, 14-15 October 2016).

¹⁵ S. Biernat, The Rule of Law in Poland, “Nederlanse Vereniging voor Rechtspraak”, May 2018; W. Sadurski, How Democracy Dies (in Poland): A Case Study of Anti-Constitutional Populist Backsliding, “Sydney Law School Research Paper”, 18 January 2018.

¹⁶ http://www.batory.org.pl/dla_mediow/eksperci_krytycznie_oceniaja_funkcjonowanie_tk