

Extraordinary Congress of the Polish Judges

Extraordinary Congress of the Polish Judges

Warsaw
3 September 2016

Edited by
Grzegorz Borkowski, Ph.D.

Warsaw–Toruń
2016

Co-editor
Alicja Seliga

ISBN 978-83-7285-813-9

Printed in Poland

Copyright by
Krajowa Rada Sądownictwa
Warszawa

Published by
TNOiK “Dom Organizatora” Toruń

Table of Contents

Preface by Grzegorz Borkowski.....	7
------------------------------------	---

Opening Speeches

Adam Strzembosz.....	13
Małgorzata Gersdorf	17
Marek Zirk-Sadowski	21

Speeches Delivered by the Invited Guests

András Baka	27
Thomas Guddat.....	33
Nils Engstad	41
Nuria Díaz Abad	47
Marek Safjan.....	53
Ryszard Piotrowski	65
Andrzej Zoll	83
Andrzej Rzepliński.....	89
Adam Bodnar.....	93
Ewa Łętowska.....	97
Maria Ślęzak	101
Danuta Przywara.....	103

* * *

Report from the Discussion	107
----------------------------------	-----

Resolutions of the Congress

Resolution No. 1 of the Extraordinary Congress of the Polish Judges	119
Resolution No. 2 of the Extraordinary Congress of the Polish Judges	121
Resolution No. 3 of the Extraordinary Congress of the Polish Judges	123

Texts submitted

Bohdan Zdziennicki.....	127
Dariusz Mazur, Waldemar Żurek.....	139



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

PREFACE

This book presents materials from the Extraordinary Congress of Judges, which took place on September 3, 2016 in Warsaw. It was co-organised by the National Council of the Judiciary and four judicial associations: Polish Judges Association “Iustitia”, Association of Judges “Themis”, Association of Family Judges in Poland and Association of Family Judges “Pro Familia”, while the First President of the Supreme Court and President of the Supreme Administrative Court have assumed the honorary patronage.

The Extraordinary Congress of Judges was attended by ca. one thousand Polish judges from the courts of common, military and administrative jurisdiction, as well as the Supreme Court and the Constitutional Tribunal (including retired judges). A number of both Polish and foreign special guests also participated in the Congress.

After welcoming the guests and participants of the Congress by Judge of the Supreme Court Dariusz Zawistowski-Chairman of the National Council of the Judiciary, chairing of the Extraordinary Congress of Judges was unanimously entrusted to prof. Adam Strzembosz, the First President of the Supreme Court in 1990–1998 and Chairman of the National Council of the Judiciary in 1994–1998.

Preface

The first part of the Congress, and at the same time of this publication, constituted the opening speeches: by Prof. Adam Strzembosz, as a Presiding Chairman of the Extraordinary Congress, who then gave the floor to honorary patrons of the Congress: The First President of the Supreme Court Prof. Małgorzata Gersdorf and President of the Supreme Administrative Court Prof. Marek Zirk-Sadowski

The next part of the Congress was co-chaired by Judge of the District Court Grzegorz Borkowski, Ph.D. – Head of the Office of the National Council of the Judiciary and Judge of the Regional Court Krystian Markiewicz, Ph.D. Hab. – President of the Polish Judges Association “Iustitia”. During this part the Speakers were as follows:

- Judge András Baka – President of the Civil Chamber of the Curia of Hungary, former President of the Supreme Court of Hungary, former Judge of the European Court of Human Rights,
- Judge Thomas Guddat – President of the Polish-German Judges Association and Vice President of MEDEL,
- Judge Nils Engstad – President of the Consultative Council of European Judges (CCJE)
- Nuria Díaz Abad – President of the European Network of Councils for the Judiciary (ENCJ)
- Prof. Marek Safjan – Judge of the Court of Justice of the European Union in Luxembourg, former President of the Constitutional Tribunal
- Prof. Ryszard Piotrowski of University of Warsaw and
- Prof. Andrzej Zoll – former President of the Constitutional Tribunal, former Ombudsman.

After the break, Judge of the Military Regional Court Piotr Raczkowski, Vice-President of the National Council of the Judiciary and Judge of the Supreme Administrative Court Irena Kamińska, President of the Association of Judges Themis, took over the chairing of the Congress. In this section, followed by a discussion on the topics related to the current situation of Polish judiciary, (which had been previously indicated by the organizers of the Congress) the Speakers *inter alia* were:

- Prof. Andrzej Rzepliński, President of the Constitutional Tribunal
- Adam Bodnar, Ph.D., the Commissioner of Human Rights
- Prof. Ewa Łętowska, retired judge of the Constitutional Tribunal
- Danuta Przywara, President of the Helsinki Foundation for Human Rights and

Preface

- Maria Ślężak, Vice-President of the National Council of Legal Advisers former President of the Council of Bars and Law Societies of Europe (CCBE).

There were 33 speakers in total, so a number of voices in the discussion have been presented in the publication in the form of a report of the main theses of the speeches. Their full recapitulation in such a short time (the book was put into print in less than four months after the Extraordinary Congress of Judges took place), was not possible for editorial reasons. In addition, not all of the interventions were, in fact, directly linked to the topics of the Congress, however, you can see the video recording of the Congress on the websites of both the National Council of the Judiciary (www.krs.pl) and the Polish Judges Association for Justice (www.iustitia.pl).

At the end of the Congress participants adopted three resolutions of the Extraordinary Congress of Judges, which constitute another part of this publication.

At the end of the book two texts submitted to the Congress, and related to its topic may be found: “*Statutory violation and the avoidance of constitutional regulations*” by Bohdan Zdziennicki, Ph.D., former President of the Constitutional Tribunal and *First year of so called “Good change” in Polish system of administration of justice* written by Judges of the Regional Court in Cracow: Waldemar Żurek, member and spokesman of the National Council of the Judiciary and Dariusz Mazur.

Although, as indicated above, the publication does not include all statements presented at the Extraordinary Congress of Judges on September 3, 2016 in Warsaw, yet I hope that, even in this incomplete form, the book, at least partially, reflects the spirit of the meeting. There was about one-tenth of all Polish judges of various courts and jurisdictions gathered in one place. Time will tell how much the remarks, and sometimes even warnings, of different Authors, presented in this book, will prove to be true for the future status of Polish judges and the entire system of administration of justice.

Judge Grzegorz Borkowski, Ph.D.,
Head of the Office of the National Council for the Judiciary

EXTRAORDINARY CONGRESS OF POLISH JUDGES

Opening Speeches



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

Adam Strzembosz*

I want to briefly remind everyone about the now-historic events, which determined the state of the current judiciary in Poland. Following 1956, there was a radical transformation of the judiciary. The most drastic and shameful practices, like appointing former secret agents and people with no elementary legal education as judges, and the arrests of judges for their expressed opinions or professional activities outside of the courtroom, and the lists of questions prepared for judges by the security services, were all gone. But this did not mean that the political authorities of the time released their influence over the judiciary. They continued to force judges to act for the benefit of the party in power or even of individual party activists. All judges were aware of and painfully experienced various forms of influence. Because of this, during the “carnival of Solidarity”, the judicial communities of Poznań, Cracow, and Warsaw prepared an integrated programme of reforms of the judiciary within the scope of the Social Legislative Board. At the sessions of the Round

* Prof. Adam Strzembosz, President of the Supreme Court (1990–1998), President of the National Council of the Judiciary (1994–1998).

Table, it was used as the foundation for discussions of the sub-table “Law and Courts”, which I had the honour of co-presiding. Our objective was to design and introduce a system for protecting the judiciary from various forms of pressure. In the past, people applying for legal training in court were subject to political verification. Nomination depended on the decision of the officer at the appropriate level of the Polish United Workers’ Party, the President of the voivodship court, and the Minister of Justice. This system was the perfect tool to choose the “right” judges to serve in the judiciary. All promotions depended on political opinion and the opinion of court supervision. The more influence the given court department had on the political situation, the more meticulously the judges were chosen. For example, in 1989 the Criminal and Military Chamber of the Supreme Court did not include a single judge who was not a member of the Polish United Workers’ Party. None of them were even members of the United People’s Party or the Alliance of Democrats! There were also easier methods of influencing judges. All courts had various ranks and remuneration levels, and support was gained through rewards for things like loyalty. This was not a mass situation, but sufficiently severe and humiliating, because a disobedient and independent judge received no rewards or promotions.

That’s why we wanted to use the Round Table to eliminate all forms of influence over judges. It was especially important to establish a new institution, which would determine both nominations for the first judicial degree and further promotions under the name of the National Council of the Judiciary. We assumed that the Council should be primarily composed of judges, whose nominations should be made by the General Court Assemblies through secret ballots with a mandatory majority. This would guarantee that the independent judicial authorities were closely bound to the National Council of the Judiciary, which was not to be composed of judges exclusively: there were also four deputies, two senators, a representative of the President, and the Minister of Justice. The aim was to keep the judicial community from retracting and have it cooperating with the legislative and executive authorities. The proposals discussed during the sub-table “Law and Courts” became the foundations for the changes adopted on 20 December 1989. Despite the predominance of the Polish United Workers’ Party in the Sejm at that time, there were no votes against these changes and the long-term guarantees of judicial independence.

There were people sitting at the sub-table I co-chaired who went on to represent very diverse political offices, including Jarosław Kaczyński, attorney Jan Olszewski, Zbigniew Romaszewski, Jerzy Ciemniewski, and Professor Janina Zakrzewska. All those representing the opposition, Solidarity, fully understood that an independent judiciary was the foundation of human rights, which must be protected, which are based on human dignity and the equal rights enrooted in Christianity – the foundation of the European civilisation.

But with time it has turned out that different political parties have had problems with this agreement. The empowerments of the Minister of Justice in respect of the presidents of voivodship and regional courts have grown, which was disturbing, but it seemed that things would go no further. Unfortunately, they did. We are witnessing a situation in which the empowerments of the National Council of the Judiciary are being called into question. The executive power wants to at least partially decide who can serve as a judge or who will be promoted. This is very alarming, especially since we had agreed that the judiciary must be totally independent from the executive and legislative powers. Judges base their rulings on laws and do not protest when their decisions are criticised, but they can be criticised primarily through appeals. This is the legal way to criticise the judgments. Approaching the end of life, I am deeply concerned with the current situation in Poland and I am appealing to all people of good will to keep the separation of the three powers and maintain law and order in our State.



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

Małgorzata Gersdorf*

“During transitional periods, the law and its advocates become unpopular and a free voice is treated as an attempt at a coup.” This quote, which is very appropriate to our times, is taken from an article written by Zygmunt Rymowicz, a Warsaw lawyer, and published in the October–November 1931 edition of *Palestra*, a Warsaw magazine. This period was the time of rebuilding the authoritarian State after the 1926 May coup with the Brest trials and the Bereza Kartuska prison. We can quote the author because the voices coming from this room will be evaluated in a similar way tomorrow. We, as judges, are used to it, because no post-1989 “political” power ever showed us respect as a partner in public debate.

At organized by the National Council of the Judiciary conference early this year, I was alarmed that the courts and the judges are treated like an object in the game for power. Several months have passed and I can say it all once again, perhaps with a higher timbre. Ladies and Gentlemen, the fate of the Constitutional Tribunal is a test of the condition of our State. We can

* Prof. Małgorzata Gersdorf, First President of the Supreme Court.

all see how “respected” its independence is. So what can we expect from the bill of a law on the system of common courts which is being prepared behind closed doors by the parliamentary majority? What do we know about it? The standards of transparency and social participation in lawmaking are being completely ignored.

We, the judges, are not opposition politicians, the mafia or a group of cronies defending the former system, or our jobs. The only thing we are authorised to defend is the state ruled by law, which is not leftist or rightist and does not serve our interests but the interests of every citizen and the national community. The insults, which I quoted *relata refero*, only prove the standards of those insulting us. I am not discouraged by them and I want to tell you what this congress should be like and what challenges await us. And there are plenty of challenges.

First of all, we now have the opportunity to come out of the shadows and reveal ourselves as citizens. Judges are the guardians of public authority, not ordinary office workers. Due to our specific role – making authoritative decisions about human affairs – we must maintain our restraint in our actions and words. We are not members of parties, we do not go on strikes, we do not attend demonstrations, but we cannot and should not stay quiet when we see that there is something bad going on in the country and that every now and again someone usurps the right to decide what is and is not the law. Whether anyone likes it or not, lawyers, especially judges are the best-educated pro-State group in the nation. It is about time we stopped being afraid of the potential reaction to our participation in public debate, which is now needed more than ever! And we are only human, which means that our congress is associated with emotions and tremendous concern about the future of Poland, and all of us, the nation. Please note that for a long time now the law has not been the will of the majority in power due to the won election. All actions must comply with the Constitution and the laws currently in force, determined *in concreto* by courts.

The aim of the congress is for us, a community of people whose, due to their function, are not allowed as much freedom as others to openly say that we do not want the State to drift straight towards anarchy, and do not want the consequent disruption of public law and order. The slogans which have been paraded for the past few days in front of the Supreme Court by demonstrators can serve as the starting point.

Second, our congress is an appeal to the camp of “political” power to start playing fair with us. For months we have been hearing that the group associated with the Ministry of Justice is preparing a completely new judicial system. We hear about it, but there is absolutely no regular debate on such an important matter! No one is talking with us, the judges! This is not a normal situation. Perhaps the current parliamentary majority wants to force it through like other acts? If this is the case, I want this to be announced openly. And by the way, we also want to know how we, nominated judges holding public authority, will be treated if new courts are established and some of the current ones are closed? Does the political power really want to manipulate the composition of the National Council of the Judiciary? And what instruments does it plan on using?

Third, we want to use this congress to show the representatives of the “political” power that they have neither the knowledge nor the ability to diagnose judicial problems, which are to be replaced with a set of wishful thoughts and common people’s complaints on the alleged partiality, corruption, and laziness of the courts. This not only insults us, but also greatly distorts reality! Judges – who are the best-educated among all public authorities – perform tremendous work for the benefit of the entire State (16 million rulings a year). Furthermore, they are mostly younger people who never experienced life under communism or, at the very least, could not have been contaminated by that system. Please remember that the whole composition of the Supreme Court was replaced in 1990. There are many examples of courageous and unconditionally honest people holding top judiciary offices.

Courts are obviously not perfect, but the blame lies mainly with the legislator, burdening judges for decades with tasks very distant from meting out justice, to the point where we have as many as 1000 cases being handled by a single judge; the legislator who took pleasure in turning around the criminal procedure numerous times – all within the same Code of 1997 – so hats off to anyone who make no mistakes under such conditions.

The blame lies with successive Government majorities, which have been changing Ministers of Justice on average every six months. The blame lies with dark PR experts, who keep telling the public that we are the ones to blame when, e.g., maltreated children are taken away from pathological parents or when there is a ruling unfavourable to one of the parties, even though the lawyer had promised that victory was a sure thing. We want to say that we no longer agree to be the “scapegoat”. We are eager to point out

the judiciary problems – because there obviously are judiciary problems – but we demand a peaceful discussion. A will to talk. I see no debate and it must change! We will no longer let them drag our names through the mud.

This should be a congress of judicial dignity. This should be the beginning of the end of the lawlessness of the political players, who for years have been presenting us as the villains – as people without conscience and allegedly sold out to the mythical behind-the-scenes powers. We have to finally stop being silent and hope that *“our rulings will defend themselves”!* We work hard as public servants and see more than anyone thinks we do, but we follow the rule of restraint and do not take advantage. And now we should start to clearly and systematically explain the problems in the Polish judicial system AD 2016; the hazards, the ailments, and the deficiencies.

I cannot stress this enough: we should debate peacefully, but we must make sure that these fundamental problems are presented in a way clear to the people and the Government.

Ladies and gentlemen, this should be a congress of judicial dignity. This should be the beginning of the end of the lawlessness of the political players, who for years have been presenting us as the villains – as people without conscience and allegedly sold out to the mythical behind-the-scenes powers. We have to finally stop being silent and hope that *“our rulings will defend themselves”!* We work hard as public servants and see more than anyone thinks we do, but we follow the rule of restraint and do not take advantage. And now we should start to clearly and systematically explain the problems in the Polish judicial system AD 2016; the hazards, the ailments, and the deficiencies.

I cannot stress this enough: we should debate peacefully, but we must make sure that these fundamental problems are presented in a way clear to the people and the Government.



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

Marek Zirk-Sadowski*

I am very glad to see that our Court has joined the organisation of this Congress, which is referred to as extraordinary, because we have an extraordinary situation, stemming mainly from the situation of the Constitutional Tribunal and the judiciary position built in accordance with Art. 10 of the Constitution. Besides some problems related to the protection of certain human rights in Poland, these, I believe, are the main reasons for convening this Congress by the National Council of the Judiciary.

The postulate to build a platform for discussion for Polish judges is very important. Let us note that we are not members of political parties and have no trade unions, which makes it very hard to articulate our professional problems. We must also remember our civic standpoints, which we have the opportunity to express during this Congress.

Today's Congress aims to serve these objectives, and I think that it will not be dominated by professors and executives. I hope that most of the opinions will come from ordinary judges – after all, we do not have a clear

* Prof. Marek Zirk-Sadowski, President of the Supreme Administrative Court.

picture of how our community is reacting to numerous problems. Naturally, all the essential matters are set and have been presented numerous times. The relation to the Constitutional Tribunal, to what has happened, is clear and declared by pretty much all courts. The Supreme Administrative Court has also received resolutions from courts of appeals, which were presented to the judges. We also clarified our own standpoint. In brief, the matter is obvious to anyone who knows the law. The Constitutional Tribunal stands guard over the Constitution and there is control over its judicial decisions or procedures, but, in the face of the current tension between the judicial, executive, and legislative powers, we must take a stance in all matters we see as obvious. There is an additional benefit to it: this is also a form of civic education. The citizens well-oriented of today are in many issues associated with the application of the Constitution, the activities of courts, because these are now public matters. Our Congress will also contribute to it, as long as our position is expressed in an understandable and clear way. The defence of the Tribunal in our legal system has turned into the main issue, which I believe has united all the courts. The matter was clear in administrative courts. Before the publication of the twenty-one rulings of the Constitutional Tribunal, the Supreme Administrative Court issued judgements in which the judging panels repealed judgments where the courts of first instance did not apply the unpublished sentences of the Constitutional Tribunal. The twenty-one rulings in question were published only two or three days later, which, in my opinion, was also the consequence of our judgments. Administrative courts wanted to resolve this problem due to the threat of dual-track decisions, which we continued to cover in our discussions. The administration was unsure of what to do, and I hope that these decisions, including our decisions, helped standardise the administrative operating concept, and the influence of the Constitution on courts, offices, and citizens. The problem is still not completely resolved, and, because of this, our main objective is to defend the Tribunal, defend the Constitution.

I think we should not restrict ourselves only to this extraordinary Congress. I suggest that we, as the judicial community, hold such meetings regularly. Today we have gathered because of matters on the fringe of the judiciary and other powers, but there are many issues which our community should discuss regularly. Professional ethics, for instance. Today's social and business life is evolving so rapidly that there are many aspects of our relations with the external world which need to be reviewed. Matters once obvious to

us are now resolved differently in many other countries. One such matter is the freedom of speech of judges and its limits. This is something which has been covered extensively in the literature, so it deserves of discussion. In my opinion, the situation of the judges as citizens, as members of the society, is one of the most burning issues – I think we have certain responsibilities in this area.

I think that, besides fundamental axiological matters, there are certain very important problems which are taking priority. First, there is the recognition of the importance of the separation of powers (Art. 10 of the Constitution) in the State's political practices. This is not about the opinions of the judges, but more about the stance of the executive power and the legislative power on this issue, as it seems that they are both dominated by either the concept of uniform power and parliamentary domination or by the very obsolete concept of a Montesquieu-like judiciary, in which the courts serve only as the "mouthpiece of the statutes". After 1989, we learned that judges participate in the exercising of power, as they control the observance of the Constitution and can extensively interpret the public interest. Therefore, the concept of a closed court, which does not reveal its standpoints and does not converse with the citizens through, e.g. the press and other media, became outdated. In one of his books written back in the 1990s. Professor M. Safjan was the first to point out this change to judiciary in Poland. In my opinion, this is a problem we should discuss, learn, and pass on others. This judicial concept also includes the problem of legitimising the extensive public authority of judges. Something pointed out by politicians in all countries is the fact that our authorities are not appointed through common democratic elections, but we have to take note that pretty much all contemporary advanced democracies have seen such evolution of the role of the courts and have deviated from the narrow concept of the power of judges of the past.

Another problem standing before us and requiring accord concerns the Act on the common judiciary, which is naturally related to the problem of court effectiveness. I, as President, see the effective solution in the enforcement of the judicial assistance system, which is very small in Poland. With 15 million annual judgments to be issued, the judges have only their computers and perhaps database access. In many countries, the thing which determines the adjudication pace is the number of office workers. We have roughly 1.5 person while France has 6–7.

And finally, the problem I see as most painful. It has been mentioned many times by Judge Żurek of the National Council of the Judiciary's and now pointed out by the First President. It is the public opinion's negative approach towards us. This is not only a matter of statements made by politicians – the media might also be to be blamed for their gloomy presentation of the Polish judiciary, but the fact is that something has happened to our contacts with the public. I think that this is a very important matter, the current priority. We need to rebuild good communication with the public. The cooperation of individual courts with the media is also important.

There are many problems, and I think that turning this judicial Congress into a regular event could be helpful in the search for a common path leading to their resolution. As a Congress supporter, I encourage discussion. We will be hosting brilliant speakers who will introduce us to many interesting issues and keep from straying into vague divagations. And we also have our guests, specifically foreign guests, who can provide us with very important comparative analyses. Our discussions should include legal comparisons, because of their effect on public opinion and the tendency to show that there are other solutions, and that we are suggesting things that work in other democracies.

EXTRAORDINARY CONGRESS
OF POLISH JUDGES

Speeches Delivered by
the Invited Guests



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

András Baka*

I must admit that I am sincerely astonished by this massive participation at this event. I have never seen so many judges coming together for the protection of a common goal. That is why I feel even more honoured and delighted to have been asked to participate and speak at this event, the Extraordinary Congress of Polish Judges. I think that the Hungarian and Polish judges are facing the same problems, we have the same task trying to preserve the organisational and personal independence, the competence and the authority of our courts and judges. We shouldn't do that in order to promote our personal interests, but to maintain the system of checks and balances, the rule of law and democracy.

In democratic countries governments and independent judiciaries have a relatively harmonious relationship while playing different roles. This relationship is not exempt of tensions, even in the oldest democracies there are sometimes critics and certain clashes between the two branches, but as

* András Baka, Head of Civil Department of the Curia of Hungary, President of the Supreme Court of Hungary (2009–2012), Judge of the European Court of Human Rights (1991–2008).

a whole, their constitutional system is still functioning well, serving the interests of the respective country. However, when anywhere in Europe politics want to dominate over the judiciary, wants to gain decisive influence over the courts and the judges, undermining judicial independence, weakening or ruining the separation of powers, well, that is a crucial moment and time for anyone, especially lawyers to take action. I believe that this is, and this should be, the task of this Extraordinary Congress of Judges.

Since I have heard rumours that” the Hungarian judicial train should arrive in Poland” or “creating Budapest in Warsaw”, my task at this moment is to briefly summarise what happened in Hungary under the umbrella of the” judicial or constitutional reform”, what is really on the “Hungarian judicial train”.

The whole process started with the reform of the Constitutional Court immediately after the elections of 2010. The ruling party, having 2/3 majority in Parliament changed the election rules of the members of the Constitutional Court, replacing the consensus based model of the parliamentary parties with the new nomination and election model, which simply requires 2/3 majority. They raised the number of judges from 11 to 15 in 2011 and elected new judges to the vacant positions, therefore gained the decisive majority in the court. Today almost all the judges are elected by the ruling party alone. The mandate of the newly elected judges has been raised from 9 to 12 years, abolishing the upper age limit too. The parliamentary majority ruled that the president of the Constitutional Court is elected by the Parliament and not by the judges.

At the same time in 2010 the competency of the Constitutional Court was significantly reduced, the Constitutional Court in principle cannot rule on budgetary issues anymore, including taxes, duties and revenues. The institution of *actio popularis* has been abolished, now only a defined category of persons have the right to raise an issue before the Constitutional Court. There have been also other significant limitations imposed to it.

The mandatory retirement of judges older than 62

It is important to mention that from February to end of March 2011 a massive press campaign was carried out against the judiciary in the government controlled media. Subsequently, 9 days before the new Constitution, the so called Basic Law, was adopted by the Parliament a new amendment

was added to the constitutional provisions, namely the mandatory retirement of judges at the age of 62 instead of 70. This constitutional provision was never discussed by the judiciary and was not supported by any public reasoning or explanation. As a result one tenth of the Hungarian judiciary, 287 senior judges had to retire as from January 2012. This great number of judges was serving at higher courts and the overwhelming majority of them were court leaders. Their vacant positions were filled in with new judges by the new President of the National Judicial Office following an accelerated appointment procedure.

When in 2012 the European Court of Justice in Luxemburg ruled that these retirement provisions were discriminatory and as such were against the European law, these judges could go back and continue to serve as judges. However, only two of them were able to get back their former higher position as court functionaries because their posts had already been filled by the newly appointed judges. Many of the former judges decided not to come back and to leave the judiciary forever.

“Judicial reform”

Neither the judiciary, the National Council of Justice, nor the president of the Supreme Court had the possibility to get to know the concept of the draft bill, or the drafts itself, before it was submitted to Parliament. *No consultation* whatsoever took place with the officials of the judiciary on any element of the changes.

Under cover of a judicial reform the ruling party *drastically changed the model of the administration of the courts*. The system of self-governing judiciary has been abolished together with the National Judicial Council. While in 2009 the Parliament opted for maintaining the system of self-government of the judiciary, after the election, in 2011 with a significant conceptual shift the National Judicial Council was completely abolished. As one of the analysts wrote: “The administration of the courts has become fully centralised and even though the system set up is presented as a new model, only the mechanism of decision making has been transformed: the collective decision making has been replaced with a one person decision making mechanism.”

The full authority of the former National Judicial Council together with some additional powers was referred to the President of the newly created National Judicial Office who was elected by the two-thirds majority for nine

years. Thus, this new President has acquired sole and unlimited discretion and competence as regards administration of the court system. Furthermore the currently elected President of the National Judicial Office is closely connected to prominent figures of the ruling party.

As a consequence, for nine years *the President of the National Judicial Office* can decide alone who is going to be a court functionary (president, department head, etc.) in Hungary. The President is not bound by the recommendations of judicial professional organs, not even formally. The new organ, the *National Council of Judges*, which in principle should be responsible for controlling the president of the National Judicial Office and which will be comprised of fifteen judges, not to the smallest extent could influence the decisions of the President. It meets four times a year, it is informed about decisions subsequently, it has no powers on the merits, it only issues opinions and recommendations and it is made up of judges whose evaluation and promotion depends on the person controlled. The President has no political responsibility, cannot be interpellated in Parliament and questions cannot be asked from him/her. His/her can hold her office even if his/her service relation as a judge terminates during his/her mandate.

This unrestricted, non-transparent and uncontrollable power is unparalleled in today's Europe, where nineteen states have some kind of a council of justice with various degrees of power. The extent and uncontrollability of such centralised authority is without precedent even in countries where the administration of the judiciary lies with the ministry of justice and even during the last years of the socialist dictatorship in Hungary, when Kálmán Kulcsár, member of the Hungarian Academy of Sciences and Minister of Justice responsible for the administration of the judiciary declared that he would only appoint judges to higher judicial positions who had been supported by the autonomous professional organs of the judges.

The power to appoint judges and court presidents and functionaries described above was contrary to the decision no. 38/1993. (VI.11.) AB of the Constitutional Court, which declared that if the decision on the appointment of judges or court presidents is not made by the judicial branch itself (i.e. in cases of "external management") then "the participation of the Judiciary must result in a situation where the opinion of judges, expressed on the ground of judicial independence, substantially determines the appointment." The Venice Commission takes a similar standpoint in its opinion CDL-AD(2007)028.

The Bill authorises the President of the National Judicial Office to carry out tasks of administration. However, it *does not separate administrative and professional responsibilities consistently*.

The new power authorising the President of the National Judicial Office *to assign any court in a given case* was seriously challenged not only in Hungary but also before international forums. There can be no reason for assigning this designating power to a person exercising external administration instead of a court. Such a power contradicts the basic legal principle which stipulates that no one may be deprived of his lawful judge. The right to have one's case adjudged in a fast manner is important but by necessity secondary to the constitutional right not to be deprived of his lawful judge. (This standpoint was taken also by the European Court of Human Rights when it interpreted Article 6 of the Convention.)

The unconstitutional powers that I described above unambiguously imply that the structural problems of the judiciary were not addressed by the legislation but are left to the discretion of the executive of external administration who has been assigned excessive and in Europe unprecedented powers without any adequate responsibility.

Dear Colleagues! My speaking time is limited so I restricted my focus only to the major changes of our judicial system as introduced in January, 2012. Since then – due to the outside pressure of the international organisations – certain elements of the reform have been slightly modified, the power of the National Judicial Office became weaker. But even this modified system is lacking the basic guaranties of the judicial systems of the European democracies. As such, it remains outside of the mainstream of European solutions of the rule of law.

What can I say to conclude? As a Hungarian I would like to show and express solidarity and warm sympathy with all of your efforts to preserve the rule of law and democracy. As former chief justice I ask again the politicians to act reasonably, exercise self-restraint during their legislative work and try to understand and protect the deep legal traditions of this country. Do not forget that changing the administration of the court system is easy but it never solves the real professional problems of the judiciary. Finally as a judge, I ask all of you fellow colleagues to remain firm and strongly united for the protection of your judicial independence.



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

Thomas Guddat*

It is a special honour for me to be given the opportunity to participate in this very important congress and to discuss with such outstanding personalities. Not so long ago it would have been unimaginable or even unthinkable that judges from all over Europe come together and discuss about the independence of the judiciary. Nowadays, we can talk – as friends – in mutual respect and solidarity about all issues even those of sensitive and difficult nature.

I am chair of the German-Polish Judges' Association, but today I am here mainly as a representative of MEDEL.

MEDEL (Magistrats européens pour la démocratie et les libertés) is an international association of 22 national associations from 15 European countries, including Poland. It is independent from governments, political parties and other groups of influence on national or supranational level. Since its foundation in 1985, MEDEL has set itself the goal to strengthen and support the rule of law as well as judicial independence and impartiality, to safeguard the interests of the judiciary as an essential requirement of the judicial fun-

* Thomas Guddat, Judge, Vice-president of MEDEL (Association “European for Democracy and Liberty”).

ction and guarantee of human rights and freedoms and last but not least to safeguard the constitutional and moral standing of the judiciary. MEDEL has observer status at the Council of Europe, the CCJE and the CEPEJ and many other judicial committees.

So I did not hesitate when I was invited to talk about the supervision of judges and share my impressions on the recent developments concerning the judiciary in Poland with you.

Recently, there have been a number of developments in Poland, which could have a negative impact on the rule of law and the status of the judiciary in Poland. However, due to the time limits and the specifics of the interpretation it would seem advisable to limit this speech only to a few of them.

I would like to draw your attention to (1) the constitutional crisis (2) the presidential refusal of the appointment of judges and (3) the planned reforms of the judiciary particularly those related to the supervision of judges and courts.

I can't stress enough that by no means, it is my goal to interfere in Poland's internal matters.

We, as MEDEL, deeply respect the autonomy of the Polish state. It is from our position as citizens of Europe, that we feel obliged to express our deep concerns. Our common values as European citizens, such as the respect for the rule of law, are indivisible and if one Member State disrespects these values, this regards all of us.

The changes in Poland have attracted a great deal of criticism from the European Commission, the Venice Commission for Democracy through Law of the Council of Europe, the European Parliament as well as the United States. But the ruling government has paid more or less no attention.

(1) Constitutional Crisis

Whatever it is Poland is going through right now, the constitutional situation is far from normal.

For the moment the issues on -which the European Commission based and justified the imposition of its rule law mechanism against Poland, are not formal constitutional amendments, but a series of legal pronouncements that have dubious constitutional underpinnings.

It is a really alarming phenomenon that MEDEL is currently observing. What I am referring to is the increasing trend among many young democra-

cies in Europe to weaken the competences of their Constitutional Courts and to debilitate the institutional safeguards for an independent judiciary. This is even more difficult to understand since only two decades ago people were fighting for- these achievements of a modern society in these states.

States must have no Constitutional Court, to be democratic and legal. There are a handful of States, where the Constitution is respected without a Constitutional Court ensuring compliance. But it is just a handful. In general, constitutions tend to be shaky if they lack a legal instance enforcing them. Therefore, there was widespread consensus that the new order in young democracies had to be secured by Constitutional Courts in all States that freed themselves – from authoritarian regimes. The German Constitutional Court served as an example.

Exactly 63 years ago, on 3rd September 1953, the Convention for the Protection of Human Rights and Fundamental Freedoms was signed at Rome. It then entered into force on 4th November 1950. It was in the ruling 2 BvR 1481/04 (case of Gorgulu) on 14th October 2004 that the German Federal Constitutional Court – Bundesverfassungsgericht, as called in Germany – expressed the obligation of the German courts to “Take account” of the case-law of the European Court of Human Rights. However, the decision of 14th October 2004 contains also the fact that judgments of the European Court of Human Rights do not have the same status as the basic law. In its decision the Constitutional Court assumed a broad, but not absolute binding of German courts to the decisions of the European Court.

And in the Jurisprudence of the European Court of Human Rights you find many cases where the court played a key role in defining the independence of the Judiciaries in the Member States. The case *Baka v. Hungary* two months ago was one of them.

But after implementing Constitutional Courts the ruling parties had to learn that they could not do what they wanted, and the Constitutional Courts were found guilty for this quickly and made out as culprit. Some new democracies had established their constitutional court from the outset in the first place so that the ruling government had nothing to worry about. As for others the indignation arose over the course of time. The parliamentary majority gained in elections was used in an attempt to pull the strings in the constitutional courts reaching their judgements – After Hungary – as well as Poland a State with a respected constitutional court – this is what is happening in Poland at the moment.

But attempting to disempower the Constitutional Court only seems to be the symptom of an underlying disease. However, the liberation from communist regimes and the establishment of the new order turned out to be often very difficult for the young democracies. So far, many of them have developed neither a sufficient understanding of democracy nor a sufficient constitutional culture. Different views over the common good are legitimate in a democracy. The Constitution is what arches over these contradictions by writing down a list of all shared principles and rules. It allows for the political opponent to be regarded not as an enemy but as a competitor in a fair game. The Constitutional Court draws its significance from promoting this basic consensus.

This idea hasn't been established so far in many new democracies. For example, in Poland – into my view – there is a dialogue in fact consisting of two monologues. Each side feels it possesses the common good exclusively and therefore considers its political competitors as the enemies. The winner is chosen by the people. The minority, in this understanding, will appear to be the enemy of the people, and independent veto or instances of criticism as their confederates. For the law remains only an instrumental role under these circumstances. It is a means for the government to make the own particular opinions generally binding, without being bound by the law itself. The emasculation of the Constitutional Court exacerbated this problem.

I do not want to repeat the arguments of the Polish Constitutional Tribunal's judgement of 9th March 2016. But let me remind You of its most important argument as it stressed – that the new procedure would in practice lead to a delay of the proceedings.

It is save to say that the *Bundesverfassungsgericht* would be virtually paralyzed under such conditions. It can only deal with around 7000 cases per year. Those cases less important or hopeless from the outset are, if possible, decided in the so-called Chambers.

Regrettably, the Polish Government has not yet published the judgement of the Polish Constitutional Tribunal of 9th March 2016 because the Tribunal did not follow the procedure foreseen in the amendments.

(2) Presidential refusal of the appointment of judges

MEDEL as a non-governmental organization having among its aims the protection of judicial independence, the respect for the values of democracy and the rule of law, the promotion of the European democratic le-

gal culture and the democratization of the Judiciary, is seriously concerned by these news and expressed its concerns recently in an open letter towards the President of Poland.

We have learned, that on June 22nd the President of Poland refused to appoint ten out of thirteen judges from lower-level courts to higher positions. The refusal to appoint the judges met with particular opposition of Polish Judges' associations due to the lack of justification for this decision. The judges were proposed by the Krajowa Rada Sądownictwa (National Judicial Council) for positions of judges in courts of different levels, which prevented them from simply taking up these posts. As we were informed, these candidates went successfully through the selection process conducted by the Council, in which also judges' peers played an active role through voting for each candidature. Furthermore, the decision of the Council to present the successful candidates to the President was provided with the reasoning, while non-successful candidates had the right to appeal against it to the Supreme Court. The President did not provide any reasons – for the refusal although media informed that some of the candidates are adjudicated in political controversial proceedings.

Newspapers have speculated on the which reasons that may have led to the president's rejection of the nominees. In fact, some of the nominees are indeed not uncontroversial. However, none of the above-mentioned controversies would generally justify denials of appointment or other presidential interventions. Some say that it is more likely part of the Law and Justice government's plan to reform and mould the judiciary in their image. In a recent proposal (which has already been widely criticised by the Human Rights Ombudsman and NGOs) the government suggested, the National Judiciary Council should propose two candidates per vacancy thus considerably increasing the president's power over judicial nominations. This, together with the conflict over the constitutional court and the government's decision to once again merge the position of general prosecutor with the minister of justice makes the aforementioned concerns understandable.

In its "Recommendation CM/Rec (2010)12 to the Member States on judges: independence, efficiency and responsibilities" the Committee of Ministers of the Council of Europe exposes not only the need to use objective criteria of decisions on the career of judges which should be based on qualifications, integrity, ability and efficiency, but also recommends that their recruitment and promotion should be independent from the government

and the administration. In case of accepting the tradition of the appointment of judges by the head of state, it is recommended to provide the relevant guarantees to ensure that the procedure to appoint judges is open and free from external influences, and that decisions in this matter are not caused by reasons other than objective criteria.

We are sure that the Republic of Poland, as an important Member State of the United Nations and of the Council of Europe, recognizes these international standards and hope that President Duda will reconsider his decision.

3. The planned reforms of the judiciary particularly those related to the supervision of judges

On the one hand, in Germany and Poland a judicial supervision is generally accepted and there is a broad agreement that judges be accountable for misdemeanour. A well-ordered judicial system, responding to the requirements of the constitution, should be secured in order to make sure that judges comply with their official duties. Finally, the supervision of judges is considered a part of the Rule of Law principle, under which a State must undertake every action adequate in order to respect the law.

On the other hand we have the principle of judicial independence. Only a judge, free of all undue influence from third parties, can secure an independent judicature. The German and Polish constitution guarantees the independence of the judiciary. This is an essential principle in a democracy governed by of the rule of law. Judicial independence however is neither a fundamental constitutional right of the judge nor a professional privilege.

The judge is subject to supervision only in so far as this would encroach upon his independence as a judge. The exact limit cannot always be defined easily. However, all measures – exercising influence on the essence of judicial activity are inadmissible. This comprises undoubtedly everything that might obstruct the course of justice. The fact that a senior judge for example a court president – cannot reverse a decision is a good example. This is the privilege of the appellate court provided for by the stages of appeal. This comprises the supervision of judges and with it not only the judicial decision but, as well, all decisions of the judge even if they only concern decisions indirectly – may it be by the judge preparing substance or procedure of the case or assessing it in retrospect. This encompasses fixing the date for hearing or trial,

citation, taking evidence, the question of how much time a judge would need for decision-making or for writing a judgment.

Obviously there is a difference between securing judicial independence on the one hand and administrative supervision, admitting disciplinary measures, and civil and criminal law liability on the other.

Judicial independence is based on the positive expectation, that the judge would justify the trust and would do the right thing without interference of others.

But judges, too, are not unfailing. Judges' failures might undermine the authority of the court and the acceptance of its rulings. Supervision of judiciary is therefore indispensable. It does not, as such, jeopardize the independence of courts. On the contrary: It assures the functioning of the judiciary in conformity with the constitution. It will support judicial independence if used to uncover dependence and improper influencing. At the same time supervision should not hamper what is meant to be_ protected. This shows the difference between independence and responsibility both in legislative drafting and concrete handling of judicial supervision.

Since the Law and Justice party came into power in autumn 2015 the Minister of Justice has announced several times that the government is planning far – reaching reforms of the system of Judiciary, for example the liquidation of first instance courts. Although no official draft about the planned reforms has been presented publicly yet, in the media one could read about some proposals, which raise some serious doubts. Last November (2015) the media reported that some competences in disciplinary proceeding against judges would be transferred from the judiciary itself to a special body established under the aegis of the President. Another proposal concerned changes of the catalogue of disciplinary sanctions against judges and the introduction of a new sanction of lowering the salary of judges for a certain period. In July 2016, the Ministry of Justice informed about plans to strengthen the role of Jurors (ławnik). Another medium reported a compulsory retirement of judges, who started their career already under the communistic regime. But as there are no official proposals it is a difficult topic to discuss.

Whether such future reforms will contradict the Polish Constitution, is for Poland itself to decide. This makes it all the more important that there is an independent and functioning Constitutional Court. Which brings us back to the Constitutional Crisis I talked about at the beginning.

Thomas Guddat

Constitutional democracies require checks and balances. In this respect, where a constitutional court has been established, one of the central elements for ensuring checks and balances is its independency. Its role in keeping checks and balances is especially important in times of strong political majorities.



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

Nils Engstad*

1. First of all I want to thank the organisers of this Extraordinary Congress for inviting me to take part in your discussions on various aspects of judicial independence related to recent developments in Poland. I am here today in my capacity as President of the Consultative Council of European Judges (CCJE), a Council of Europe body, composed exclusively of judges as professional individuals not being accountable to their governments. The CCJE was set up by the Committee of Ministers in 2000 with the aim of strengthening the role of judges in Europe.

2. I repeat what I have said on several occasions: Today, the work of the CCJE is more relevant than ever. The role of the CCJE lies at the heart of the Council of Europe and its interdependent core values; human rights, democracy and the rule of law. And today I want to talk about the rule of law.

3. The rule of law concerns essentially control of and limitations on public power through law with the aim of protecting the individual. The rule of law

* Nils Engstad, Judge, President of the Consultative Council of European Judges (CCJE)

entails that governments must act on the basis of law enacted by the legislature. The rule of law requires separation of state powers, with an independent judiciary as the third power of state entrusted with the task of controlling the exercise of governmental power. Through judicial review the judge shall judge whether the government has acted within the boundaries of the law.

4. In our part of the world, the rule of law is closely linked to democracy and to the protection of human rights. Aharon Barak, former president of the Supreme Court of Israel, has stated that the role of a judge in a democracy is to protect the constitution and the democracy itself, including the rule of law and the protection of human rights. I agree to that, and I repeat what has been communicated by the CCJE in its Opinion No. 18: Judicial independence is the fundamental requirement that enables the judiciary to safeguard democracy and human rights.

5. An independent judiciary, thus, is not only a crucial element of the rule of law, but is a prerequisite for the rule of law. Without an independent judiciary, there is no rule of law. And – to reword Aristotle – where there is no rule of law, tyranny may evolve.

6. Therefore, the rule of law is perceived – by the public, by the individuals, by the voters – to be something good. No wonder that governments all over Europe say that they adhere to the rule of law and that they see adherence to the rule of law as a basis for government legitimacy. But what is being said must be followed in practice. Accordingly, governments must respect and safeguard the principles upholding the rule of law as must the legislature and the judiciary, all of them at the same time being aware of the fact that a certain level of tension is inevitable between the powers of state.

7. Accepting that there must be some degree of tension between the judiciary and the other two powers of state, the rule of law is best protected when the three powers of state act in mutual respect for each others functions in a democracy based on the rule of law. As emphasized by the CCJE, each of the three powers of state depends on the other two to work effectively (Opinion No. 18, 2015, paragraph 31). Bearing this in mind, the judiciary must take care not to step outside the legitimate area for the exercise of judicial power. On the other hand, the government and the legislature must re-

spect the independence of the judiciary and the institutions set up to protect this independence.

8. In this respect, and on this occasion, I want to emphasize two principles of importance.

- (i) Firstly, judges should be appointed on the basis of merit by an authority being independent of the executive and legislative powers. This principle is aimed at protecting the judiciary from undue influence and pressure from the politicians, and is well accepted and adopted by the Committee of Ministers of the Council of Europe in its Recommendation No. 12 from 2010 on Judges: independence, efficiency and responsibilities (paragraph 44 and 46). The CCJE has recommended that every decision relating to a judge's appointment or career should be based on objective criteria, and that political considerations should be inadmissible (Opinion No. 1, 2001, paragraph 17).
- (ii) Secondly, Councils for the Judiciary shall ensure independence of judges, and must be independent from legislative and executive powers. The Council shall be composed of a substantial majority of judges elected by their peers. The Councils should be endowed with broad competences for all questions concerning their statute as well as the organisation, the functioning and the image of judicial institutions (CCJE, Magna Carta of judges, paragraph 13).

9. We all know that judicial independence is threatened in member states of the Council of Europe. Some attacks on the independence of judges are quite obvious and blatant, while others are more subtle. The subtle ways of undermining judicial independence can be as dangerous as the flagrant ones, as the subtle ways over time will erode and wear away judicial independence.

10. How judicial independence can be undermined is described in the report of 2015 on challenges for judicial independence and impartiality in the member states of the Council of Europe, prepared jointly by the Consultative Council of European Judges and the Consultative Council of European Prosecutors (CCPE).

11. Of particular importance in this respect are the ways judges are appointed. I have already mentioned that judges should be appointed by an autho-

rity being independent of the executive and legislative powers. On the other hand, it is accepted that the head of state or the government may be vested with the power to appoint judges. However, where the constitutional or other legal provisions prescribe such an appointment procedure, the head of state or the government should follow in practice the recommendation from an independent and competent authority as a Council for the Judiciary.

12. Yet we see that recommendations from a Council for the Judiciary or an independent judicial appointments board are not followed in practice by all member states of the Council of Europe in all situations involving appointment of judges. In such cases the executive exert direct influence in the process of appointment of judges. This is in particular challenging when the decision of the head of state or the government is without any reasoning. We are left with no information at all about the criteria used by the executive for their selection of judges. This is an unacceptable practice.

13. Councils for the Judiciary must have broad competences in order to safeguard the independence of the judiciary and the individual judges. The Councils must be able to work independently from the executive, and their competences must be respected by the other powers of state. As mentioned in the joint CCJE/CCPE report from 2015 on challenges for judicial independence, judicial independence can be infringed by weakening the Council for the Judiciary in various ways. The Council can be weakened by reducing its powers, by reducing the financial means at the disposal of the Council, by changing the composition of the Council or by termination of the term of office of the members of the Council before the expiration of their mandate. Such interferences in the work of Councils for the Judiciary put the independence of the judiciary seriously at risk.

14. There are numerous examples on how judicial independence can be undermined and infringed, and it is of utmost importance that we are aware of the ways this can be done.

15. I will conclude by repeating that the role of a judge in a democracy is to protect the democracy itself, the rule of law and human rights. We must do so in our rulings, but we must also raise our voices in the public discourse when reforms, whether planned or implemented, may have negative impacts

Nils Engstad

on the independence of the judiciary. Therefore, the initiative to organize this conference is highly appreciated. Seeing so many judges here today, standing up for the values inherent to the rule of law, makes me proud. Dear colleagues, I am most honoured to have been invited to take part in your discussions.



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

Nuria Diaz Abad*

Who we are

Let me start by explaining very briefly who we are. For those of you that do not know, the ENCJ consists of the Councils for the Judiciary in Member States – they are independent of the executive and legislature, and are responsible for the judiciaries and justice systems. In addition, Ministries of Justice in Member States that do not have such institutions may be granted observer status (8 Observers), as can Councils for the Judiciary from European Union candidate Member States (6 Observers) and the Court of Justice of the European Union.

The principal objectives of the ENCJ are the improvement of cooperation between Councils for the Judiciary and the members of the Judiciary and the promotion of best practices to enable the judiciary to deliver timely, effective and quality justice for the benefit of all citizens.

* Nuria Diaz Abad President of the European Network of Councils for the Judiciary (ENCJ).

Over the last 11 years, the ENCJ has laid down a whole series of standards, best practices and guidelines in every area of judicial activity: appointment, promotion, evaluation of judges, judicial ethics, judicial discipline, and the establishment of Councils for the Judiciary to name but a few. Recently, the ENCJ has embarked on a major project aimed at identifying indicators of the independence and accountability of judges. We are now extending that project to look at indicators of the quality of a justice system. All this has fed in to our cooperation with the European Commission in the production of its important Justice Scoreboard.

The ENCJ also undertook a survey among judges about their independence. In the autumn of 2016 we will repeat this survey and we hope that many Polish judges will participate and express their ideas about their own independence.

The situation in Poland

The ENCJ has been following the developments in Poland with growing concern. The ENCJ has its General Assembly last June in Warsaw and was duly informed about the situation by the National Council of the Judiciary and various other stakeholders.

My predecessor was given the opportunity to speech at a reception hosted by President Duda in his Presidential Palace and he said amongst other the following: “ It should not be forgotten that judges need to be wholly independent from the state because they have to decide cases between the citizens and the state in a whole variety of subject areas – administrative, criminal and family amongst them.(...) If judges are not appointed, governed and disciplined by wholly independent processes, free from improper influences from the executive and the legislature, the citizens will not have confidence that their cases against the state are being decided by an impartial tribunal free of bias.”

In the same vein the ENCJ General Assembly adopted the Warsaw declaration in which it stated that :”In relation to the developing situation in Poland, the ENCJ emphasises the importance of the executive respecting the independence of the judiciary, and only undertaking reforms to the justice system after meaningful consultation with the Council for the Judiciary and the judges themselves.The ENCJ will continue to monitor developments in [Turkey and] Poland to ensure that the core principles underlying the independence of the judiciary are respected.”

In the communication on the Establishment of a EU framework to strengthen the Rule of Law, which is now applied by the European Commission in relation to Poland the ENCJ is mentioned as one of the organisations that might be consulted in order to advise the European Commission.

Since 2012 the ENCJ runs a system whereby it could provide assistance to Councils for the Judiciary in the implementation of its recommendations, guidelines and standards, and in problem solving. The concept is that such assistance will be provided in the form of co-operation in response to a request from the Council concerned. The ENCJ is ready to assist the National Council of the Judiciary when they would call for this assistance.

Focus on the some of the main issues in Poland

I would now like to focus on some of the most urgent issues in Poland. I would like to do so by explaining the ENCJ standards in relation to the role and composition of Councils for the Judiciary, the Standards for selection and appointment of judges and for judicial reform.

Councils for the Judiciary

The separation of powers is a fundamental principle of a democracy. Judicial independence requires the Judiciary to govern itself. The preferred option is for that governance to be undertaken by a Council for the Judiciary composed predominantly of a judicial membership elected by their peers. The Minister of Justice and the executive should, in general, have no influence over the Council for the Judiciary (save for a formal role in relation to, for example, appointments).

A compliant Council should have a broad mandate. In the ENCJ we have never adopted a standard on the length or termination of the mandate of the members of the Council. It simply did not occur to us that this would ever be necessary. It is unimaginable that mandates of Council members especially judicial members elected by their peers, could be cut short by the government.

The Council should have primary responsibility for the organisation, finance and decision-making of the Judiciary. It should have a supervisory role in relation to the courts.

The Council for the Judiciary must be an independent body which operates in a transparent and accountable manner. The structure, powers and

processes of Judicial Councils must be designed to safeguard and promote judicial independence and efficient judicial system

Selection and appointment of judges

The most relevant standards developed by the ENCJ on this issue are the followings:

- Judicial appointments should only be based on merit and capability.
- The selection process should be conducted by an independent judicial appointment body, be open to public scrutiny and be fully and properly documented, be undertaken according to published criteria and promote the diversity of the range of persons available for selection.
- An unsuccessful candidate is entitled to know why he or she failed to secure an appointment; and there is a need for an independent complaints or challenge process to which any unsuccessful applicant may turn if he or she believes that he/she was unfairly treated in the appointment process.
- If the Government or the Head of State plays a role in the ultimate appointment of members of

the judiciary, the involvement of a Minister or the Head of State does not in itself contend against the principles of independence, fairness, openness and transparency if their role in the appointment is clearly defined and their decision-making processes clearly documented, and the involvement of the Government or the Head of State does not impact upon those principles if they give recognition to decisions taken in the context of an independent selection process. Besides, it was also defined as a Standard in this field that where whoever is responsible for making the ultimate appointment (the Government or Head of State) has the right to refuse to implement the appointment or recommendation made in the context of an independent selection process and is not prepared to implement the appointment or recommendation it should make known such a decision and state clearly the reason for the decision.

Reform of the Judiciary

The Judiciary should always be involved at all stages of any reform process, whether directly or through appropriate consultation.

Judges should not be hostile to modernisation and reform of the justice system, provided always that the contemplated reforms are aimed at

Nuria Diaz Abad

improving the quality of the justice system for the benefit of those that it serves. Judicial involvement in the reform process should provide the balance between the wishes of the elected government and need to maintain judicial impartiality and the rule of law.

Closing

In closing, I want to return to the protection of the independence of individual judges and ensuring their impartiality. Three factors ensure the independence and impartiality of judges. First, their appointment and promotion on the basis of merit and capability alone; secondly, their close and collaborative involvement in the reforms to the judiciary and the justice system; and thirdly, the existence of durable constitutional safeguards that ensure proper finance and facilities for the operation of the justice system. Each of these three factors contribute to enhance public confidence in a quality justice system.

I know that these are challenging times for the Polish Judiciary. Please know that we share your concerns and we offer you our assistance and cooperation when and where needed. In the end we all share a common objective – namely a reliable independent and accountable justice system in every country for the benefit of all the citizens of Europe.



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

Marek Safjan*

**On actual threats
to judicial independence
– the matter of standards and good practices**

To start with, we should ask ourselves how real the threats to judicial independence are today. We have a democratic Constitution establishing the state ruled by law and guaranteeing respect for the separation of powers, which means that it fully recognises the independence and mutual restriction among the authorities, the prohibited infringement of the prerogatives of others, the respect for the exclusive competences of every authority group. In the part concerning the judiciary, the Constitution is precise and leaves no doubt as to the key and autonomous role of the Polish courts, recognises the rules of judicial independence, guarantees the special status of judge

* Prof. Marek Safjan, Judge of the Court of Justice in Luxembourg, President of the Constitutional Tribunal (1998–2006).

and its concomitant guarantees, and gives everyone the right to a fair trial, which is necessary in a democratic state of law. The solutions of the Polish Constitution can serve as a model for modern depictions of the judiciary and thus as the foundation and point of reference for systems searching for the proper constitutional mechanisms to ensure judicial independence. But an analysis of Polish reality suggests that good constitutional solutions developed and specified by common legislature and extensive judiciary are not enough to eliminate the threats to the independence of the judiciary, which are now appearing on the fringes of the judiciary, legislature, and executive power.

This conclusion causes sadness and anxiety, because it turns out that good legal mechanisms, including those of the highest rank, which establish the rule of judicial independence are ineffective when it comes to blocking the practices and actions of State authorities if the said authorities are driven towards objectives other than the preservation of the effective and stable separation of powers. Such actions can sometimes lead to situations in which official constitutional guarantees are ineffective. This is the case in instances of clear and direct violation of the constitutional regulations establishing the standards of a state of law through legislature and in instances in which the practices of State authorities evolve in a direction departing from good standards and constitutional customs accepted in States with strong democracy.

At this point, we can briefly reflect on the general situation. All European States which have experienced the violation of the separation of powers over the past 20 years (including Turkey, Ukraine, Belarus, and Hungary) had constitutional guarantees of judicial independence and separation of powers and all but one, Belarus, were members of the Council of Europe. These examples show that proper State operation is determined not only by a good law and its obedience but also by the practices, customs, and level of public consensus as to the understanding of a State of law and its attributes. This suggests a cliché: a State of law is not only normative texts declaring rules and values but it is also tradition, practices, common standards, and the awareness among the public that it is a common good and value completely independent of political preferences, the party in power, and the said party's programme options. There are serious concerns whether such understanding of a state of law is a commonly shared opinion in the Poland of today.

Perhaps we should pay some attention to what the disturbing customs and practices of today consist of.

First of all, we must point out the language used by the authorities to communicate with the public. Colloquially speaking, a language of narration about the judiciary. It seems like a less important matter with no impact on the actual position of the third power, but, as demonstrated in the aforementioned standards of the Council of Europe referring to the judiciary, the other authorities should refrain from criticising and discrediting the roles of courts and rulings. At this point, we can refer to the Recommendation CM/Rec(2010)12 of the Committee of Ministers of the Council of Europe for Member States, dated 17 November 2010, on the independence, efficiency and responsibilities of judges, point 18 of which states: “[...] *the executive and legislative powers should avoid criticism that would undermine the independence of or public confidence in the judiciary [...]*” (also see the recommendations of the Venice Commission and the rulings of the Constitutional Tribunal dated 14 October 2015, case No. Kp 1/15, 7 November 2013, case No. K 31/12, 8 May 2012, case No. K 7/10, and 15 January 2009, case No. K 45/07).

In my opinion, we are currently dealing with the violation of this obvious standard on an almost everyday basis. The most drastic examples of verbal aggression towards judges were made towards the judges of the Constitutional Tribunal (“the sessions of the Tribunal are like casual coffee breaks”) and of the Supreme Court (“a group of cronies”) by high-ranking representatives of the executive power. Just a few days ago, a representative of the party in power (the chairman of one of the parliamentary clubs) mentioned the need to remove judges who have a negative impact on the institution of the Constitutional Tribunal because “they have no intention of following the law adopted by the Sejm.” A deputy and member of the National Council of the Judiciary (Krystyna Pawłowicz) used her Facebook profile to express “hope that the next constitutional majority in the Sejm will have no qualms about liquidating the Constitutional Tribunal after it has been embarrassed by its current judges and President or alternatively leave it only the responsibility for issuing rulings as non-binding legal opinions. [...] The existence of something with the attributes of the Constitutional Tribunal violates the standards of democracy [...]” This statement clearly reveals the intentions of numerous politicians representing the majority in power, but also raises the question: does such a reality still have room to respect the rules of the separation of power and judicial independence?

Personal attacks by politicians on judges who gave rulings contrary to the political expectations of a certain party are unfortunately real events in Poland, evidenced in numerous examples from the past 20 years. And this is not about critical opinions of the decisions made by judges as such opinions could serve as elements of public debate. The criticisms concern the judges as people and an unfavourable ruling is treated as if it did not exist. During my term at the Constitutional Tribunal, its judges were often the targets of, euphemistically speaking, ungrounded criticism from the executive power, especially in the years 2005–2006 (e.g. concerning the matter of the National Broadcasting Council, the bank investigative commission of the Sejm, the Acts on the legal professions, the Institute of National Remembrance, etc.). In 2007, during the term of Jerzy Stępień, the representatives of the Sejm took aggressive action against several Tribunal judges and wanted to exclude them from ruling in vetting cases. As it turned out, their motions were based on insinuations and false facts. There were also the strong personal attacks in 2006 on judge Małgorzata Mojkowska for her ruling in a vetting case and in 2013 on judge Igor Tuleya, who ruled in the case of the practices of the Central Anti-Corruption Bureau (in both cases, the main theme of the attacks aimed to disparage the credibility of the judges was the past of their parents). Personal criticism is also often accompanied by political narrative, which takes the form of dangerous generalisations in relation to all courts and the whole body of judges. We hear opinions that this is a privileged caste of people who make too much money, mostly take care of their own interests, are usually lazy (which is evidenced in the lengths of court procedures) and corrupt (because their rulings are often unfair). When consistently repeated, such statements create a very dangerous situation, which cannot be reduced to the matter of political customs. This is a direct and straightforward violation of judicial independence and an attempt to intimidate and pressure judges to keep them submissive towards the other branches of power and be easier to control in the future. In this context, we can see the threat of a situation in which the rules for nominating judges are governed by some unspecified criteria applied with no explanation and irrespectively of the procedure the candidates have to go through during the process concluded with the voting of the National Council of the Judiciary. The risk of having judges appointed for political reasons is becoming more and more realistic. The requirement of the planned new regulations to present at least two candidates before the President in the sco-

pe of the procedure for appointing judges can only escalate this process. It is hard to disagree with the National Council of the Judiciary when it claims that the mechanism assuming that the President chooses from among the candidates for judges has no basis in the Constitution and radically alters the meaning and point of having judges appointed by the head of State. The important matter of the transparency of the judge-nomination process itself and the premises determining the choices made during the procedures remains unanswered. The solution leaving the choice of one of the candidates to the head of State, which is completely discretionary and not subject to any appeals, without consideration of the procedure conducted by the responsible independent judicial authorities stands in direct violation of judicial independence. Meanwhile, in accordance with Article 179 of the Constitution, judges may be appointed only on the motion of the National Council of the Judiciary.

A judge who does not meet the expectations of the Government can expect consequences for a further career as a judge since it will be subject to evaluation with vague and confidential premises. This stands in violation of one of the main rules determining the standards of judicial independence, which clearly establishes the decisive influence of independent judiciary bodies in the process of appointing judges and guarantees the minimisation of political risk in such procedures (see, e.g., *The Magna Carta of Judges* – the document of the Consultative Council of European Judges dated 17 November 2010, point 4 of which reads: “Judicial independence shall be guaranteed in respect of judicial activities and in particular in respect of recruitment nomination until the age of retirement [...]”; also said Council’s opinion No. 1(2001) dated 23 November 2001 on judicial independence, point 25: “[...] The authorities responsible for making and advising on appointments and promotions of judges should now introduce, publish and give effect to objective criteria, with the aim of ensuring that the selection and career of judges are based on merit, having regard to qualifications, integrity, ability and efficiency. [...]”). Additionally, the risk of applying non-scientific criteria can grow considerably when the responsibilities of general judicial assemblies and the regulations for appointment to the National Council of the Judiciary are reduced according to the assumed premises.

A situation in which the public actions of judicial representatives taken in defence of judicial statutes are qualified as unacceptable political involvement is a form of pressure and restriction of the independence of judges.

The appearances of the chairs of top judicial authorities or common gatherings of judges of supreme instances or representatives of the National Council of the Judiciary are currently condemned by the representatives of other authorities as the aforementioned unacceptable involvement in current political affairs. For months, such criticism from representatives of the governing majority has been appearing, aimed at all public appearances of the president and judges of the Constitutional Tribunal, including those who took part in the legislative work on the bill of the new Constitutional Tribunal Act in 2015 and attended the sessions of the Sejm's committee. Please note that the appropriate legislative initiative was undertaken by the President of Poland almost two years before – following the arrangement of the filed bill's content with the Constitutional Tribunal. The presence of the President and judges of the Constitutional Tribunal at the committee's session was natural and required by the procedure, much as in the case of any other situation concerning changes to the Constitutional Tribunal Act. For clarity's sake, we should also note that the representatives of the Constitutional Tribunal were neither the authors nor the initiators of the changes, which led to opening up the potential for the appointment of five Constitutional Tribunal judges under the previous parliamentary term of. In most of European States, work on Acts associated with the judiciary and the judicial status are consulted on by the political authorities with judicial representatives. The Court of Justice of the European Union even has a legislative initiative concerning the regulation of its statutes and procedures, and its representatives have always taken part in the work of appropriate bodies concerning legal reforms in this area.

The criticism from prominent representatives of executive and legislative powers, and their clear disregard for them have also appeared with regard to the First President of the Supreme Court and representatives of the National Council of the Judiciary who commented on legislative bills associated directly with the activities of the third power.

Judges with a critical approach to the suggested solutions or practices of State authorities towards the judiciary, e.g. when they concern the procedure for appointing judges, are immediately declared by politicians as having betrayed their mission and calling. In other words, judges are expected to keep quiet and stay completely indifferent towards all activities or intentions of the executive and legislative powers related to the activities of the third power. This completely shakes up the separation and balance of power because

there is no restraint at all from the Government or representatives of Parliament when they express (often brutal) accusations and opinions about the judiciary.

Bluntly said, the pursuance of the elimination of representatives of the third power from public debate on matters considering judicial status and judicial activities is equal to violation of the independence of the judges. This approach could only be justified in the light of the new legal ideology, which clearly rejects the equality of individual authority segments in a democratic State in favour of hierarchical superiority of the legislative authority.

Meanwhile, a judiciary deprived of a voice platform and actual active participation in debates on its condition and reforms becomes only an object of the influences of other State authorities and loses its independence from other authority segments. Restriction or restraint of the opinions of judges on matters associated with any decisions concerning judicial activities is consequentially a clear violation of the fundamental rule of the separation of the three powers, which is discussed in Article 10 of the Constitution. Also, it stands in complete violation of the standards assumed in Europe, which stress the importance of the participation of third power in public debate concerning the condition of this segment of the State. The aforementioned Magna Carta of Judges clearly states in point 9: “The judiciary shall be involved in all decisions which affect the practice of judicial functions (the organisation of the courts, procedures, other legislation).” The voice of the representatives of the third power is an important component of a democratic society, and, as stressed by the Consultative Council of European Judges in point 9 of opinion No. 7(2005) dated 23–25 November 2005, it is very important to “create direct relations between the courts and the public at large. Integrating justice into society requires the judicial system to open up and learn to make itself known”.

This standpoint is also clearly confirmed by the ruling of the European Court of Human Rights made on 23 June 2016 in the case of Baka (Grand Chamber, appeal No. 20261/12), which stresses not only the right but also the responsibility of the individual serving as the President of Supreme Court to present opinions on legislative reforms with unquestionable impact on judicial activities. The judges in Strasbourg followed the appropriate standards in the documents of the European Council and clearly indicated that all judges were responsible for the protection of judicial independence and

that consequentially judges and the judiciary must be consulted in association with ongoing legislative work in all matters concerning judicial status and the mechanism determining court operations. Restriction, or attempts at the elimination, of the presidents of the supreme courts and the presidents of common courts from participating in such work, which is apparently planned within the scope of the new bill on the National Council of the Judiciary, is very disturbing, also from the perspective of relations between the judiciary and other authorities, because it leads to limiting the roles of court representatives in important groups representing the voices of the entire community.

The elimination of judicial representatives from the debate on the most important institutional solutions associated with the activities of the said authority under the excuse of the political involvement of the judges is therefore a groundless categorical transition aimed at depriving representatives of the judiciary of the right to be consulted and heard out on matters essential to the judicial status. We have witnessed such practices over the past nine months, when none of the successive bills of Acts on the Constitutional Tribunal were consulted on with judicial representatives with regard to their purpose and correctness. This shows that there is a new custom emerging, which clearly violates the standards commonly accepted in European States, standards recently recalled in the opinion of the Venice Commission.

The violation of the constitutional separation of powers can take various forms – with more or less intensification. I have no doubts that the events of the past few months – the peculiar censorship of the Tribunal’s rulings before their publication – is a sign of direct interference by the executive and legislative powers in the prerogatives of the judiciary.

In the light of the effective constitutional mechanisms and the rulings of the Constitutional Tribunal, it is obvious that the rule of the separation of powers cannot be treated as an expression of the complete separation of powers operating on completely different orbits. This is obviously not the case, and the points connecting the judiciary with the other powers appear in various configurations. However, rulings of the Constitutional Tribunal clearly indicate that the prerogatives of the other powers towards the judiciary (also in the scope of administrative supervision) cannot reach so far as to invade the area subject to judicial actions and covered by guarantees of judicial independence. The Constitutional Tribunal has ruled that “[...] neither the executive power nor the legislative power may measure out

justice and therefore may not interfere in areas where judges are independent” (see the Constitutional Tribunal’s rulings dated 15 January 2009, case No. K 45/07; 19 July 2005, case no K 28/04, and 29 November 2005, case No. P 16/04). By the way, the following reflection comes to mind: radical enforcement of the Prosecutor General’s prerogatives allowing interference in specific ongoing proceedings stemming from the recent legislative changes might, together with the responsibilities of the Minister of Justice within the scope of the so-called administrative supervision of courts, constitute a serious risk of destabilising the balance among authorities and see the executive power invade the jurisdictional authority of the courts. A particularly sad paradox is when the executive power attempts to usurp the right to determine whether to publish the announcements of rulings made by the Constitutional Tribunal. The magnitude of this violation must be perceived in a broader context – as the first clear step towards the creation of a special mechanism for the division of court rulings into those legal and effective and those illegal and deprived of enforcement. Could this be the first step in the establishment of a mechanism seeing the selective control of rulings, especially those of the supreme courts, for compliance with the requirements of legality? This concept still seems far-fetched, but is unfortunately growing in our reality.

The investigation into the activities of the President of the Constitutional Tribunal, which is directly associated with the coordination of his jurisdictional work, the organisation of the work of the Tribunal, and mainly procedural decisions appointing judicial bodies in accordance with prior rulings of the Tribunal, is probably the final proof of the plan to reverse the rule of the separation of powers and create a hierarchical structure with the courts answering to the executive power, including the prosecutor’s office, which is under the control of a member of the Government – the Minister of Justice. I am afraid that something like the prosecutor’s office in Katowice’s deciding to launch an investigation in case of the President of the Constitutional Tribunal cannot be treated in the categories of common incidents, which tend to happen in the scope of the ongoing dispute between the majority in power and the Tribunal. It seems to be the result of a completely different philosophy of State operations, which was adopted 10 months ago. This is a warning sign for other courts, for the entire judiciary, showing that the prosecutor’s office might become the ultimate censor of procedural correctness. In a state ruled by law, such things do not happen.

In this context, we must keep reminding ourselves that the right to independent courts delivering independent rulings is not a personal privilege of the judges, but rather the most important component of the individual constitutional right to justice.

Therefore, the emerging and worrying changes in the practices, customs, and language used in respect of the judiciary by the majority in power are accompanied by several equally or perhaps even more disturbing concepts of new regulations, which might give rise to negative situations, which are still perceived as incidents and not as a predominant trend. This includes the aforementioned changes to the new operating standards of the National Council of the Judiciary (the concept of shorter terms, which stands in complete opposition of the Constitution, the way of appointing judges to the National Council of the Judiciary, the procedure for appointing judges, etc.), but also the announced reforms leading to elimination of so-called judicial privileges, i.e. retirement, bases for remuneration and the right to use research assistants. It must be said that together all these changes – the planned reforms of the third power and the now-emerging practices and customs in the form of the “new standard” – seem to be leading to the actual modification of the constitutional system and the establishment of a new system, one without respect for the separation and restriction of the powers, but with a new rule assuming a clear advantage of the executive and legislative powers over courts.

Instead of conclusions

The current situation, which can be safely referred to as a crisis in the state of law, requires extraordinary involvement by the judiciary, who must use all the legal instruments available to them in order to prevent the introduction of poor, thoughtless reforms destroying the standards approved in all democratic States and seemingly preserved in our legal space, which has been in development over the past 27 years.

Let us say it again: the presidents of courts and judges representing judicial communities have not only the right but also the responsibility to react to negative situations, which can endanger proper judicial activities and consequentially the mechanisms of a democratic State. Opinions in this area can never be classified as political opinions or seen as support for any side in a political dispute. A credible, effective, and primarily independent judiciary is

not a matter of political choice but the common value of the whole of society, regardless of political preferences.

Therefore, the representatives of the judiciary have the right and responsibility to express their concern and objections, when institutional transformations can deprive the courts of their most important attribute: independence. Therefore, we cannot allow a situation in which the unjustified categorisation of a judge as “politically involved” leads to closing down discussion and preventing the community from taking a stance in its most vital matters.



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

Ryszard Piotrowski*

Comments on the constitutional limits of amendments to the acts of law concerning the National Council of the Judiciary

1. In a democratic state of law, judicial independence and, in consequence, the independence of the National Council of the Judiciary, which is particularly important in ensuring the separation and balance of powers and the right to court, forms the constitutional value determining the axiological personality of the system.

The separation of the judiciary power, in order to make it independent from other authorities, is consistent with the rule of the democratic state of law, as well as with the rule of the separation of powers and their roles in ensuring individual rights “by preventing the abuse of power by any authorities”¹.

* Ryszard Piotrowski, Ph.D. habil., University of Warsaw.

¹ Ref. The Constitutional Tribunal in the substantiation of the decision issued in case No. K 11/93.

The main objective of the constitutional regulation, which is to guarantee individual freedom and dignity, requires the separation and balance of powers constitutionally ordered to “preserve the natural human dignity and the human right to freedom and solidarity with others”. Like other authorities, the judiciary bodies are ordered by the preamble of the Constitution to make human dignity a “firm foundation” for the state’s system. Therefore, in light of the preamble to the Constitution, the laws of Poland should be interpreted and applied according to the rule of “*in dubio pro dignitate*”. The state’s point of the judiciary makes it the guardian of human dignity, and the guardian of timeless universal values. In some instances, the majority in the Parliament tends to either forget or neglect these values because they are not important from the perspective of polls. And, in such cases, the judiciary can make corrections based on those values which the culture of human rights sees as independent of any authority².

Judicial independence is a constitutional value which determines the axiological personality of the system, and hence the axiological personality of the democratic state of justice. Therefore, the independence of the National Council of the Judiciary, which is especially important to guarantee the compliance with this rule, also forms a constitutional value. The Council is not the only entity appointed to stand on guard of the state’s axiological personality. The Constitution also provides for establishing the Constitutional Tribunal, and entrusts both the Tribunal and the Council with a leading role in the protection of judicial independence. This role is further entrusted to the President of the Republic of Poland who makes sure that the Constitution is enforced and, therefore, stands on guard of the constitutional values.

However, the independence of the judiciary power from political authority, which is the foundation of the constitutional democracy, being rejected in totalitarian and authoritarian systems, is also threatened in democratic systems. This is likely to happen especially when – like now in Poland – the currently binding constitution is perceived as an obstacle to the fulfilment of pre-election promises and there is an ongoing dispute concerning democracy. This dispute is about whether democracy is a system where the majority in power is restricted by human rights and the values reflecting such rights, or whether the values and rights are determined by the rulers.

² Cf. R. Piotrowski: *Władza sądownicza w Konstytucji RP* (The Judiciary in the Constitution of the Republic of Poland), “National Council of the Judiciary”, No. 1/2010, p. 17 *et seq.*

Judicial independence is closely related to the fact that the fundamental values are perceived as the actual rulers. The judges recognise the rulers, because they represent the values and make their rulings in the name of Poland. However, this leads to conflicts between judges and politicians. Attempts to make judges accountable to politicians had already been made after 1989³, but they were not associated with such fundamental questioning of the system's axiology as is the case now.

2. The Constitution must be read in its entirety and not just in fragments, and we cannot declare that when the President of the Republic of Poland enforces his prerogatives he is not bound in this scope by the regulations of the Constitution and can do as he pleases. When the President takes advantage of his prerogatives and rejects the motion of the National Council of the Judiciary concerning the appointment of judges, he should substantiate his standpoint, given the rule of cooperation among the authorities. In light of the rulings of the Constitutional Tribunal and the prevailing doctrine, the President can reject an appointment only in specific cases, following prior presentation of reservations by his representative in the National Council of the Judiciary, and the rejection must be legitimate. It is necessary to reveal the reasons justifying the rejection of the candidate for a judicial position to the National Council of the Judiciary⁴.

In Article 179, the Constitution of the Republic of Poland states that judges are appointed by the President at the motion of the National Council of the Judiciary for life. The interpretation of this constitutional regulation requires the interpretation of the constitutional model of relations between the head of state and the judiciary, determined by the rules of a democratic state of justice (Article 2 of the Constitution), the separation and balance of powers (Article 10 (1) of the Constitution), the independence and autonomy of courts from other authorities (Article 173 of the Constitution), and

³ Cf. e.g. R. Piotrowski: *Pozycja ustrojowa sędziego a zakres i charakter zarządzeń nadzorczych* (The State Position of Judges and the Scope and Nature of Supervisory Regulations), in: R. Piotrowski, eds.: *Pozycja ustrojowa sędziego* (The State Position of Judges), Warsaw 2015, p. 169.

⁴ Cf. R. Piotrowski: *Opinia o projekcie ustawy o zmianie ustawy o Krajowej Radzie Sądownictwa oraz niektórych innych ustaw (projekt z 2 maja 2016 r.)* (An Opinion on the Bill Amending the National Council of the Judiciary Act and Certain Other Acts (The Bill dated 2 May 2016), used in this study.

the rule of judicial independence (Article 178 (1) and (3) of the Constitution), ensuring the right to justice (Article 45 (1) of the Constitution) that constitutes the foundation of a democratic state of law. Therefore, the mode of appointing judges, as specified in Article 179 of the Constitution, is determined by the objectives of the National Council of the Judiciary in the scope of protecting judicial independence (Article 186 (1) of the Constitution). The internal cohesion of the Constitution excludes any interpretation which would deprive the Council of the ability to perform its objectives and to create the potential for arbitrary refusal to appoint judges nominated by the Council. The rule of cooperation of authorities, expressed in the preamble to the Constitution, is especially important for the interpretation of Article 179 of the Constitution. Article 9 of the Constitution must also be taken into consideration as it forces the Republic of Poland to comply with the binding international law.

Excessive relations between judges and the President of the Republic of Poland seem irreconcilable with Article 45 (1) of the Constitution as they would allow the destruction of the social perception of the judiciary corresponding to the constitutional requirements of impartiality. This would make it consistent with the postulate of objective impartiality based, according to the European Court of Human Rights, on the court providing “sufficient guarantees eliminating all legitimate concerns”⁵. A valid act of law entrusting a certain range of judiciary authority to the government may raise concerns towards the existence of such guarantees and, according to the European Court of Human Rights, “these guarantees refer to the judiciary structure and system, and to the position of judges, in order to ensure that the right to justice has a real dimension”⁶. From this perspective, excessive relations between the judiciary and the executive authority may render the right to justice unreal.

In light of the doctrine, there is no doubt that the decisions on the appointment of judges “make an impact on the enforcement of the state authority and – on the other hand – the decision-making process must respect judicial independence”⁷. Moreover, the mode of establishing the rights ve-

⁵ Ref. Ruling in the case of *Findley vs. Great Britain*, in: M. A. Nowicki: *Orzecznictwo Europejskiego Trybunału Praw Człowieka w 1997 r.* (Rulings of the European Court of Human Rights in 1997), *Biuletyn Centrum Europejskiego Uniwersytetu Warszawskiego* 1997 (1997 Bulletin of the European Centre of the Warsaw University), No. 3.

⁶ Ref. The justification to the ruling in case No. K 11/98.

⁷ Ref. L. Garlicki: *ibidem*, p. 1.

sted in the President of the Republic of Poland, and in the National Council of the Judiciary, in relation to appointing judges “contains one of the guarantees of the independence of judges”⁸. The mode of appointing judges, their irremovability, and the practice of implementing professional promotions are not only guarantees of the independence of judges⁹, but they also ensure the right to justice¹⁰. Article 179 of the Constitution provides for “a system of limited nominations”¹¹ or, alternatively, a nomination system including – in reference to the actions of the National Council of the Judiciary – elements of an election system¹², entrusting the competences to appoint judges to the President of the Republic of Poland, acting on the motion of the National Council of the Judiciary. This aims to “ensure the proper balance between the nominating competences of the head of state and the rule of independence of courts as a separate authority”¹³. The President is under “no legal obligation to recognise the motion”¹⁴, which is indicated by “depicting the authorisations of the President as prerogatives”¹⁵. The role of the President of the Republic of Poland in nominating judges is “restricted to potential rejection of the nominated candidate”¹⁶. At the same time, “refusal to recognise the motion (...) is permitted only in extraordinary situations and must always be preceded with a presentation of the reservations to the Council by its member representing the President”¹⁷. However, in principle, “any attempts to prove that the President is obliged to recognise the motion of the National Council of the Judiciary seek to limit the constitutional com-

⁸ Ref. W. Skrzydło: *Konstytucja Rzeczypospolitej Polskiej* (The Constitution of the Republic of Poland). Commentary, Warsaw 2013, p. 237.

⁹ Cf. L. Garlicki: *Polskie prawo konstytucyjne* (The Polish Constitutional Law), Warsaw 2015, p. 336.

¹⁰ Cf. J. Ciapała: *Charakter kompetencji Prezydenta RP. Uwagi w kontekście kompetencji w zakresie powoływania sędziów* (The Nature of the Competences of the President of the Republic of Poland in the Context of Competences for Appointing Judges), “Przegląd Sejmowy” No. 4/2008, p. 39.

¹¹ Ref. L. Garlicki: comments to art. 179, in: L. Garlicki, eds.: *op. cit.*, p. 4.

¹² Cf. J. Ciapała: *op. cit.*, p. 37.

¹³ Ref. L. Garlicki: *op. cit.*, p. 4.

¹⁴ *Ibidem*, p. 5.

¹⁵ *Ibidem*.

¹⁶ Ref. L. Garlicki: *Polskie... (Polish...)*, p. 261.

¹⁷ Ref. L. Garlicki: comments to art. 179, in: L. Garlicki, *op. cit.*, p. 5.

petences of the President and should be decisively rejected¹⁸. The President may reject the motion of the National Council of the Judiciary¹⁹, but is bound with the Council's motion in the sense that he cannot appoint a judge not nominated in the motion²⁰. The President's competence cannot be recognised as merely ceremonial²¹. Furthermore, the National Council of the Judiciary may make a wrong decision concerning a specific motion or, alternatively, circumstances may arise putting the motion's legitimacy into question, following its submission, and if the President was bound by the motion, it would pose a risk to the rule of legalism²². However, besides such "absolute exceptions", the President "is bound by the motion of the National Council of the Judiciary and cannot reject the nomination of the candidate specified in said motion"²³. The opinion that the President of the Republic of Poland may reject a nomination submitted by the National Council of the Judiciary is viewed as grounded in the studies of law²⁴.

However, considering the constitutional rule of the independence of judges, all arbitration and randomness in this scope should be excluded²⁵. This applies to an interpretation of Article 179 of the Constitution which entails the risk of arbitration and randomness in the nomination process, thus permitting the President to reject a nomination put forth by the National Council of the Judiciary even if such rejection is not justified in a way eliminating the arbitration of the executive authority. Therefore, the justification, which is not part of the appropriate decision on rejecting the nomination,

¹⁸ Ref. W. Sokolewicz: *Konstytucyjna regulacja władzy sądowniczej* (The Constitutional Regulation of the Judicial Power), in: T. Debowska-Romanowska, A. Jankiewicz, eds.: *Konstytucja, ustrój, system finansowy państwa. Księga pamiątkowa ku czci prof. Natalii Gajl* (The State Constitution, Political and Financial Systems. In Memory of Professor Natalia Gajl), Warsaw 1999, p. 174.

¹⁹ Ref. K. Wojtyczek in: P. Sarnecki, eds.: *Prawo konstytucyjne* (The Constitutional Law), Warsaw 2002, p. 306.

²⁰ Cf. J. Sułkowski: *Uprawnienia Prezydenta do powoływania sędziów* (The Authorisation of the President to Appoint Judges), "Przegląd Sejmowy", No. 4/2008, p. 53.

²¹ *Ibidem*.

²² Cf. B. Szczurowski: *Prezydent Rzeczypospolitej Polskiej jako organ czuwający nad przestrzeganiem konstytucji* (The President of the Republic of Poland Standing on Guard of the Constitution), Warsaw 2016, p. 160.

²³ *Ibidem*.

²⁴ Ref. B. Banaszak: *Konstytucja Rzeczypospolitej Polskiej* (The Constitution of the Republic of Poland). Commentary, Warsaw 2009, p. 796.

²⁵ *Ibidem*.

becomes an integral part of the constitutionally accepted rejection of the nomination due to the nature of said rejection.

While attempting to answer the question whether the President may reject the motion of the National Council of the Judiciary and refuse to appoint a given individual to the position of a judge, the Constitutional Tribunal has declared that, in light of the prevailing opinions of the doctrine's representatives, "the President does not have legal responsibility to recognise the motion of the National Council of the Judiciary but should only reject it in extraordinary instances, following prior presentation of reservations by the President's representative in the National Council of the Judiciary"²⁶.

The question of whether the refusal to appoint a judge should be justified is certainly worth consideration. The doctrine indicates that when the President refuses to appoint a judge, "he should clearly explain the reasons of his actions to prevent any accusations of acting in an arbitrary manner"²⁷. The opinion of the Constitutional Tribunal is opposed to the recognition of such responsibility as it states that Article 179 of the Constitution is "the complete standard when it comes to establishing the competences of the President in the scope of appointing judges, because it regulates all of the necessary elements of the nomination procedure. It is also obvious that this regulation does not cover the details of the whole procedure and is not self-executive in this sense. In this scope, the President's implementation of his competences may be specified in the acts of law, but only under the condition of preserving the rule of constitutional superiority expressed in Article 8 (1) of the Constitution, as it sets clear boundaries for the legislator in its Article 179 when it comes to the statutory regulation of nomination of judges by the President. Specifically, statutory regulations cannot violate the essence of the President's prerogative in the scope of appointing judges"²⁸.

The doctrine contains an opinion that the standpoints of the Constitutional Tribunal, which perceive Article 179 of the Constitution as a "complete standard", cannot be "deemed convincing" because "the release of the consignment obligation cannot be considered tantamount to unlimited arbitration for the President in the implementation of a given competence"²⁹. This release

²⁶ Ref. The justification to the ruling in case No. K 18/09.

²⁷ Ref. B. Szczurowski: *op. cit.*, p. 160.

²⁸ Ref. The justification to the ruling in case No. K 18/09.

²⁹ Ref. B. Szczurowski: *op. cit.*, p. 166.

serves “not to enforce the statutory position of the head of state but rather to eliminate the influence of the Council of Ministers on judicial makeup”³⁰. From this perspective, the admission of the President acting in violation of the National Council of the Judiciary’s nomination may be perceived in favour of having judges subordinate to the executive power.

The Constitution points to the obligation of justifying the rejection of a nomination to the position of a judge. The grounds for this obligation lie in the ban on the arbitrary nature in the activity of the public authority³¹ decoded by the Constitutional Tribunal from the rule of the democratic state of justice (Article 2 of the Constitution), the rule of rationality serving as the grounds for legitimisation of the public authority in a democratic state of justice, and the rule of cooperation between authorities, which is expressed in the preamble to the Constitution of the Republic of Poland.

When it comes to appointing judges, the ban on the arbitrary nature in the activity of the public authority is consistent with the requirements concerning the elimination of any political influence in appointing judges, specified under the European Charter on the Statute for Judges and in the recommendations of the Council of Europe, benefiting from the transparency of this process.

As noted by the Constitutional Tribunal, if the action of the President is “preceded by a certain reasoning (in the decision-making process)”, which emerges “in the form of a decision to take advantage (or not) of the competences in appointment of judges”³², the content of said rationalisation, which does not find reflection in a decision approving the motion of the National Council of the Judiciary, should be revealed to the Board. It is unlikely for the rejection of a nomination to be deprived of a written substantiation corresponding to the criteria of rationality, prepared during the decision-making process preceding the release of an appropriate decision. Therefore, such justification should be subject to release to the National Council of the Judiciary in the form approved by the President of the Republic of Poland.

The rule of cooperation between the authorities, expressed in the preamble to the Constitution, which has a normative nature reflected in the re-

³⁰ Ibidem.

³¹ Ref. The justification to the ruling in case No. K 32/04.

³² Ref. The justification to the ruling in case No. Kpt 1/08.

corded jurisprudence of the Constitutional Tribunal³³, is the foundation for the responsibility of the President of the Republic of Poland in the scope of justifying the rejections of nominations of judges.

According to the Constitutional Tribunal, “the Preamble to the Constitution obliges Polish authorities to cooperate with one another. This formula imposes an obligation to mutually respect the constitutional responsibilities and competences of the state authorities, as well as to respect the dignity of the offices and their holders, to be loyal to one another, to act in good faith, to share information about various initiatives, to be ready to cooperate, to determine and fulfil the cooperation conditions, and to cooperate effectively. The concurrence of objectives as an expression of cooperation is the consequence of the fundamental system rule expressed in Article 1 of the Constitution: “Poland is the common good of all its citizens”. The constitutional state authorities are obliged to act in compliance with the system directive presented in Article 1 of the Constitution”³⁴.

Therefore, the constitutional rule of cooperation between the authorities requires the President of the Republic Poland to inform the National Council of the Judiciary of the reasons for rejecting a given nomination, and to provide said information in the form of justification. If the Council submits a motion, which is rejected, respect for the dignity of Poland requires said rejection to be explained irrespectively of there being an appropriate regulation in the Constitution, because the Constitution orders the President of the Republic of Poland and the National Council of the Judiciary to work together. The rules for and methods of cooperation are left to the practices of the mutual relations between the. These relations should include presentation of explanations for rejection of judge nominations to the Council. The explanation is important to the formation of the constitutionally required relations between the President of the Republic of Poland and the National Council of the Judiciary, coessential with cooperation, i.e. based on a dialogue and mutual respect.

According to the Constitutional Tribunal, “the form of ‘the President’s Decision’ announced in the *Monitor of Poland* prevents the external form of the President’s official act from covering explanation of a personal decision”³⁵.

³³ Cf. The justification to the ruling in case No. Kp 5/08.

³⁴ Ref. The justification to the ruling in case No. Kpt 2/08.

³⁵ Ref. The justification to the ruling in case No. Kpt 1/08.

However, this does not rule out the option of having the President or his representative in the Council inform the Council in writing of the reasons for rejection. The technical details depend on the arrangements made in the scope of the practice of cooperation between the President and the Council.

3. The mode of selecting members to the Council cannot weaken its power. Because of the rule of credibility and efficient operation of public institutions, the selection cannot restrict the Council's effectiveness and cannot be conducted in the same way as parliamentary elections, because it would stand opposed to the nature of the Council.

The rulings of the Constitutional Tribunal have expressed an opinion that "regulations for the appointment of judges to the Council are constitutionally enforced and hold a special place in the system, since their *de facto* position determines the independence of this constitutional body and the effectiveness of the Council's operations"³⁶.

The mode of selecting members to the Council should not foster any of its operating effectiveness in favour of judicial independence. The binding rules order that judges be selected under the independent categories of judges and that this selection be associated with the existing system of judicial self-government, which differentiates the strength of judges of various instance courts. However, the appointment of judges to the Council by the authorities of judicial self-government does not mean that the Council itself forms a body of that judicial self-government³⁷. This mode of selections helps to guarantee that the Council is composed of experienced judges.

No change to the procedure of appointing judges to the Council should favour transformation of the Council into a certain type of representation of judges grouped in electoral districts, as this would require the candidates to carry out election campaigns, *inter alia*, by posting information and statements associated with the elections on the court website. This solution would transform the selection process into a venture based on patterns borrowed from elections to representative bodies, which could expose the Council to the risk of having political influence in the judicial community and of making

³⁶ Ref. The justification to the ruling in case No. K 40/07.

³⁷ Cf. R. Pęk, M. Niezgodka-Medek: *op. cit.*, p. 94. Cf. also M. Dębska: *Ustawa o Krajowej Radzie Sądownictwa (The Act on the National Council of the Judiciary)*. Commentary, Warsaw 2013, p. 50 et seq.

the selection public. This, in turn, would stand in violation of Article 178 (3) of the Constitution, which states that a judge cannot conduct any public activity that cannot be harmonised with the standards of judicial independence. A judge conducting his/her campaign online in the electoral district becomes dependant on the voting colleagues, thus risking independence in the scope of this rivalry. Although the Constitution determines the rules of appointing judges to the National Council of the Judiciary, this is not the same selection as the one in the main act, in relation to the elections to the Sejm and Senate, because appointments to the National Council of the Judiciary are apolitical in principle. Any potential democratisation of the process of selecting members of the Council should not make this procedure excessively competitive, as it might give rise to divisions, pre-election promises and coalitions, thus making the judicial community political.

The role of the judicial “part” of the Council might be weakened if court presidents and vice presidents were banned from the Council. These judges have experience and authority and can considerably help the Council perform its statutory functions associated with judicial independence. Such also a ban stands in violation with Article 187 (4) of the Constitution, which states that the system, the scope of operations and the mode of appointment to the National Council of the Judiciary are specified by the law. The rulings of the Constitutional Tribunal indicate that “a common legislator bound by this standard to regulate the organisation, the scope and the mode of operations of the National Council of the Judiciary has no right to establish additional standards on which judges can pursue their appointment and be chosen to the Board, and which ones are deprived of this right. The legislator is obliged only to regulate the mode of appointing judges to the Council”³⁸.

4. Independence of the Council makes it necessary to ensure the proper respect for the provisions of the Constitution of the Republic Poland concerning the terms of office of the judges appointed to the Council. If the legislator was allowed to reduce the term of office only because of a decision to change the rules of appointment towards this group of Council members, the ability of these judges to act as the guardians of judicial independence would be severely compromised.

³⁸ Ref. The justification to the ruling in case No. K 25/07.

If the term of office of the appointed members of the Council, as well as its Presidium, were determined by an act of law, this would mean that the legislator could arbitrarily interrupt the function of a constitutional state body. This, in turn, would be in violation of the rule of a democratic state of justice and the rule of legalism. It would also constitute a disproportional interference of the legislator into the constitutionally established system, determining the appointment to and operations of the National Council of the Judiciary, being a constitutional entity based on the tenures of appointed members³⁹. In its rulings regarding the principle of proportionality, concerning the verification of the use and need of the analysed standards, the Constitutional Tribunal has always stated that “if a given objective can be reached through other means, which impose less restrictions on the rights and freedoms, the legislator’s use of the more inconvenient means exceeds the necessity and thus violates the Constitution”⁴⁰. The rulings of the Constitutional Tribunal express an opinion that “changes to regulatory mechanisms (...) should be particularly justified and made with caution because instability of the law in one of the factors constituting potential violation of the rule of trust in both the state and the law established by said state (Article 2 of the Constitution)”⁴¹. According to the Constitutional Tribunal, only extraordinary and constitutionally justified circumstances may legitimise the violation of the rule of tenure⁴². The Constitutional Tribunal recognises that “the legislator may use the rights in the scope of freedom of regulation in a proportional manner and cannot even indirectly restrict, impair, or deform any activity of public entities made within the limits of their constitutional authorisations without a proper constitutional foundation”⁴³.

Shortening the terms of office of the appointed members of the Council would entail an ordinary change to the Constitution of the Republic of Poland without change to Article 187 (3) of the principal act in force. It would also be a transformation of the system identity of the Council, which would

³⁹ Cf. Evaluation of such interference in the justification to the ruling of the Constitutional Tribunal in case No. K 25/07.

⁴⁰ Ref. In particular the justification to the ruling in cases Nos. P 11/98, K 26/00, and K 8/07.

⁴¹ Ref. The justification to the ruling in case No. K 25/07.

⁴² Ibidem.

⁴³ Ref. The justification to the ruling in case No. K 40/07.

see a departure of the general independence of the Council from the legislative and executive authorities, manifested in the permanent tenures of the appointed judges.

The Council 's tenure ending earlier than on the date resulting from the Constitution should be assessed in due consideration of the standpoint of the Court of Justice of the European Union. In relation to the end of tenure of the Hungarian inspector of personal information protection, the Court noted that providing for such a solution in the ordinary law would have to lead to making the authorities of the entity in question dependant on the political factor. According to the Court, "if every Member State was entitled to compel a supervisory authority to vacate office before serving its full term, in contravention of the rules and safeguards established in that regard by the legislation applicable, the threat of such premature termination, to which that authority would be exposed throughout its term of office could lead it to enter into a form of prior compliance with the political authority, which contradicts the requirement of independence (...). This occurs even when the reduced term is due to any transformation or change in the model, which should be organised in a way ensuring respect for the requirements of independence, as established in the applicable regulations"⁴⁴.

5. Despite the Constitution being clear on the matter, there is a questionable bill planning to present the President with multiple motions for nominations to the offices of judges instead of one (if there are multiple candidates for appointment, the Council would present the President with at least two candidates nominated for judges). In light of this proposal, the Council should also present the President with a motion for appointing and not appointing the same individual as a judge, as the Council has no idea whom the President will appoint.

Article 179 of the Constitution stipulates that the President appoints judges nominated by the National Council of the Judiciary, which does not mean that the head of state has any choice in that matter. The President is constitutionally empowered to make the choice when the principal law allows him to do so, *inter alia*, when choosing the President of the Constitutional Tribunal from among the candidates presented by the General Assembly

⁴⁴ Ref. Court of Justice of the European Union in the resolving of its judgment in case No. C-288/12.

of the Constitutional Tribunal (Article 194 (2) of the Constitution). In light of Article 179 of the Constitution, the President's authorisation is based appointing or refusing to appoint a given judge, while the powers vested in the Council come down to the formulation of a single, rather than multiple, appointment motion. The singular form used in this case by the legislator appears of special importance.

The bill in question considerably weakens the position of the Council in the system, as there is currently no way to become a judge without the Council's motion. At the same time, it strengthens the role of the head of state in appointing judges, thus shaking up the balance between the judiciary and the executive authority in this process. The rulings of the European Court of Human Rights point out that, in the evaluation of judicial independence, it is of key importance to determine whether the ruling body retains independence of the executive authority⁴⁵. The Committee of Ministers of the Council of Europe interprets Article 6 of the Convention on Human Rights as a command to entrust decisions on appointing and promoting judges to bodies independent of the executive authority.

In accordance with recommendation No. R(94) 12 of the Committee of Ministers of the Council of Europe for Member States of 13 October 1994 on the independence, efficiency, and role of judges: any decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking a decision on the selection and career of judges should be independent of the government and administration. The opinion of the Venice Commission should also be taken into account, according to which "an independent judicial council should have a decisive influence on any decisions regarding the appointment and career of judges"⁴⁶.

The doctrine offers an opinion that the authorisation of the head of state "depends on the appropriate motion presented by the National Council of the Judiciary"⁴⁷ and the "freedom of the President to appoint judges is limi-

⁴⁵ Cf. e.g. the case of 3 March 2005: *Brudnicka and others vs. Poland*, par. 41.

⁴⁶ Cf. The European Commission for Democracy through Law (Venice Commission): Report on the Independence of the Judicial System. Part I: The Independence of Judges, Venice 2010, p. 17.

⁴⁷ Ref. M. Haczowska, eds.: *Konstytucja Rzeczypospolitej Polskiej* (The Constitution of the Republic of Poland). Commentary, Warsaw 2014, p. 448.

ted to presenting an opinion of the proposed candidate⁴⁸, but the President is not permitted to “appoint an individual who was not the subject of a motion for appointment, submitted by the National Council of the Judiciary⁴⁹ and “when rejecting the motion of the National Council of the Judiciary, the President of the Republic of Poland cannot appoint anyone not specified in the motion⁵⁰.

A provision introducing a presentation of motions with at least two candidates to the President would violate the rule of legalism, because – as specified in the rulings of the Constitutional Tribunal – “in relation to the rule of legalism based on the presented regulations, there is no doubt that the President may not perform actions composing competences of providing opinions on candidates for judges, which are assigned to the Council. In legal terms, the President does not have the competences to express opinions alternative to those of the National Council of the Judiciary, nor can he invade the Council’s opinion-forming competences. Meanwhile, the National Council of the Judiciary cannot appoint judges. These are different acts reflecting the performance of different competences⁵¹. The provision in question would thus blur the borders between the competences of the Council and the President.

In line with the standpoint⁵² expressed by the National Council of the Judiciary, the system for nominating judges, as discussed in Article 179 of the Constitution, is somewhat restricted; while entrusting the appointment of judges to the President, it simultaneously requires the President to act in compliance with the motion of the National Council of the Judiciary. However, the Council believes that this solution ensures the proper balance between the nominating competences of the head of state and the independence of courts as a separate authority.

Acting as the requesting body, the National Council of the Judiciary performs extensive verifications of the candidates for judges. The Constitution does not specify either the requirements which must be met by the can-

⁴⁸ Ref. J. Ciapała: *Prezydent w systemie ustrojowym Polski* (The President in the Polish Political System), Warsaw 1999, p. 304.

⁴⁹ Ref. L. Garlicki: notes to Article 179 in: L. Garlicki, eds.: *Konstytucja RP* (The Constitution of the Republic of Poland). Commentary, Warsaw 2005, v. IV, p. 4.

⁵⁰ Ref. B. Banaszak: *Konstytucja Rzeczypospolitej Polskiej* (The Constitution of the Republic of Poland). Commentary, Warsaw 2009, p. 797.

⁵¹ Ref. Justification to the ruling in case No. Kpt 1/08.

⁵² Expressed in case No. Kpt 1/08 considered by the Constitutional Tribunal.

didates or the procedural stages which must precede the appropriate motions of the National Council of the Judiciary. The act regarding the system of common courts and the act regarding the National Council of the Judiciary establish significant competences for the Council towards candidates for all judge positions. In light of these regulations, the Council examines, as well as formally and substantively evaluates all submitted candidacies. The final decision on nominating a given candidate in the motion submitted to the President is made by the Council.

Therefore, the opinion of the Council is that the presented solutions contain substantial restrictions as to the nominating competences of the President, clearly stating that an individual not nominated by the National Council of the Judiciary cannot be appointed a judge.

The National Council of the Judiciary claims that, while the doctrine of constitutional law does present different opinions concerning the President's competences to recognise or not recognise the Council's motion for nomination, the matter should fall under constitutional regulations.

The Constitution authorises the National Council of the Judiciary to submit the motions and, therefore, to prepare them objectively. The President is not legally empowered to proceed in the scope of the motions because, in accordance with Article 126 (3) of the Constitution, the President performs his activities "in the scope of and in accordance with the principles laid down in the Constitution and acts of law". Since neither the Constitution nor the law regarding the system of common courts include any regulations concerning the verification of motions of the National Council of the Judiciary by the President, it means that the President is not empowered to perform any actions aimed at verifying such motions.

The National Council of the Judiciary also stresses that "the President cannot establish a special group at the Chancellery of the President for reevaluation of the candidate, examination of the candidate's files, and reconsideration of the opinions and documents used as the foundation for the motion by the National Council of the Judiciary, which would require a specific and separate act of law. According to the National Council of the Judiciary, the act of internal law of the Chancellery of the President cannot be considered sufficient because, as it concerns the appointment of judges, it could discredit the separation of the judiciary and the executive authority"⁵³. In conclusion,

⁵³ Ref. Justification to the ruling in case No. Kpt 1/08.

the Council declared that the examination of the candidate's files at the Chancellery of the President "may stand in violation of the Constitution, because the President does not have competences for such examination. If such actions were based on the Constitution or act of law, it would mean that the legislator permitted repeated examination of the files. This, in turn, would stand in contrast to the rule of separation of the three powers and constitute an act of interference into the organisation of the judiciary whose relations with the other authorities must be based on the rule of separation"⁵⁴.

Leaving the establishment of the nomination criteria to the President entails the risk of applying criteria alternative those employed by the Council. This would, in consequence, discredit the Council's constitutional role as the protector of judiciary independence, separated from the legislative and executive authorities, as well as compromise the role of the Constitution of the Republic Poland and violate the foundations of the democratic state of justice.

6. The Constitution precisely defines the principles determining the position of the National Council of the Judiciary in the system. The problem in question lies in the application of constitutional standards.

The complex relations, or even conflicts, between judges and politicians form part of the legal system. Hamlet's complaint about "the law's delay, the insolence of office"⁵⁵ is actually timeless. In the eyes of the public, as confirmed by a number of studies, the judiciary system of Poland has been the object of criticism for many years⁵⁶, and so has the legislator⁵⁷. However, seekers of justice will not be satisfied with bare words regarding judicial independence and the rule of a democratic state of justice.

There is no way to build trust in the judiciary power while weakening the independence of judges. Citizens see judges as the faces of law. The law is

⁵⁴ *Ibidem*.

⁵⁵ W. Shakespeare: *Hamlet*, act III, scene 1, translated by Barańczak in: W. Shakespeare: *Tragedie i Kroniki (Tragedies and Chronicles)*, Kraków 2013.

⁵⁶ Cf. e.g. M. Bernatt, A. Bodnar: *Wymiar sprawiedliwości w Polsce (The Judiciary System in Poland)*, in: L. Kolarska-Bobińska: *Demokracja w Polsce (Democracy in Poland) 2007–2009*, p. 92.

⁵⁷ Cf. e.g. W. Stańkiewicz: *Stanowienie prawa w pierwszym okresie rządów koalicji PO–PSL (Legislation in the Initial Period of the PO–PSL Government)*, in: L. Kolarska-Bobińska: *Demokracja w Polsce (Democracy in Poland) 2007–2009*, p. 55 et seq.

established by politicians and lobbyists, including those across the ocean, but these are judges who are seen responsible for the state of law.

The negative opinions on the judiciary system are likely to have subjective foundations, stemming from the fact that every legal case inevitably leaves one of the parties in defeat, which is always accompanied by the sense of mistreatment and injustice. In certain instances, success in court is also not enough to eliminate the feeling of mistreatment.

Judges do not establish the laws they execute. Therefore, the negative opinions on the judiciary power should be extended to the legislator who usually carries out the policy of the government, i.e. to the parliamentary majority elected as the law-making body by the same citizens who question the results of the activity which they impose upon the judiciary.

However, we cannot turn a blind eye to the public perception of the judiciary system. When it comes to social cases, ordinary people tend to be right. However, when they employ the way of reasoning promoted by the media, they may as well be wrong. It is easy to gain social support through criticism of the judiciary, but such criticism as such does not necessarily mean that those seeking justice will not be disappointed. In fact, this does not result from the ill will of the critics, but rather from the complex nature of the problems, which often cannot be solved by merely obeying the law and must be handled in court.

Judicial independence is not an objective in itself. It is only important as long as it exists in reality and protects the actual rights and freedoms. The disappointment of all those who believe – sometimes subjectively and sometimes objectively because of their actual experiences – that they have not found justice in courts may cause the independence of judges to be perceived as a barrier separating us from a better world.

The independence of judges depends on themselves to a large extent. This is why it will survive against all the odds, and so will the independence of thought, which is the foundation of freedom.



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

Andrzej Zoll*

My status as a judge emeritus of the Constitutional Tribunal does not allow my involvement on any side of a political dispute conducted in observance of the rules and regulations established by and entered into the Constitution. Being a judge emeritus, however, I feel obliged to take the floor in situations when I see threats to the law, in particular constitutional order, which initiate political discourse in a democratic state of ruled by law.

I believe that the president of the Tribunal, Professor Andrzej Rzepliński, who has been under brutal attacks by representatives of the party in power for the past 10 months, has a similar opinion. The most absurd thing was the launch of criminal proceedings aimed to keep people, whose grounds for appointment as judges of the Constitutional Tribunal were disqualified with the final ruling, from making judiciary decisions. Prof. Rzepliński consistently stands on guard for constitutional order. He tries to prevent the creeping attack on constitutional order. He tries to prevent the unlawful change to Poland's system from a democratic state of justice into an uncontrolled

* Prof. Andrzej Zoll, President of Constitutional Tribunal (1993–1997), Commissioner of Human Rights (2000–2006).

“Sejmocracy” with an uncontrolled and irresponsible one-person political decision-making centre.

We are starting to live in an authoritarian system. The words of certain prominent members of the current authority, especially those of Mr Jarosław Kaczyński, show traces of language typical of totalitarianism. Mr Kaczyński is building a community, but only with those who agree with him in all aspects. Others are not admitted. The next step will be to draw legal conclusions associated with the said exclusion. Mr Jarosław Kaczyński’s words directly refer to the theory of Carl Schmitt. The statements made by the representatives of the group in power and now their decisions depart from the legalism and normativism Schmitt tried so hard to prevent, i.e. referring to abstract and general standards and promoting decisionism, which Schmitt recommended to his leaders. The will of the man in power, who is convinced that he can do no wrong, is starting to become the supreme law in Poland.

Today, the challenge of the protection of the democratic state of law stands before all citizens aware of the now current direct threat. It especially concerns the lawyers and representatives of the judiciary. The same judiciary which is now the focus of attacks and which will continue to be so in the near future. The majority of this judiciary does not recognise the will of the man in power as the supreme law and continues to base the law on the rules and regulations of the effective Constitution of Poland and the standards in the Constitution-compliant statutes.

The defence of the basic values of a state of law, and therefore the defence of basic human and civil rights and freedoms, should not be seen as a political activity. Professor Safjan recently aptly stated that the situation in Poland is not about a political dispute, nor is it about a legal dispute. Such disputes require common premises, common grounds, common rules of the game. This founding premise has been rejected by the people who are currently ruling Poland; they do not recognise any common rules of the game. Right now, Poland is not experiencing a political or legal dispute. It is experiencing a battle in defence of the State’s democratic system, a battle against the introduction of a uniform State authority, a battle against political rulers standing above the law, a battle against a return to the times of the Polish People’s Republic with the Sejm having authority expressed in the then Constitution and the political office headed by the First Secretary holding actual power.

Today’s Congress is validated by standing guard over the democratic system. We are not politicians, we are not fighting for power. We have

the utmost respect for the results of the parliamentary elections. What we are doing is standing guard over the Constitution and its legal order.

There was a reason why the first objective of the Government was and still is to eliminate the verification of compliance between the legislature and the Constitution by an independent authority such as the Constitutional Tribunal. There is no way to balance uniform “Sejmocratic” State authority with a constitutional judicial system. The attacks on the independence of the Constitutional Tribunal started way back in 2007. On 29 June of that year, the Law and Justice party (PiS), which at the time was in power, together with League of Polish Families and Self-defence, submitted a bill on the Act on the Constitutional Tribunal to the Sejm. Many sections of this bill were similar to those of the Act adopted on 22 December 2015, which was rightly recognised by the Constitutional Tribunal on 9 March as standing in violation of the Constitution. Back then, the Sejm was dissolved, which prevented the adoption of the Act, which would paralyse the work of the Constitutional Tribunal.

The arguments raised against the legitimacy of the rulings of the Constitutional Tribunal, which, according to the politicians of the party in power, are supported by the Constitution and the law in force, can be reduced to a single argument, which has been presented many times by Jarosław Kaczyński and others like the Marshal of the Senate. This argument is based on Article 197 of the Constitution: “The organisation of the Constitutional Tribunal, as well as the mode of proceedings before it, shall be specified by statute”. This means that the mode of proceedings is determined by the Sejm and not by the Constitutional Tribunal. This provision allegedly results in the *ipso iure* invalidation of the Tribunal’s rulings dated 9 March 2016 and 11 August 2016. The Tribunal did not base the said rulings on the Act dated 22 December 2015. Proponents of this argument fail to note that Article 195 section 1 of the Constitution states that the judges of the Constitutional Tribunal, in the exercising of their office, shall be independent and subject only to the Constitution. This regulation cannot be interpreted otherwise than as follows: the Tribunal is not bound by the legal standards of a statute assessed by the Tribunal for compliance with the Constitution.

The usurpation of the right to evaluate the legitimacy of the Tribunal’s rulings and to determine their nature by the President, Prime Minister, and Minister of Justice – Prosecutor General, is one of the most important elements in the aforementioned creeping attack on the Constitution and on

the values it expresses in relation to a democratic state ruled by law and established by the European civilisation.

The defence of democratic legal order required resolutions of the supreme court instances and court rulings recognising the effectiveness of the decisions of the Constitutional Tribunal announced to the public, irrespective of their official promulgation. Such a standpoint of courts prevents legal chaos and protects constitutional values.

The current actions of Mr Jarosław Kaczyński and the politicians of the party in power carrying out his orders, which aim to close down the Constitutional Tribunal and restrict judiciary independence, remind me of the judiciary situation in the Polish People's Republic. There are many obvious similarities with the current threat to the Polish judiciary.

Like every other totalitarian system, communism was governed by the doctrine of uniform State authority. The judiciary was not only an organisational subordinate of the authority represented by the Minister of Justice, but also completely subservient to the political authority of the communist party.

The communist doctrine failed to pay any attention to the differences between the independence of the courts and the independence of the judges. Contemporary literature (A. Rzepliński) points out that, until late 1988, the programmes of Polish United Workers **Party** never mentioned the term "judiciary independence". The party's leading judiciary role was justified by the fact that the legislature is an expression of the will of the proletariat in power. The party and its authorities exercise the said power in the name of the proletariat and must have the deciding voice when it comes to application of statutes.

In the Polish People's Republic, the independence of the judges was statutorily declared and understood as independent ruling on specific matters and the prohibition of interfering with specific court decisions. This was a fictitious understanding because of both the above types of direct interference by the political authorities in rulings on specific cases and because the judges were bound by extra-statutory directives of a political nature.

A system based on a uniform State authority sees judges treated as officers of the State obliged to serve the said State instead of the law and the rights of the people, who are parties to court decisions. In a uniform authority system, the protection of State interests, specifically the protection of the interests of the group in power, is more important than protection

of the rights of the individual. This hierarchy was clearly presented in the Act regulating the system of common courts from 1985. According to the said Act, the courts were obliged to stand guard over, in order, the political system, the interests of the State-owned economy, and finally the “personal and material rights and interests of the citizens guaranteed by the people’s law and order” (Article 3). Please note – not all human and civil rights and freedoms, just those guaranteed (permitted) by the people’s law and order.

I am recalling those unfortunate times to stimulate a reaction to the symptoms of attempts to go in a similar direction today: in the direction of turning courts and judges into tools of authority used for political purposes.

A condition (but not a determinant) of the actual independence of the judges is institutional judiciary independence, which is the simple result of the division of power, which in turn is the foundation of a democratic state ruled by law.

The independence of the courts and the judges cannot be perceived in the same manner as corporate law, which has recently often been the case. The independence of the courts and the judges represents values guaranteeing that the Government will obey human and civil rights and freedoms. You could say that the fundamental right of every human being is the right to an independent court and an independent judge in the court serving to handle his case. This understanding of the independence of the courts and the judges, this understanding of the human right to a judiciary, is included in the Constitution of Poland. Our Congress should determine how to protect these values.



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

Andrzej Rzepliński*

Representatives of the entire Polish justice system would not have gathered in one place had it not been for truly extraordinary circumstances. These have been caused by the crisis and the wrong path currently being followed by Poland. Our country appears to have detached itself from both Western Europe and North America, and from the legal culture typical of western countries, a member of which were two or three years ago. We have been becoming the easternmost country of Western Europe, just like Portugal is situated on its western edge.

At this point it might seem useful to recall a decision made by Judge Stanisław Leszczyński, a member of the adjudicating panel in the Brest Trials. This case was brought by the authorities of those times against 11 outstanding Polish politicians and MPs who had been imprisoned and tortured for nearly two years. Ten of them were eventually convicted, and only one was found not guilty. Stanisław Leszczyński was the only judge to demand that all the defendants be acquitted. He submitted an official *votum separatum* against the judgment, despite the authorities' expecting him to support the conviction.

* Prof. Andrzej Rzepliński, President of the Constitutional Tribunal.

The public prosecutor in charge of that case was then appointed Minister of Justice in recognition of his services. Following the outset of World War Two and the collapse of the Polish State, the President-In-Exile revoked that verdict. The Polish government in Paris, chaired by General Sikorski, upheld the cassation, and so did the Polish Parliament-In-Exile, i.e. the National Council in London. However, the cassation proceedings before the Supreme Court have never been officially conducted. At the turn of the 21st century, it seemed that the State Prosecutor would finally see through the cassation appeal, and the honour of those convicted was about to be restored. This would provide an excellent opportunity to underline the actions of Judge Leszczyński, who had enough courage to say 'no' eleven times in an extremely brutal campaign against democratic politicians and institutions.

In the post-War period there have also been numerous judges whose examples should be followed. Their portraits should be displayed in court-houses to remind both judges and court staff, and all people referring their personal or property matters, and cases concerning their freedom and rights, to courts which judges in the Republic of Poland serve as lighthouses. Prof. Adam Strzembosz is definitely one of such judges. Following his graduation and training as a judge, he began his professional career at the Juvenile Department of the Warsaw-Praga Court. His remarkable professional efforts and development served the purpose of the judiciary and the justice system during the difficult times he came to live in. He was a true role model for our community. Dear Professor, I would like to thank you for your noble life as a judge.

In recent years the National Council of the Judiciary has passed a number of resolutions on awarding distinctions to retiring judges, who are a credit to the justice system. We should bear in mind that these people are important, and have remained faithful, to their local communities. Such distinctions testify to their exceptional judicial work.

Let me also refer to the case I was dealing with jointly with Judge Piekarska. In 2006 the policy of disciplining judges was introduced, and its implementation involved young and extremely ambitious prosecutors hoping for quick promotion to Warsaw-based institutions. Two regional-court judges soon fell victim to their actions. As one of these stories did not end with disclosing the judge's name in a meritorious context, I would like to refer to that case. Judge Statkiewicz from the Regional Court in Łomża was accused of bribery by a man who had been sentenced to three years in prison for fraud, i.e.

a man of no credibility. The Higher Disciplinary Court in Warsaw totally dismissed these false and devastating accusations. Jointly with Judge Piekarska, I successfully defended Ms Statkiewicz, although a TV camera operator had already been waiting at the courthouse doorstep to capture the Judge leaving in handcuffs. Three years later, while searching through the website of the President of the Republic of Poland, for the purposes of an entirely different case, I came across an announcement that in February 2010 President Lech Kaczyński had promoted Judge Statkiewicz, as part of a lateral move, to the position of appellate-court judge to be assigned to a regional court. This promotion proves that Judge Statkiewicz's actions were approved of, not only by the appellate court judges and the National Council of the Judiciary, but also by the President himself. The promotion was thus granted to a person well worthy of the justice system, who had been deeply humiliated while performing her duties. Although we can often hear about judicial "*privileges*", the Act on the Common Courts System does not, in fact, speak of any privileges, but the word "*service*" is repeated over 200 times. It refers to serving people who put their fate in judges' hands.



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

Adam Bodnar*

I'm very happy to see that Professor Adam Strzembosz has decided to accept the honorary patronage and support of today's session of the Extraordinary Congress of Polish Judges.

It is not necessary to justify that judicial independence is a particularly important constitutional standard and value from the perspective of the empowerment and constitutional role of the Commissioner for Human Rights. It determines how citizens can take advantage of their right to proceedings before court. There is no way for a person to take full advantage of the right to have his case heard – which is guaranteed by Article 45 of the Constitution or Article 6 of the Convention – in situations where the courts and judges are not independent. In my opinion, as the Commissioner for Human Rights, I should be involved in such matters, just like I should be involved in defending the independence of the Constitutional Tribunal, which I have been doing for quite some time.

We are facing a very important question – what will happen to the judges not appointed by the President? I know that some of them have deci-

* Adam Bodnar, Ph.D., Commissioner for Human Rights

ded to appeal to the Voivodeship Administrative Court. As the Commissioner for Human Rights, I will be contributing to these cases. But our courts have already handled a similar case, as has the Constitutional Tribunal¹. Unfortunately, there was no commitment to fully guarantee the rights and freedom of the judges, their right to public service, their right to the protection of their reputations, and the obligation to explain the decision, which is a rule of a democratic state of justice. There is some comfort in the fact that three judges, Tuleya, Wróbel, and Biernat, presented different opinions, which pointed out the essence of the matter, which is that it is important for the motion of the National Council of the Judiciary to receive only approval from the President and end in the appointment of judges or higher judiciary authorities. I hope that the re-examination of cases concerning other people will lead to the establishment of a constitutional standard.

We should not forget that the Government's objectives include the amendment of the National Council of the Judiciary Act. The bill of the Act assumes reducing the terms of the National Council of the Judiciary members, which should not be accepted in a democratic State. It also assumes a mechanism for choosing one judge from two candidates, which can steer the nomination process into a much more political direction. Bear in mind that this is not about this case alone but rather about the operation of the whole system.

I wish to note that the public debate has included such questions as what could happen if the Constitutional Tribunal did not fully stand guard over constitutional law. And, at this point, I have a feeling that magic will start to appear. Expectations like *"now judges will apply the Constitution directly"*, or *"judges will have to carry more weight as carriers of the values expressed in the Constitution"*, and ultimately *"judges will have to ask the Court of Justice of the European Union more prejudicial questions"*. And this should obviously be the case. But I want to make it very clear that declarations by scientific authorities are not the same as the actual everyday work of judges, who often have lots of cases, no administrative support, no assistance, and sometimes no time to see and analyse the problem from the perspective of the Constitution or European law. I think that this is a good time for all of us to think about how we can help judges. About the proper roles of the courts of higher instances, the Commissioner of Human Rights, NGOs, judicial organisations, to strengthen the competences and abilities of judges in their

¹ Case No. Kpt 1/08.

everyday work when it comes to issues concerning the direct application of the Constitution and the European law.

This might be the Congress of Polish Judges, but we must bear in mind that the threats to law and order are equally real for representatives of other legal professions: attorneys, legal counsels, notaries public, prosecutors. If we think about the future of law and order in Poland only in the context of judicial status and competences, and forget about our fellow prosecutors or attorneys, whose defensive rights are limited or insufficiently respected, we will not be able to reach a state of law and order. The judiciary system is a vessel combining various legal institutions and professions and we must also preserve professional solidarity.



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

Ewa Łętowska*

When administering justice, it is equally important to clearly show that it is being administered fairly. In other words, it takes communication. The dissonance between the justice actually administered and the failure to make sure that the public (in court rooms and in social discussions) has no doubt that the courts apply and interpret the law fairly and diligently lies in the sources of the current crisis of the judiciary. The crisis that is strongly exploited for political purposes with the aim of making the court system liable for the deficiencies of other powers. Legislative mistakes towards people are usually revealed when the acts are applied – by the courts. Therefore, as the courts neglect the aforementioned communication aspect of the judiciary, they underestimate the opportunity to gain credibility in direct contacts with the recipients of their decisions. Furthermore, they are too lenient in allowing themselves to accept accountability for the sins of other powers. Legitimation through transparency, explanation, dialogue.

* Prof. Ewa Łętowska, Commissioner for Human Rights (1987–1992), Judge of the Constitutional Tribunal (2002–2011).

Judges are present inside this room, outside the same room there are demonstrators, who believe that the courts are disrespecting them, looking down on them, “know better”, refusing to pay attention to them. I talked to them. As it turns out, some of them were disciplined for improper conduct in the courtroom and are concerned with the dictatorial nature of both the weight of the sentence and the automatic replacement with imprisonment. In turn, this room criticised the situation in which without any explanation the President refused to accept nominations for judges. In both cases, the existing law allows arbitrary decisions without clarification. In both cases, the victims are complaining of their arbitrary nature, of being treated like objects and deprived of dignity. In both cases, the criticism and protests have common ground: a communication crisis, because those applying the law see no reason to justify their decision.

I have written the suggestion I have been repeating for years on the board for “*ideas for improvement*” – “*the court should speak like the people*”. This is another reference to the communication crisis – taking two forms. First of all, the statements made by courts must be clear to non-lawyers, the recipients of the decisions, and not in the legalese language addressed to professionals. Second, the point of the court statements should be accepted by the public. The latter requires some clarification.

Courts in democratic States are democratic institutions and need social approval. In democratic States, no power is allowed to base its legitimation only on legal origin and legally held power. Courts have great power because, through the interpretation of regulations and its rulings, they determine the actual content and standards of the law. The actions of the courts are received by the public as the real content of the law. Therefore, if currently the courts have little social support, it means that it has neglected to get this support for courts representing the judicial power and its reasons. Not for reasons of the judicial corporation, but those of an independent judicial power acting for the common benefit. The third power is somewhat autonomous of the legislator. It can operate within the confines of the law established by Parliament, but the said Parliament does not regulate everything in a uniform and exhaustive manner and gives courts a margin for interpretation. This means that the courts may vary their rulings depending on the situation – but must explain them and demonstrate that their actions make sense and fulfil the needs of those standing before the court – the body of power and authority which acts with understanding of their interests and needs, even if it does not always fulfil their expectations.

Ewa Łętowska

If we fail to understand this need for communication, if we do not make an attempt to sufficiently clarify situational differences in judgments, we will never overcome the legitimation crisis and will not be able to protect courts from the usurping attacks of the executive power and politicians. And, to a certain extent, we are the ones responsible for the communication and legitimation crisis because we stopped pursuing public understanding of the reasoning behind being done.



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

Maria Ślązak*

The self-government of legal counsels was pleased to hear that the organisers of the Extraordinary Congress of Polish Judges invited to this event not only the legal community but also members of the highest State authorities, providing a platform for debate on the matters around which the key topics of the Congress were to centre. This demonstrates a responsible approach by the judicial community in ensuring in Poland absolute, continued, respect for the fundamental principles of a democratic State governed by the law, whose political system, as enshrined in the Constitution, is based on the separation and balance of legislative, executive and judicial power. Pursuant to the Convention for the Protection of Human Rights, it is judicial power which guarantees every citizen the right to have his/her case heard before an independent judge and to be represented by an independent, trained attorney, with all the information provided for the purpose of legal proceedings kept fully confidential. The self-government of legal counsels is an active participant in debates on legislative projects, as evidenced, for example, by the expert assessments it has provided on changes to the Act on the Constitutional Tribunal, and on the

* Maria Ślązak, Vice-President of the National Council of Legal Counsels.

amendments to the Act on the National Council of the Judiciary, and the Acts on the Police and special services – in these expert assessments we pointed out that certain solutions failed to comply with the Constitution.

While we cannot deny the parliamentary majority the right to go ahead with their programme and introduce changes to the law in force, we should keep on stressing that any such changes must be done in observance of the Polish Constitution as a collection of fundamental rights based on respect for freedom and justice, cooperation between the powers, and social dialogue. Judges, and also us, lawyers who serve in professions of public trust, recognise the importance of the rule of law, where the law holds the supreme position and determines the scope of responsibilities for the respective powers, while guaranteeing rights and freedoms to the citizens. The oath, sworn by each one of us, and by judges taken before the President of the Republic of Poland, reflects these constitutional values and obliges us to defend them. This might sound pompous, but the times are calling for loftier tones. When taking our oath, we swore to remain faithful to the Constitution – no one and nothing can exempt us from that vow. Bearing this in mind, we are obliged to protect the democratic State governed by law, and today's Congress is a manifestation of this obligation.



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

Danuta Przywara*

Danuta Przywara presented a joint declaration from 12 civil NGOs: the Civil Development Forum (FOR), the Stefan Batory Foundation, the Panoptikon Foundation, the Helsinki Foundation for Human Rights, the Allerhand Institute, the Inpris Institute for Law and Society, the Institute of Public Affairs, the Polish Society of Anti-Discrimination Law, the Watchdog Poland Citizens Network, the Amnesty International Association, the Association for Legal Intervention, and the Open Republic Association Against Anti-Semitism and Xenophobia.

“As representatives of civil-society organisations witnessing the current situation in the judiciary, but first and foremost as citizens, we understand how important it is to keep judges truly independent. We promise to defend them. What we expect from the legislative and executive powers is respect for the judiciary,

* Danuta Przywara, President of the Helsinki Foundation for Human Rights.

Danuta Przywara

and refraining from any actions which could compromise the independence of the courts and from exerting any pressure on judges. At the same time, we expect judges to stand guard over our constitutional rights and freedoms, and to act with the moral courage inherent in the truly independent administration of justice. We are aware of the fact that certain aspects of the judiciary might require reforms. It is important, however, that these are not imposed *ad hoc*, but arise from the law and preparatory work, including extensive consultations and public debates, also together with the judicial community. Good communication between the courts, judges and citizens is also of crucial importance. We strongly encourage courts and judges to foster such communication and take the initiative on keeping society updated about what the courts are doing.”

EXTRAORDINARY CONGRESS OF POLISH JUDGES

Report from the Discussion



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

Judge Igor Tuleya of the Regional Court in Warsaw directed his speech to the “former judges who are currently serving at the Ministry of Justice.” He reminded everyone that the independence of the judiciary depends not only on the opinions of the judges making the judgments, but also on the judges working in the administration. He noted that “while collecting the remuneration of judges plus the ministerial fringe benefits, they have forgotten about certain standards.” In accordance with Article 82 § 2 of the Law on the common courts organisation, a judge should stand guard over judicial authority both on and off duty and avoid anything which would potentially discredit judges or weaken confidence in their impartiality. § 4 and § 14 section 1 of the Collection of Principles for Professional Ethics of Judges oblige judges to care for the authority of their office, the interest of the court and the justice system, and the statutory position of the judiciary. These standards also pertain to judges-officials, i.e. judges appointed to the Ministry. “This is not about the corporate interests of ‘united and corrupt cronies’, but rather about the foundations of the system established in the Constitution of Poland,” he stressed. “Our colleagues delegated to the Ministry of Justice offer no protest when the Minister disparages court judgments, discredits judgements of the Constitutional Tribunal, and attacks the president of the Tribunal, the Commissioner for Human Rights, and the Supreme Court. I understand their silence as approval.” He noted that the judges employed by the Ministry are simply officials reporting to the executive power and carrying out specific

political orders, and that there is no way to reconcile judicial duty with a seat in the Ministry. “I am also under the impression that our colleagues at the Ministry tend to forget that you are a judge for life and an official only for some time.”

Judge Grażyna Szyburska-Walczak of the Court of Appeal in Wrocław reminded everyone that there was mention as far back as 1998, during the first Congress of Judges, that no work on the reform of the courts should exclude judges because it is the judges who will determine its success. Judges want to contribute to the creation of a state ruled by law and the judiciary work required in preparing judgments is the foundation of justice and serves the interests of the public. Judge Szyburska-Walczak stressed that nothing had changed from that time. Judges still want to contribute to the creation of the organisational judiciary framework. “We will not fall for to the image created and put out by the media, which claims that judges take various sides in interest groups,” she said, and emphasised the need to build social capital, understood as a source of mutual trust and cooperation, which is a necessary component in the Montesquian separation of powers. As a representative of, as she called them, ‘palace judges’, i.e. functional judges, appellate judges, she pointed out the need for understanding and cooperation, because when ‘palace judges’ perform their tasks in the right way, they have an important role, and are responsible for creating new paths in the difficult task of interpreting regulations. And this comes in times when the regulations are established in a rush, without due care, and then amended, usually for the worse. They also play an important educational role in explaining judgments, but also by teaching and assisting their colleagues to keep courts from becoming judgment factories. In conclusion, she stressed that as long as ‘palace judges’ understood the above, they must ensure credible decisions and opinions in the nomination process and guarantee the proper operations of disciplinary courts.

Judge Bartłomiej Starosta of the District Court in Sulęcín stressed that judicial independence was a value that all judges must protect in all situations. The biggest wrong for the justice system is interference with the judiciary by politicians of successive parties, who want to have as much influence as possible on court judgments after they put their people in executive power. “Unfortunately, the Constitutional Tribunal has accepted the administrative

supervision of the Minister of Justice over the courts, even though, following analyses of the appropriate regulations of the law on common courts organisation, we warned that it should be assumed that the position will be held by the most unpredictable politician. I have no doubt that administrative supervision should be the responsibility of the First President of the Supreme Court,” he declared.

Judge Olimpia Barańska of the District Court in Gorzów Wielkopolski noted that there is a need for discussions on changes to the judiciary, support for law and order, and opposition to the flagrant breaking of the law by executive authorities, and that we should not count on things improving, on waiting things out, because it would not get any better. “This is not a political issue, but rather an issue of protecting basic universal values. We must build social trust, which was never too high, and is now being damaged by the propaganda of politicians who are accumulating political capital, and also by the hermetical nature of the community.” She appealed for effective cooperation with local media, the organisation of open days, education for young people, the invitation to courtrooms of various organisations, like the Helsinki Foundation for Human Rights and the Court Watch Poland Foundation, and making judgments and reasonings clear and understandable. She urged the media to refrain from focusing on single scandals and judicial mistakes, and to start presenting a more objective image of the justice system. She addressed the public with a request for “trust and understanding. We make mistakes, but we try to make them right.” She noted that the changes would not be limited to judges and that they would have an impact on everyone sooner or later. “When the Minister will be invigilating, when they start to confiscate property without court trials, when Facebook users will be cut off from the internet, who will you call on? Because of this, we have the obligation to standing guard over the law to protect the citizens, not ourselves, as they are trying to make the public believe.”

Supreme Court Judge Emeritus Józef Musioł, President of the Association of Supreme Court Judges Emeritus, noted that he came from a generation which survived the tragic times of war and occupation. He quoted Goebbels, who said to judges on 24 July 1934: “A strong State must be able to remove incompetent officials from their posts. This also includes judges. The concept of judicial immunity was born in the foreign world of

intellectuals, a world hostile towards the German nation.” He also added a few personal reflections: “The judiciary is the moral nerve of the State. Whoever damages this nerve damages the State.” “A politician preparing laws for the opposition rarely considers the fact that the said law might apply to him as well”. “When he held power, he forced judges into submission. When he was relieved of power, he expected and pretty much demanded independent courts and judges.”

Judge Tomasz Marczyński of the District Court in Bełchatów quoted the statement made by a deputy of a coalition in power a few years ago when addressing judges. “We must control you,” and noted “this concept seems to drive most political groups, as they have been continuously reforming the justice system since 1989, when the new law on the common courts organisation was adopted in order to adapt the judicial system to the standards of a democratic State. It was a terrific law and it was based on the rule of judicial independence, which is an important guarantee of the independence of judges. Since that time, the law has been amended over 100 times.” He stated that the various “miraculous” reforms were supposed to solve the problems in the judiciary. “The reforms contradicted one another, and the later ones repealed the earlier ones, which caused chaos and disorder in the courts.” The common attribute of most reforms is the restriction of judicial independence and the elimination of the authority of the judicial governing body. Judge Marczyński pointed out that no one knows what an effective judiciary looks like better than judges, and that no one wants speedy trials more. After twenty-seven years of continuous reforms, we can say that politicians have no idea how to reform the judiciary. It turns out that belief in the superiority of personal ideas is not enough to develop effectively operating courts. “As the politicians drive to increase their control of the courts, we are unfortunately starting to reach a stage where the separation of courts from politics, judicial independence, and the rule of the separation of the three powers, are all in danger.” The Iustitia Association has been requesting a credible debate concerning the judiciary for years.

Judge Jarosław Gwizdak, President of the District Court for Katowice-Zachód, thanked the 1000 judges in attendance for their courage, and asked where the remaining 9 thousand were. He declared that they either had too much work to “take one day off to come, talk, meet, listen, and deba-

te with no detriment to their health and the needs of their families”, or they “are afraid of something. Perhaps the rejected appointments are the first stage of something bigger, perhaps that referred to as the great reform is intended to cover up the fact that judges can be reappointed and that not everyone will be reappointed.” He noted that judges had problems too, and that they also have credits in Swiss francs. “Perhaps they are starting to value the issues of employment and security, but also a certain level of conformity and opportunism. I really hope that this is not the case. I do not think that this is in the best interests of the judges, the courts, or the public.” He stressed that judges were also to blame for the negative opinion of the judiciary, because they had gone overboard with metalanguage, and poor communication, and never bothered to check whether the people understood them.

Judge Małgorzata Stanek of the Court of Appeal in Łódź presented the dramatic situation of a judge in Turkey, who e-mailed: “I have been dismissed, I am awaiting arrest, I do not know if we will ever see each other again.” Because of this, the Iustitia Association of Polish Judges decided to declare support for its Turkish colleagues and has taken appropriate action together with the European Judges for Democracy and Liberty (MEDEL), the International Association of Judges (IAJ-UIM), and the European Association of Judges (EAJ) (of which it is a member). She read out the bill of an Act on this matter.

Judge Joanna Bitner of the Regional Court in Warsaw stated that the position of the MEDEL Association presented on 12 March 2016 recognised Turkey, Poland, and Romania as countries, where judicial independence was in the biggest danger. The changes depriving the judiciary of independence, subjecting it to the control of the executive power, and the weakening of its constitutional position, were deemed negative. Judge Bitner said that the judges who rule in the name of the Polish State are the ones upholding the judiciary, and not the presidents. “The presidents are the representatives of the supervising authority in courts. Due to the numerous legislative amendments, they represent the Government.” For many years, the judiciary system had been developed to gain the attention of the Ministry of Justice. The judges associated their tremendous unfulfilled hopes with the judgments of the Constitutional Tribunal, which was able to stop it. She also said that “we should think about what to do to prevent embarrassing situations where the

President refuses to nominate judges. The Constitution assumes a division of powers, but not their complete separation. The State's authorities must cooperate. Both the National Council of the Judiciary and the President must work together to appoint judges. In situations when the authorities are arguing and failing to come to terms when it comes to appointments for the good of the State, the citizen always loses." She also appealed to the National Council of the Judiciary to return to the matter of supervisory abuse, specifically to the report prepared after the death of Judge Langner from Poznań.

Judge Emeritus of the Court of Appeal **Michał Kopeć** recalled the statement that judges were the mouthpieces of the law and added that judges had not only mouths but teeth as well, thus the ability to defend their rights and freedoms by, e.g., asking prejudicial questions and presenting legal issues. He also recalled the "Good Judge's Decalogue" written in 1993 by Professor Ewa Łętowska, which included the 10 rules of a good judge. He stressed that judges had tremendous potential when it came to influence law enforcement, interpretation, and the protection of fundamental rights and freedoms. Besides European standards, there are also the judicial standards and rules of judiciary organisations established by the United Nations.

Judge Waldemar Żurek of the Regional Court in Kraków, a member of the National Council of the Judiciary, stressed that there was a need for a uniform voice for the community in that difficult time for the judiciary. In his opinion, the Congress should call the Prime Minister to publish all the judgments of the Constitutional Tribunal and the President to swear in the judges properly nominated to the Tribunal and common courts. "This is necessary to preserve the separation of the three powers. If the Tribunal and its judgments are called into question, the same will soon apply to the common courts. We must open up to the public and the National Council of the Judiciary is doing everything in its power to make this happen." He appealed to the judges to start speaking clearly and boldly because the Ministry wants to shut the mouths of press officers by giving them more cases. "It is up to us to prepare the bill on how to even out judicial work and how to open up promotions to hard-working judges of regional courts. A commission for the National Council of the Judiciary and all associations was formed, and it is now preparing the bill to the Act on the common courts organisation without the administrative supervision of the Minister. In conclusion, he asked

“experienced judges, and court presidents, to support young judges who work hard and know what the executive and legislative authorities are planning. We must support each other.”

Judge Maciej Czajka of the Regional Court in Kraków pointed out that judges knew how hard it was to make judgments, “because it requires not only credible legal knowledge but also life experience and a sense of justice. We are dispensing justice, not just enforcing the law.” They should also build up social capital and open the regulatory process to the public. He also referred to the institution of lay judges and noted that their participation was the best way to build social capital and to communicate with the people. He said “We should not make reports from the courtrooms limited to journalists. We should try to have reports presented by the people who take on the burden of adjudicating, because this would eliminate the ‘republic of cronies’, and see judgments made by store clerks and street-car drivers, who will take responsibility for the judgments, and all accusations of corruption will concern them as well. We can gain social support only when we invite the public into the ruling process.”

Judge Aneta Łazarska of the Regional Court in Warsaw stated that “the Congress is a historical breakthrough and a tremendous opportunity to show that we are united.” The past 100 years have been a time of adversity for judges and it is possible that we are awaiting similar tests in the future. What is now different is the fact that there is the National Council of the Judiciary, and that the Supreme Court, the Constitutional Tribunal, is composed of independent judges representing the highest morals and professionalism. She appealed to the said institutions for reasonable action and skilful solutions to the constitutional problems to eliminate situations in which the President refuses to appoint judges. She appealed to the National Council of the Judiciary to take a stance on the competence disputes or present its proposed legislative amendments. She also stressed that “it is a grave mistake to hand our problems over abroad to Strasbourg or other international authorities.”

Judge Bartłomiej Szkudlarek of the District Court in Piotrków Trybunalski noted “if the revolution in the judiciary is supposed to benefit the politics of the current group in power, that group will carry it out regardless of everything. Why will it benefit? Because public opinion concerning

our work is dramatic. Judges are also responsible for this situation, as they are the faces of the justice system. Besides, the world of today is a world of media, information, and image. Not substance, but form,” the speaker stressed. “We judges are used to not caring about a good image because judgments must be just. We don’t care who says what about it. If we don’t take care of this image, the media will do it for us and the media profits from sensations. We need actions like the one at the Police which hired a PR agency, and now has an excellent image. If we can improve the image of the judiciary, it will not be so easy to revolutionise the courts.”

Judge Tomasz Błaszkiwicz of the District Court in Sulęcín noted that the Congress was a special event because it had gathered judges of all instances and many courts. Unfortunately, the judges of courts of appeal do not know the specifics of the work of judges in regional courts, while district-court judges do not know what the work of appellate judges looks like and what problems they encounter. For this reason, he appealed to all appellate and regional judges, as well as the judges of the Supreme Court to “see what our work is like, the challenges we face, what we really need. We need your experience and knowledge, which would help out a lot with our work. I am certain that you could also use our knowledge and experience.” He invited everyone to the District Court in Sulęcín to share their experience.

Judge Bartłomiej Przymusiński of the District Court for Poznań Stare Miasto, had the following to say: “The destruction of the courts has been progressing for years. The higher the court instance, the harder it is for it to see what is happening in the courts of lower instances. We must talk because there are a lot of things in need of change. I read judgments in disciplinary cases, which include statements that we should be working day and night if the need arises because the working time of judges is unlimited. But can it really be unlimited 365 days a year? We want an innovative judiciary, but the proposed formula includes a poison, which lets politicians have even more influence over the courts. We have to oppose the situation, but we also have to take on the burden of preparing bills of solutions, which will change the situation of the justice system.”

Judge Monika Frąckowiak of the District Court for Poznań – Nowe Miasto and Wilda in Poznań expressed concern that there was

a potential analogy between the events in Turkey and the events in Poland. She appealed to the judges to use simple language and run educational campaigns open to as many people as possible. She stressed the importance of solidarity among regional, district, and appellate judges. “At certain times, we sensed a complete lack of understanding of the problems experienced by district judges on a daily basis. I hope that this situation will now change.” She noted the need for considering the independence of judges and appealed for transparency in promotions. She also expressed objection towards examples of “feudalism” in the courts.

Judge Hanna Kaflak-Januszko of the District Court in Słupsk pointed out that it was hard to use the term “Judgment in the name of the Republic of Poland” when the legal system had been shaken up by amendments and proliferating regulations. She recalled the appeal for ethical conduct by the judges delegated to the Ministry of Justice and said “it should be a postulate to all judges. Are we sure that they are the ones contributing to depriving judges of their independence? Appeals formed this way violate my judicial sense of justice. Our specific profession does not take advantage of any regulations in terms of healthcare like those entitled to other services,” she commented. “Back in 1998, the Helsinki Foundation for Human Rights established that the quality of the judiciary was determined by the conditions of work. The social aspect also deserves attention.”

Judge Tomasz Klimko of the District Court for Wrocław-Fabryczna noted that “if we want to criticise the President for refusing to appoint judges, we must first subject the judgments of the Constitutional Tribunal, the Supreme Court, and the Supreme Administrative Court to critical analysis.” He stressed that one of the reasons for the lack of communication between judges and the public was the overload of work, because district-court judges prepare on average five thousand pages of explanations – legal texts – and the day is only 24 hours long. One way to solve this problem is to bring back the institution of the Justice of the Peace, because not all cases require civil or criminal processes, expert opinions, or judgements made by four professional judges in two instances. “Perhaps a non-professional Justice of the Peace would be enough,” he concluded.

EXTRAORDINARY CONGRESS OF POLISH JUDGES

Resolutions of the Congress



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

Resolution No. 1 of the Extraordinary Congress of the Polish Judges

Judges participating in the Extraordinary Congress of the Polish Judges draw the attention of the public opinion to the role of judicial power as a guarantor of the right to be heard before a court as enshrined by the Constitution of the Republic of Poland and of the respect towards civic rights and freedoms, which is significant for each citizen.

The judicial power is equal in power to the legislative and executive powers. Mutual interaction (balance) of the powers constitutes the basis of the political system of the Republic of Poland (Article 10 of the Constitution of the Republic of Poland).

For many years, we have been witnessing that the legislative and executive powers have been taking steps aimed at subordinating the judicial power. Recently, this process has been significantly intensified.

Such steps include gradual limitation of the rights of judiciary self-government in courts of law, strengthening of the executive power's supervision over courts of law and subordinating the interpretation of basic systemic provisions on the judiciary and tribunals to current political interests.

In order to fight against the aforementioned phenomena with a view to protect and strengthen the separation of powers rule, we request that:

Resolutions of the Congress

- administrative supervision over common courts of law and military courts be entrusted to the First President of the Supreme Court,
- possibility to delegate judges to work in the Ministry of Justice be excluded,
- a national body of judiciary self-government representing judges, entitled to express opinion on behalf of the entire judiciary environment, be established.

In order to guarantee the right of each citizen to be heard before an independent court where an impartial judge adjudicates, we postulate that:

- the rule be established that courts of law may be established and liquidated only by means of a statutory act,
- the influence of political factor on the selection and appointment of judges, including also the judges of the Constitutional Tribunal, be limited,
- the rights of judiciary self-government be extended.

In order to guarantee the citizen's right to fair and efficient court proceedings, it is necessary to:

- limit the procedural role of courts and the scope of activities reserved for judges and to simplify procedures,
- to define the scope of professional duties of a judge in such a manner that they could be performed within the time compliant with the provisions of the Labour Code,
- to respect the rule of protecting rights acquired by judges in the event of changes in the structure of the judiciary and its functioning.

We urge the public opinion and representatives of the media to support efforts of the judiciary environment aimed at ensuring the balance of the legislative, executive and judicial powers to ensure the citizens of the Republic of Poland the constitutional right to an independent court.

We also urge all general assemblies of judges to adopt this resolution.

We also call on the National Council of the Judiciary of Poland to convene a meeting of the representatives of general assemblies of judges of respective circuits and to summon the convention of the Congress of Polish Lawyers.

We call on the representatives of the executive power and the legislative power to engage in a real dialogue with the judiciary environment.



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

Resolution No. 2 of the Extraordinary Congress of the Polish Judges

The Extraordinary Congress of the Polish Judges strongly states that never in the hitherto history of independent Poland, judges of various courts and tribunals were the subject of so drastic actions aimed at downgrading their authority.

Therefore, we call to respect the judgments of the Constitutional Tribunal and to publish them. We oppose the arbitrary refusal by the President of the Republic of Poland to appoint the candidates proposed by the National Council of the Judiciary of Poland. Such actions on the part of the President are a step towards the politicisation of the judge function and towards the restriction of judiciary independence. The procedure of appointing judges ceases to be transparent and becomes deprived of any control whatsoever. We also oppose the decision of the President of the Republic of Poland who refused to take oaths from lawfully selected judges of the Constitutional Tribunal. We disapprove of „corrective” statutory acts relating to the Constitutional Tribunal.

We note with concern the proposals to amend the Act on the National Council of the Judiciary of Poland, which is a constitutional body acting as a guard of the independence of courts and the independence of judges.

Resolutions of the Congress

We are aware that the body needs reforms, and in particular it is necessary to change the rules of selecting its members into fully democratic rules. The current proposals to amend the Act, however, lead to the weakening of the position of the Council and to the weakening of the judicial power.

Each and every public authority must act within the Constitution. While fully accepting choices made by the citizens in the act of elections, we state that any change of the legal system may happen only by means of amending the Constitution. As long as the Constitution accepted by citizens in the referendum is valid, we are all obliged to respect it, and so are the legislative and executive powers.



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

Resolution No. 3 of the Extraordinary Congress of the Polish Judges

Judges of the Republic of Poland participating in the Extraordinary Congress of Judges express their solidarity with Turkish judges unlawfully dismissed from service in connection with recent developments in Turkey.

We consider the current situation of our Turkish colleagues to be dramatic: judges have been dismissed from service, detained or imprisoned, their property has been seized and a number of restrictions have been introduced as far as the freedom of movement and the right to leave the place of residence are concerned.

Such steps taken by the authorities of the governing party constitute an attack against the representatives of judicial power. These steps were preceded by the introduction of legal regulations that significantly reduced the independence of courts and the independence of judges. Criticism of the direction of legislative changes expressed by Turkish judges in the fairly understood interest of protecting the foundations of the judiciary made the judges the subjects of repressions from the authority.

The Polish judiciary environment declares its support and help to Turkish judges expelled from service. At the same time, it acknowledges that the use of democratic freedoms by the representatives of judicial power, including

Resolutions of the Congress

freedom of speech and the right to criticise legal solutions that undermine the judiciary, is an obligation of the representatives of the third power. It is also an expression of responsibility of this environment for the fate of the state and its citizens.

EXTRAORDINARY CONGRESS OF POLISH JUDGES

Texts Submitted



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

Bohdan Zdziennicki*

“Statutory violation and the avoidance of constitutional regulations”**

1. The parliamentary majority currently in power has already dominated the structures of the executive and legislative powers, but the judiciary is still out of its range, which makes it difficult to carry out its planned transformation of the State’s system and staff, which requires a qualified parliamentary majority allowing radical change to the Constitution. Consequently, the assumed strategy sees the use of the appropriate legislation (successively adopted thanks to the majority in the Sejm, Senate, and the President, who serves the said majority) to avoid the Constitution’s regulations. In a democratic state ruled by law, which Poland is, in the light of Article 2, the Constitutional Tribunal and other segments of the independent judiciary can effectively oppose

* Bohdan Zdziennicki, Ph.D., President of the Constitutional Tribunal (2008–2010).

** Text presented at the XXII Convention of the Departments of Theory and Philosophy of the Law “Law – politics – public aspects”, 18–21.09.2016, Wrocław.

such a legislative policy. Because of this, the coalition in power has undertaken normative measures to deprive the Tribunal of its position and paralyse its work. The same fate probably awaits courts.

2. The text of the Constitution from 1997 refers to the Constitution as “the supreme law of the Republic of Poland” and states that “the provisions of the Constitution shall apply directly” (Article 8). The basis here is the concept of the rule of law (Article 7: “The organs of public authority shall function on the basis of, and within the limits of, the law”). This means that the superior legal power of the Constitution in respect of legislation limits the power of parliament, which represents the sovereign, who is not the absolute sovereign. Despite its democratic legitimacy, legislative authority is limited by the Constitution. In accordance with Article 8, the recognition of the law as lower in the hierarchy of the sources of the law is not limited to the Constitution. The laws must also comply with the most important international agreements – ratified under the prior consent expressed in the statute (Article 91 sections 12) and the law of the European Union.

3. The Constitution of 1997 assigns the judiciary with a special role in both the application and protection of the Constitution. The judges of the Constitutional Tribunal are subject only to the Constitution (Article 195 section 1), while all other judges are subject “only to the Constitution and statutes” (Article 178 section 1).

In Poland, the Constitutional Tribunal plays a fundamental role in the application and protection of the Constitution. It possesses general authority to remove the legal effectiveness of solutions standing in violation of the Constitution or other laws with extra-statutory effect (Article 188 points 1–3).

If the work of the Constitutional Tribunal is uninterrupted, the final judgment on whether statutes comply with the Constitution should be up to the Tribunal. However, no judge can assign priority over constitutional solutions to (constitutionally incompatible) statutes. This results from Article 178 section 1, which *expressis verbis* states that judges shall be subject not only to statutes but to the Constitution as well, from Article 8 section 2, which discusses the direct application of the Constitution, which – in the light of Article 8 section 1 – is “the supreme law of the Republic of Poland”. The courts are therefore obligated to apply pro-Constitutional interpretation of the law and consequentially to independently examine whether the applied statutory

regulations comply with the Constitution. The presumption of statutes complying with the Constitution is therefore accompanied by the order of their interpretation in accordance with the Constitution. In accordance with Article 193, any court may refer a question of law to the Constitutional Tribunal as to the conformity of a normative act to the Constitution, ratified international agreements or a statute, if the answer to such a question of law will determine an issue currently before such a court.

4. Following their victory in the election, the parliamentary majority adopted several laws, the constitutional compliance of which has been thrown into doubt. Most of them have seen appeals filed against them to the Constitutional Tribunal.

And so, in accordance with the new Prosecution Law dated 28 January 2016 – Journal of Laws of 2016 item 177 (in effect from 4 March 2016), the office of Prosecutor General is held by the Minister of Justice and the assigned scope of rights and responsibilities indicates that he is not only in charge of the Prosecutor's Office, but may instigate criminal action against anyone. Simultaneously, he is protected by the regulations from any legal liability. He may give guidelines and orders to his subordinate prosecutors in all ongoing proceedings concerning both administrative matters and procedural decisions. His guidelines, recommendations, and orders are binding. As a member of the party in power and the Council of Ministers, the Prosecutor General is not held legally liable before the common courts for the acts taken in office. The establishment of a new organisational unit under the State Prosecutor's Office (replacing the General Prosecutor's Office), the Department of Internal Affairs, which is modelled on the departments of the Police and special services, is particularly questionable in terms of compliance with the Constitution. This institution's objective is to handle preparatory proceedings in cases of "offences committed by judges, prosecutors, and deputy prosecutors", even though there are two other departments of the same Prosecutor's Office handling tasks overlapping those of the Department of Internal Affairs. This solution has been introduced solely for the purpose of intimidating judges and prosecutors. Contrary to the current party's propaganda, the annual number of disciplinary procedures against judges lies between 50 and 60 and they usually concern the violation of traffic rules, which are also covered by judicial immunity, rather than corruption or organised crime. The politicians are explaining all the unconstitutional changes with the need to ensure the safety

of Poles and the desire to treat the Prosecutor's Office, and soon the courts as well, as an extension of the State police system.

There is a bill being prepared to subject disciplinary courts for judges to the executive power, extend the expiry of professional offences, enter people's judges in adjudicating panels, eliminate the lowest of the three levels of the common judiciary, approve staff according to vague criteria, etc. The planned changes have been reported by mass-media outlets, which refer to various statements made by the authorities of the Ministry of Justice.

The nature of the Act dated 30 December 2015, which amended the Act dated 21 November 2008 on the civil service (the Act dated 30 December 2015 on the amendment of the Act on civil service and certain other Acts – Journal of Laws of 2016 item 34) is equally unconstitutional. The influence of politicians over the civil service, which should be an apolitical staff of public administration in Poland, or at least one independent of the party, was considerably expanded. A person who has only recently resigned from a political party can now become the head of the Civil Service. The employment contracts of everyone who held a high posts in the civil service were terminated, with the exception of individuals approved by the new management (a classic case of staff purge). The recruitment of new civil-service executives is no longer open and competitive. The guaranteed stability of their employment has also been eliminated, to make them completely dependent on the coalition in power.

The Act dated 15 January 2016 on amendment of the Act on the Police and certain other Acts (Journal of Laws of 2016 item 147), which has been referred to by media outlets as “the invigilation Act”, also violates fundamental constitutional rights. This Act does not make the gathering of telecommunications, postal, and online data by the police and other forces dependent on the inability to obtain them through different means. The adopted solutions also give the forces the opportunity to bypass regulations prohibiting the interrogation of witnesses in circumstances considered trade (legal, medical, journalistic, etc.) secrets and do not order the immediate by-committee destruction of materials containing information ruled inadmissible in evidence, the trade secrets of which the court either did not or was not permitted to lift. The Act does not introduce any restrictions on forces monitoring online activities. There is also no effective control of data acquisition by the special services. There is only the option of *ex post* control, but only as submission of collective and general reports to the courts once every six months, which

pretty much eliminates the progressive prevention of negligence and abuse, and there is no option of *ex ante* control.

The most recent amendment to Article 168a of the Code of Criminal Procedure also weakens the guarantee of the right to defence. Criminal courts have been obliged to accept illegally collected evidence. Art. 168 of the Code is restricted only in the scope of forced witness statements and statements obtained from the defendant. The problem in question has been referred to as “eating fruit from a poisoned tree”. The prosecutor will not be held liable in any way as long as he states that he was “acting solely for the public benefit.” The new Article 137 § 2 of the Prosecution Law states that measures or negligence by the prosecutor made solely for the public benefit cannot constitute a disciplinary offence.

The amendment made to broadcasting law (Act dated 30 December 2015 on amendment of broadcasting law – Journal of Laws of 2016 item 25) eliminates the independence of the public media, which should be subject to full supervision of the National Broadcasting Council. In accordance with Article 2 of the Act dated 30 December 2015 on the amendment of broadcasting law, the terms of the members of authorities of “Telewizja Polska” and “Polskie Radio” expired by virtue of the law itself. The Minister of the State Treasury has taken control of both institutions.

The Sejm has also controversially applied a simplified procedure in the adoption of the new law on the Commissioner of Human Rights and amendments to certain Acts (dated 18 March 2016) and the National Media Council law (dated June 22 2016).

The Act of 10 June 2016 on anti-terrorist activity raises justified concerns as to its compliance with fundamental constitutional rights. There are more laws being prepared to ensure the political control of other public institutions, including the already-prepared amendment to the Act on the National Council of the Judiciary, which aims to considerably reduce the Council’s independence.

Therefore, instead of the constitutionalisation of Polish legislation, what we have is its successive deconstitutionalisation.

5. As previously discussed, in the face of the implemented statutory changes to the democratic system of the state of justice of Poland (without changes to the effective Constitution), which could be derogated by the Constitutional Tribunal, the coalition in power has undertaken normative activities aimed at

depriving the Tribunal of its due prestige and importance. Successive regulations were implemented under the pretence of improving the Tribunal and regaining its public trust, the purpose of which was 180° different from that declared – the purpose was to paralyse the work of the Tribunal. Simultaneously, Government and associated media systematically built up a dark image of the Tribunal's judges and president to discredit them in the public eye and thus gain approval for the actions of the Government.

The anti-Tribunal legislative activity introduced solutions standing contrary to the standards of the Constitution on the Tribunal and judiciary, of which the Tribunal is part, and simultaneously declared that these actions were simply to enforce constitutional standards and values. Consequentially, this attack on the world of standards and values has turned it upside down. A new legal situation appeared – *in fraudem constitutionem* (the legislative and executive powers being coupled together), which stands in clear opposition to the rule of cooperation between the powers, as stipulated in the Preamble to the Constitution, and with the essence of the democratic state ruled by law.

The majority in power has created pretences of cooperation with the European Union's European Commission concerning the appointment of judges to the Constitutional Tribunal in 2015 and failure to execute the Tribunal's judgements from 3 and 9 December 2015 on these matters. Contrary to the elementary rules for judiciary operation in a democratic State, the authorities used typical *in fraudem constitutionem* arguments to refuse to acknowledge the judgments of 3 and 9 December 2015.

In its Recommendation regarding the rule of law in Poland dated 27 July 2016 C(2016) 5703 final, the European Commission stated *'Ahead of the general elections for the Sejm of 25 October 2015, on 8 October the outgoing legislature nominated five persons to be 'appointed' as judges of the Constitutional Tribunal by the President of the Republic. Three judges would take seats vacated during the mandate of the outgoing legislature while two would take seats vacated during that of the incoming legislature which commenced on 12 November 2015.*

On 19 November 2015, the Sejm, through an accelerated procedure, amended the Law on the Constitutional Tribunal, introducing the possibility to annul the judicial nominations made by the previous legislature and to nominate five new judges. On 25 November 2015, the Sejm passed a motion annulling

the five nominations by the previous legislature and on 2 December nominated five new judges.

The Constitutional Tribunal was requested to take a stance on the decisions of both the previous legislature and the incoming legislature. The Tribunal consequently delivered two judgements, on 3 and 9 December 2015.

In its judgment of 3 December, the Constitutional Tribunal ruled, *inter alia*, that the previous legislature of the Sejm had been entitled to nominate three judges replacing the judges whose terms expired on 6 November 2015. At the same time, the Tribunal clarified that the Sejm had not been entitled to elect the two judges replacing those whose term expired in December. The judgment also specifically referred to the obligation for the President of the Republic to immediately take the oath from a judge elected by the Sejm.

On 9 December, the Constitutional Tribunal, inter alia, invalidated the legal basis for the nominations by the new legislature of the Sejm of the three judges for the vacancies created on 6 November 2015 for which the previous legislature had already lawfully nominated judges.

Despite these judgments, the three judges nominated by the previous legislature have not taken up their positions as judges in the Constitutional Tribunal and their oath has not yet been taken by the President of the Republic. Conversely, the oath of the three judges nominated by the new legislature without a valid legal basis has been taken by the President of the Republic.

The two judges elected by the new legislature replacing the two judges outgoing in December 2015 have in the meantime taken up their positions as judges in the Constitutional Tribunal.

On 28 April 2016, the President of the Republic took the oath of a new judge in the Constitutional Tribunal, nominated by the Sejm to fill a vacancy created earlier that month to replace a judge whose term in the Constitutional Tribunal had ended.”

“The European Commission has pointed out that, contrary to the arguments of the Polish Government, the Law on the Constitutional Tribunal adopted on 22 July 2016 does not comply with the judgements made on 3 and 9 December. The State institutions of Poland should cooperate with and fully enforce the judgements of the Tribunal. The effects of the judgements cannot be reduced to the obligation of their publication by the Government and the judgement of 3 December 2015, which confirms the legal foundation of the previous Sejm’s nomination of three judges replacing the judges whose terms expired on 6 November, cannot be repealed in reference to the alleged constitutional custom

(according to the Government of Poland), the existence of which the Tribunal does not recognise.”

The standpoint of the majority in power threatens judicial independence. There are no judges of the “current” or “former” term of the Sejm. A “their” or “our” judge is not an independent judge at all and only a “transmission line” of the party in power. This is not a judge who obeys the demonstrated high standards and values. This is not a person who will always follow the standards and values more important than political correctness, parliamentary interests, or strictly personal preferences.

6. The majority in power applied a classic *in fraudem constitutiones* action in the amendment dated 22 December 2015 to the Act on the Constitutional Tribunal dated 25 June 2015 – the amendment was announced in the Journal of Laws of 2015 item 2217. Under the pretences of improving the makeup of the Tribunal and raising its credibility, the attempt to paralyse its activities included raising the quorum required for adjudicating, raising the majority level required for judgements made by the Tribunal in full court, introducing the requirement to examine cases in chronological order, and introducing the minimum pending period for motions. To prevent potential protests by judges, the Sejm and the President were granted the authority to interfere with disciplinary procedures. And so, when the Tribunal was composed of 12 judges, the new standard required at least 13 judges to make judgements in full court. The amendment to the previous regulations stipulated that the Tribunal should adjudicate in full court unless the law stated otherwise.

With 200 unsettled cases, case examination in chronological order was aimed to prevent judgments on newly adopted laws amending the State system, in violation of the constitution or violating civil rights and freedoms.

In turn, the minimum period for pending motions (in accordance with Article 87 section 2 of the Act in question, “a trial cannot start before 3 months have passed after the parties to the case have been notified of its date and before 6 months for cases examined in full court”) was intended to slow down the work of the Tribunal enough to keep it from “interfering” with the governing party’s legislative activities.

In the ruling dated 9 March 2016, the Constitutional Tribunal recognised the amending Act dated 22 December 2015 as in violation of the Constitution both in full and in relation to its specific provisions. The authorities responsible for violating Article 190 section 2 of the Constitution have still

not released this important judgement. The Government usurped the right to supervise the Constitutional Tribunal, even though the Tribunal is part of the independent judicial power, and questioned the legality of the ruling because the Tribunal did not follow the procedure from the questioned (deemed unconstitutional) Act, just like the quasi “super Tribunal” did not recognise the rulings made after 9 March 2016 despite the fact that the superiority of the Constitution indicates that an Act threatening the control of the constitutional compliance of the law must be examined by the Tribunal before adoption, and, if necessary, repealed based on effective regulations recognised as constitutional. After the ruling of 9 March 2016, the Tribunal released dozens of judgements, which the Government did not publish in the Journal of Laws.

7. The aforementioned Act on the Constitutional Tribunal dated 22 July 2016 (Journal of Laws of 1 August 2016 item 1157) has already been appealed against to the Tribunal by the Commissioner for Human Rights and a group of deputies representing PO and Nowoczesna. The Commissioner for Human Rights pointed out that the new Act had been adopted in violation of the basic standards of the legislative procedure (the pace of work on statutory issues and no scientific debate preceded by appropriate analyses). In the light of constitutional requirements and the commonly effective rulings of the Constitutional Tribunal, the 14-day *vacatio legis* period of the Act is insufficient.

Many solutions of the new Act overlap the ones the Tribunal ruled unconstitutional in the judgment dated March 9 2016 on the amendment dated 22 December 2015 to the Act on the Constitutional Tribunal dated 25 June 2015, which the Government did not publish. This involves not only chronological examination of motions with certain exceptions, but also the fact that the Tribunal’s ruling of 9 March 2016 was excluded from the publishing obligation, which, according to the executive power, will ultimately make it inefficient, with a flagrant violation of the Constitution. Due to the number of “own” judges, there is now a newly introduced option of blocking rulings made by four judges and the right of three judges to force a case to be examined in full court, which requires a minimum of eleven judges (at present, the Tribunal includes only 12 judges for examining cases, and the required quorum will often be impossible, which means that the solution can be used to paralyse the Tribunal’s judgments). There is a new regulation on obligatory participation by the Prosecutor General or Deputy Prosecutor General in

cases examined by the Tribunal in full court to allow a politician of the party in power, in this case the Minister and Prosecutor General, to block and paralyse the work of the Constitutional Tribunal. There is also a new formula, under which the President of the Constitutional Tribunal files the motion for the announcement of judgments and decisions to the Prime Minister, who, as a quasi “super tribunal”, decides whether to announce them and enforce them as commonly binding. The process of appointing judges of the Constitutional Tribunal has been *expressis verbis* subjected to a representative of the executive power, the President – now judgements in the Tribunal can be passed only by judges sworn in by the President. Furthermore, the number of candidates to the posts of president and vice-president of the Constitutional Tribunal presented to the president by the General Assembly was arbitrarily set at three, because of the number of “own” judges. To keep the Tribunal from blocking replacements of the elite and changes to all State structures, the procedures in all cases instituted by motions were suspended for 6 months. There is also a new order to apply the new Act in cases pending before the Tribunal in order to prolong and slow down the proceedings.

Depending on the accepted criteria, the presented solutions can be qualified as standing in violation of constitutional standards and values or serving the avoidance of constitutional regulations under the pretences of “good changes”.

Depriving the Tribunal of its ability to effectively control the compliance of adopted legislative Acts with the Constitution is an attack on the essence of the system of Poland, which is in a democratic state of law. The Act on the Constitutional Tribunal dated 22 July 2016 invades the independence of the Tribunal and its judges. The Tribunal cannot become a prop additionally legitimising the actions of the party in power.

8. The scope outlined by the Constitution can be used to improve laws and to reasonably reform the standards of the legislative, executive, or even judiciary power. But this requires following the rules, values, and concepts of public discourse, which do not exclude anyone and do not make the results a foregone conclusion. This is a culture of power based on the culture of the Constitution. Without it, democracy can transgress the restrictions imposed on it by the rule of law and turn into the tyranny of the majority. This has already happened in the ideas of a mass society in fascism and Nazism. Back then, the political authorities appropriated or even confiscated judicial independence. Even though history never repeats itself exactly, this is an impor-

tant *memento*. This is why we should listen to the National Council of the Judiciary, the First President of the Supreme Court, and the Commissioner for Human Rights, not to mention the Constitutional Tribunal. We should listen to the Venice Commission, the European Commission, the European Council, the European Parliament, as well as the President of the United States, who recognises the principles of a democratic state of law as unquestionable canon. We should listen to the Polish academia – lawyers, judges, legal counsels, and commentators and, finally, ordinary citizens.



Extraordinary Congress of the Polish Judges

Warsaw, 3 September 2016

Dariusz Mazur, Waldemar Żurek

First year of so called “Good change” in Polish system of administration of justice*

I. Introduction

On 25 October 2015, a parliamentary election was held in Poland in which the former opposition party Law and Justice led by Jarosław Kaczyński emerged as the winner. The party campaigned intensely brandishing the slogan of “Good Change”, which it was going to bring to Poland. The “Good Change” policy was to involve reforms and improvement in a number of areas of public life until then neglected, and to make it possible for Poland “to lift from the knees” in international relations, including with the European

* Article was originally prepared for the magazine of Czech prosecutors “Public Prosecutor” (“Státní zastupitelství”) – the number of December 2016; <http://www.nsz.cz/index.php/en/magazine-public-prosecution>.

Union. According to Jarosław Kaczyński's nomenclature, parties that ruled in Poland before were an element of an alleged post-communist pact, which prevented this type of thorough reform. The kind and number of legislative actions taken so far doubtless suggest that the justice system is one of the key priorities for the present government. Considering that it has been nearly a year since Law and Justice took power, it seems long enough to try to survey the effects the "Good Change" policy has had on the justice system, and prognosticate a direction further changes may take in this respect.

With a voting system where a large portion of the votes given to the political groups that did not reach the threshold goes to the winning party, the approximately 38 percent of the votes Law and Justice reaped ensured an absolute majority for the party. Although Law and Justice has a small margin majority only, due to the voting discipline within the party the lower house of the Sejm (Polish parliament) has turned into a highly efficient voting machine in the hands of the ruling party. The private member's bills procedure is used to pass bills through the Sejm, in which bills require no public consultation or consultation with other ministries before they are enacted. Being mindful of the fact that the party that won the election created a single-party government, and that the office of President of Poland was taken in August 2015 by the Law and Justice-backed Andrzej Duda, it is easy to realise that the ruling party is wielding all legislative and executive power in fact¹. We note at this point that the political situation in Poland differs from that in Hungary under Viktor Orban in one important respect: having only a slim majority in the parliament (234 of the entire number of 460 seats in the lower house) and being unable to form a coalition, Law and Justice is far from gaining a qualified majority that would allow it to change the constitution². The present Constitution states that Poland is a democratic state ruled by law, and its political system is strictly based on the tripartite separation of powers with an independent judiciary and an extensive catalogue of civil rights and freedoms. Lacking the majority to change the constitution, Law and Justice decided to further system revisions by way of adopting legislative acts, caring nothing

¹ During the first year in the office, the President of Poland neither vetoed nor referred to constitutional review any bills proposed by Law and Justice.

² As per Art. 235.4 of the Polish Constitution "A bill to amend the Constitution shall be adopted by the Sejm by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of Deputies..."

for their compliance with the constitution. Consequently, the Constitutional Tribunal thus has to become a natural chief enemy, so to say, of the ruling party as it stands in its way to unbridled autocracy. To use military terms, the Constitutional Tribunal has become a besieged fortress the taking of which will pave the way to making effective changes to the political system even if in breach of the constitution.

2. Constitutional Tribunal

Admittedly, the original sin of political attempts to tamper with the Constitutional Tribunal was committed by the coalition of the Civic Platform and the Polish Peasant Party that were previously at the helm of government. On 8 Oct. 2015, towards the end of the previous term of the Sejm, when three new judges were elected for the Constitutional Tribunal to replace those whose mandates expired in November 2015, the Sejm appointed two more judges ahead of time in order to replace two justices whose mandates did not end until December and whose successors, in light of the law, should be elected during the next term of parliament, which started on 12 Nov. 2015. What made the election of the two “additional” Tribunal judges at all possible was the Act of 25 June 2015, which came into force after it was passed with the votes of the coalition of the Civic Platform and Polish Peasant Party³. While the conduct of the former coalition should be clearly condemned, it is important to note that during the present term of the Sejm, the Civic Platform itself appealed the act of 25 June 2015 as had proposed, as a result of which on 3 and 9 December 2015 the Constitutional Tribunal found some of its provisions unconstitutional, thus invalidating the election of the two judges. At the same time, the Tribunal ruled that the election of the three judges made by the previous Sejm was constitutional and the Polish President was under the obligation to accept their oath, which is a pre-condition for them to start their service on the Tribunal. Although the constitutional review proceeding reversed the negative effects of the Civic Platform’s and the other coalition member’s misconduct, yet the fact it had to be taken at all gave Law and Justice a comfortable pretext to take “remedial action” regarding the legal status of the Constitutional Tribunal. The reasons for that action and the methods adopted to carry it out as well as the fact that it was obviously

³ The Act was published in the Official Journal (Dziennik Ustaw) of 2015, doc. 1064.

intended to hamper effective constitutional review of the legislation passed by the current Sejm, make the “remedial action” look like efforts to extinguish the fire by adding barrels of fuel to it.

The steps taken against the Constitutional Tribunal involved in particular the Sejm adopting resolutions on 25 November 2015 with the votes of Law and Justice to invalidate the election of judges of the Constitutional Tribunal by the previous Sejm majority on 8 October 2015. Next, President Andrzej Duda, a former Law and Order member, refused to swear in the three judges of the Constitutional Tribunal who were duly elected on 8 October 2015. Instead, on 2 December 2015, the parliament proceeded with the election of five new judges for the Constitutional Tribunal⁴, and, although legal basis was lacking, the Polish President accepted the oaths from all of them, despite the fact that in the light of the Constitutional Tribunal’s judgements of 3 and 9 December 2015, only two of them had been validly elected. The oath-taking ceremony was held at night, in breach of the tradition and settled custom. A large majority of the public opinion perceived it as a hasty and unconditional execution of the political instructions from the ruling party.

Next, the President of the Constitutional Tribunal admitted to the bench two of the judges elected during the new term of parliament, i.e. those who were duly elected to replace the judges whose tenure expired in November 2015. From that moment on, the Tribunal had twelve sitting judges instead of the fifteen required by the law because the Polish President refused to execute the rulings of the Tribunal of 3 and 9 December 2015 and swear in three judges that had been lawfully elected during the parliament’s previous term⁵,

⁴ The selection of the five judges of the Constitutional Tribunal was made based on the amendment of 19 November 2015 to the Act of the Constitutional Tribunal, which was adopted by the Law and Order majority in a record-breaking time. The bill was submitted to the Sejm on 17 November, and it was adopted already on 19 November; on 20 November it was affirmed by the upper house of parliament with no changes, and signed by the Polish President on the same day. Aside other provisions, the amendment terminated the tenures of the present President and Vice-President of the Constitutional Tribunal within three months from the date it came into force. That provision was another one that the Tribunal found to be unconstitutional in its verdict of 9 December 2015.

⁵ In its Recommendation of 27 July 2016 (C(2016)5703), the European Commission observed that the failure to implement the Constitutional Tribunal’s judgements of 3 and 9 December 2016 r. “... raises serious concerns in regard of the rule of law, as compliance with final court judgments is an essential requirement inherent in the rule of law” (pt. 12 of the Recommendation). The same opinion was expressed by the Venice Committee in its Opinion

while the President of the Constitutional Tribunal denied admission to the bench to the three judges elected by the present majority in breach of the law.

We soon discovered the actions described so far were only a prelude to a battle for the Constitutional Tribunal. When the ruling party realised it was not able to take control of the Tribunal fast by filling most positions in it with its candidates, legislative and *de facto* steps were taken to obstruct its activity, as well as a range of propaganda measures to undermine the reputation of the Tribunal, especially its President Andrzej Rzepliński.

Some of the steps taken by Law and Justice to hobble the Tribunal's work are so-called "remedial statutes" which were intended to "cure" the situation of the Constitutional Tribunal. The first of the laws, adopted by the Law and Justice majority on 22 December 2015, referred to the ruling procedure and the independence of the Tribunal judges. The act vastly changed the method of the Tribunal's voting such that all judgements relating to abstract compliance with the constitution, which represent a majority of cases, would have to be handed down by the full panel of judges (formerly, full-bench rulings applied only to the key matters of the rule of law); the composition of the panel was increased to thirteen out of the total of fifteen Tribunal judges (until then full bench meant nine judges). Additionally, that category of matters would require a two-thirds majority to resolve on, instead of a simple majority as used to be the case in the Tribunal. Another change brought in by the "remedial statute" was that regardless of the significance of the matters on the table, the Tribunal was to consider motions in the order in which they were filed ("the sequence rule"), unlike before, when the President of the Tribunal had the authority to order an early consideration of more fundamental matters. Finally, the 22 December 2015 amendment to the Act on the Constitutional Tribunal required that a motion could not be heard by the Tribunal earlier than three months from the date notice of the sitting date was served on the parties, and for cases to be heard by a full bench (in fact the majority of matters) service of notice of the sitting date would have to precede the actual hearing date by no less than six months (compared to the former fourteen days' notice period). We need to emphasize that this statute entered into force at the date of adoption with no *vacatio*

of 11 March 2016, no. 833.2015, issued, by the way, on request from the Polish Minister of Foreign Affairs of the Law and Justice cabinet (pt. 136 of the Opinion).

legis, which was a gross violation of good law-making practice. The European Commission⁶ and the Venice Commission⁷ were of one mind noting that the implementation of the changes would hamper the decision making process in the Tribunal, cause a risk of the Tribunal becoming unable to rule, at least temporarily, and slow down the proceedings in breach of art. 6 ECHR, let alone the fact that the requirement of a two thirds majority violates art. 190.5 of the Polish Constitution⁸. It is cautiously estimated that as a result of adopting these changes the average case consideration time would increase from the current one to two years (when matters which the President of the Tribunal finds urgent can be put on a faster track) to five years or more, which would raise a question mark over the point of constitutional review, especially that the term of parliament is four years. The adoption of the changes might frustrated completely the functions of the Tribunal by swamping it with a insignificant motions which, if the sequence rule is applied, might postpone the consideration of critical systemic issues to some unforeseeable future date.

A constitutional complaint against the 22 December 2015 amendment to the Act on the Constitutional Tribunal was lodged by the National Council of the Judiciary, a group of opposition MPs, the Ombudsman and the Chief Justice of the Supreme Court. On 9 March 2016 the Constitutional Tribunal ruled that the new law in its entirety and a number of its individual provisions were unconstitutional, and held that the law generally crippled the Tribunal's efficient and reliable work and violated the rule of law as regards constitutional justice rendered by the Tribunal. A panel of twelve judges reviewed the constitutionality of the 22 December 2015 amendment (i.e. the judges authorised to sit, including the two elected by the new parliament), and the legal basis for the Tribunal's act was the Constitution itself and not the law under review. The Tribunal did not proceed based on the amendment of 22 December 2015 because it ruled that an act of law that is presumed to jeopardize the control of constitutionality of law has to be reviewed for compliance with the constitution before it can be applied by the Tribunal. The government reacted to the verdict of the Constitutional Tribunal by de-

⁶ Pts. 30, 32, 34 and 36 of the Recommendation of 27 July 2016 referenced in footnote 5.

⁷ Pts. 62, 63, 65, 71, 82 and 83 of the Opinion of 11 March 2016 referenced in footnote 5.

⁸ When reviewing the bill, the National Council of the Judiciary also pointed out that the absence of even three judges from a panel will prevent any resolutions from being adopted (Reasons for the Council's resolution no. 99/2016 of 15 January 2016).

nying the publication of it in the *Official Journal* (Dziennik Ustaw), although in keeping with art. 190.2 of the Constitution to do so is an obligation of the government. Importantly, this was the first case of the government refusing to publish a ruling of the Constitutional Tribunal since the Constitutional Tribunal was founded in 1986.

Still before the ruling was announced, Prime Minister Beata Szydło warned when speaking to the media: *“Tomorrow’s communication which some judges of the Constitutional Tribunal are going to release, will not be a verdict as defined in the law. Therefore I cannot violate the constitution and publish such a document”*. In another statement she said that the Tribunal’s sitting *“...was not held in conformity with the statute then in place”* (i.e. the law the constitutionality of which was being reviewed by the Tribunal). The Minister of Justice and Prosecutor General representing Law and Justice told the media: *“The meeting in the chambers of the C[onstitutional] T[ribunal] was a meeting of some judges and not a constitutional sitting in its strict sense”*, and in another statement he added: *“If the Prime Minister decided to publish a verdict of the C[onstitutional] T[ribunal] passed in breach of the law, she would face legal liability and could be brought to stand trial before the State Tribunal”*. Finally, the Deputy Minister of Justice compared the sitting of the Constitutional Tribunal to a *“friendly meeting over a coffee and biscuits”*. A wave of demonstrations swept through Poland organised by the civic movement Komitet Obrony Demokracji (Committee for the Defence of Democracy), in which the protesters expressed their support for the Constitutional Tribunal and urged the government to publish the Tribunal’s judgements, while the officials of one of the opposition parties projected the text of the Tribunal’s verdict onto the wall of the Chancellery of the Prime Minister. A range of academic Law Departments and non-governmental organisations made appeals to the Prime Ministers to publish the judgements of the Constitutional Tribunal⁹.

On 11 March 2016, an opinion on the Constitutional Tribunal issue in Poland was adopted by the European Commission’s agency known as the Venice Commission after the place it has its seat¹⁰. The Commission stated that the 22 December 2015 amendment to the Act on the Constitutional Tribunal is a threat to the rule of law and to the functioning of the democratic system,

⁹ Resolutions in support of the Constitutional Tribunal were adopted by councils of the Law Departments at the universities in Poznan, Krakow, Wrocław, Łódz and Warsaw.

¹⁰ Its full official name is the European Commission For Democracy Through Law.

and the legal solutions adopted in it are likely to slow down the proceedings and cripple the Tribunal's work. The Commission further urged the government to publish the Tribunal's judgement of 9 March 2016 and confirmed that the Tribunal was authorised for constitutional review of an amendment to the Constitutional Tribunal law under the constitution itself without having regard to the law the constitutionality of which is the subject of its scrutiny. Also, the Commission suggested that in future a system for electing the judges of the Tribunal should be introduced whereby a third of the judges of the Constitutional Tribunal are each appointed/elected by three state powers – the President of Poland, parliament and the judiciary. Paradoxically, while the Venice Commission issued this opinion on request from the Minister of Foreign Affairs, member of the present Cabinet and of Law and Justice Witold Waszczykowski, as soon as the opinion proved to be unfavourable for the ruling power, its officials commented in the media that “*it is not binding*”, “*is biased*”, “*is orchestrated by the UE leading powers that want to frustrate certain processes in our country*”, and, last but not least, that the opinion “*is something we may or may not use*”.

The Constitutional Tribunal received overt backing from the judiciary. A number of assemblies at regional and appellate courts in Poland¹¹ adopted resolutions expressing their support for the activities of the Constitutional Tribunal. The same position was taken by the National Council of the Judiciary.

Finally, on 26 April 2016, the Polish Supreme Court adopted a resolution declaring compliance with the verdicts of the Constitutional Tribunal on the constitutionality of laws from the moment they were announced, whether or not the Polish government published them in the Official Journal. On the same day, the spokeswoman for Law and Justice commented on the resolution in the following fashion: “*The message of today's position of the Supreme Court is clear to me: this is producing further anarchy in our country. In fact, a crew of cronies got together to defend the former status quo*”.

The Law and Justice party took action that can hardly be interpreted as anything other than an attempt to browbeat the justices of the Constitutional Tribunal. In particular, on 5 April 2016, Zbigniew Ziobro, Minister of Justice and Prosecutor General, sent an official letter to the President of the Constitutional Tribunal in which he noted: “*The Prosecutor General will not*

¹¹ These are judicial self-government authorities at various levels of the judiciary.

*authorise, or participate in, any attempts by the Constitutional Tribunal to act outside the constitutional and statutory regime. They can only be subject to his scrutiny for legal compliance*¹². From today's perspective, those words presaged further, criminal action launched against Andrzej Rzepliński, President of the Constitutional Tribunal. One of the criminal proceedings is handled by the Regional Prosecution Office in Warsaw, which is investigating into whether the Tribunal's President acted in breach of the law when he admitted twelve judges to the bench on 5 April 2016. Characteristically, the Regional Prosecution Office in Warsaw initially dismissed a motion to launch a pre-trial process yet after the law on the prosecution service was amended the Prosecutor General nominated a new head of the Regional Prosecution Office in Warsaw¹³ and the proceeding was restarted. Despite clear and unchallengeable facts, the investigation is still pending, having been extended several times, with the sole aim of pressurizing the President of the Tribunal, it seems. Moreover, the Regional Prosecution Office in Katowice is investigating into his alleged "misconduct in public office" (art. 231 of the Criminal Code) by not admitting the three judges, whose election was found unconstitutional by the Tribunal on 3 and 9 December 2015, to sit on the Tribunal. Efficiently "reformed", the prosecution service¹⁴ then completed a pre-trial process concerning complaint on the government's failure to publish the Constitutional Tribunal's judgement of 9 March 2016: it dismissed the motion to prosecute already on 27 April 2016 stating that the refusal to publish a ruling is not a misconduct in public office because the prosecution failed to identify "the element of acting against public or private interest". Incidentally, before that decision was handed down, a prosecutor who argued for opening an investigation was reassigned to a new office. The prosecutors of his department stepped forward in his defence and penned a protest letter. The dismissal was appealed by the Helsinki Foundation for Human Rights, and on 13 October 2016 it was reversed by the court in Warsaw. The assumption that the refusal

¹² The National Council of the Judiciary objected to the statement and its content, and in its resolution of 7 April 2016 it observed that being a representative of the executive power, the Minister of Justice and Prosecutor General is not authorised to verify the judgements of the Constitutional Tribunal, so his statement violates the principle of tripartite separation of powers and [is an attempt to] muscles in on the independence of the judges.

¹³ He was replaced in the position of the District Prosecutor in Warsaw by a former assistant of the current Minister of Justice – Prosecutor General.

¹⁴ The way the prosecution service was reformed is discussed in chapter 3 of this article.

to publish the Tribunal's verdicts is not "*acting against public interest*" must leave one flabbergasted if a range of expert bodies both international (the Venice Commission or the European Commission) and domestic (legal academia, a variety of law organisations) assert straightforwardly that failing to publish the judgements of the Constitutional Tribunal is an outright breach of the democratic rule of law in Poland.

On 22 July 2016 the parliament passed another "remedial statute" with the votes of Law and Justice, concerning the functioning of the Constitutional Tribunal. On the face of it, it looked like a softer option compared to the laws of 22 December 2015; on closer inspection, however, it vested the executive branch of government with a number of handy instruments to trammel the Tribunal. In particular, the law required that the full bench of the Tribunal meant eleven judges (instead of the thirteen in the 22 December 2015 law). Matters would be decided by the full bench if at least three judges of the Tribunal so moved, even if they were not part of the bench assigned to decide the matter, and their motion for a full-bench procedure would not even have to be justified. Under the amendment, decisions would be adopted by a simple majority, which was an improvement over the 22 December 2015 law, where full-bench resolutions required a qualified majority of two-thirds of votes. The 22 July 2016 statute reintroduced the "sequence rule", according to which the Constitutional Tribunal had to hear cases in the order in which they were registered, with a reservation, however, that the President of the Tribunal was authorised to set a date out of turn if such derogation was motivated by the protection of civil rights or freedoms, the security of the state or the constitutional order. The rule of deciding cases in the order they are received applied only to matters initiated by applications (requests) and not constitutional complaints. Another improvement over the 22 December law was the minimum thirty-day period between the date the parties receive notices of hearing and the date the case can be heard; for matters of special significance the President of the Tribunal may order shortening the period by half (in the 22 December law, he notice period was three or even six months). Finally, the 22 July 2016 law, unlike the previous "remedial statute", did not permit interference by the executive or the legislative with disciplinary proceedings against the judges of the Tribunal, which is another improvement over the 22 December 2015 law.

Can we say, then, that the second draft of the "remedial statute" guarantees conditions for the Tribunal to render constitutional justice effectively?

Unfortunately, we need to answer in the negative. There is one additional provision in the law: the presence of the Prosecutor General is obligatory to consider matters that require a full bench. This reservation, in conjunction with the above-quoted statement of the Prosecutor General of 4 April 2016, inspires concern that the Prosecutor General, who is the Minister of Justice and a Law and Justice MP (meaning an active politician) at the same time, may hold up certain proceedings by absenteeism. Another provision of the 22 July 2015 law that raises concern as to its impact on the efficiency of proceedings is the one that says that when a case is heard by the full bench, a group of at least four judges may, during a meeting in chambers, make an objection to the decision made by the majority, which automatically defers the case by three months; if another objection is later made, another obligatory deferment by three months will take place. Only after two period of obligatory deferment expire the Tribunal is convened and the case is put to vote. Also, with the new wording of the Constitutional Tribunal law (art. 89), the government would have significant powers to decide which judgements of the Tribunal are lawful and which are publishable. What also worries are the transitional provisions of the act, whereby all cases started before its enforcement, no matter how advanced they are, ought to be proceeded with under the new law, and the proceedings should be suspended mandatorily for six months. The act under discussion was to enter into force fourteen days from the date of announcement, period not long enough for a constitutional review before enforcement¹⁵, while a review is simply indispensable for such fundamental political system-shaping laws. It is not hard to notice that while the law of 22 July 2016 appears as a compromise in comparison to that of 22 December 2015 (reducing the number of judges in the full bench, numerous exceptions from the sequencing rule or a shorter period for hearing notice), it was in fact formulated so as to potentially enable the executive to hamper the Tribunal's work under the current political circumstances. In particular, if the full bench is defined as eleven judges and twelve are authorised to vote, even two judges going on a sick leave would make it impossible to pass any resolution. This and the obligatory presence of the Prosecutor General at full-bench sittings would together effectively obstruct the Tribunal's work, while

¹⁵ In its opinion of 11 March 2016, the Venice Commission stressed that the Constitutional Tribunal has the right to constitutional review of an act that regulates the functioning of the Tribunal.

deferring vetoes from four judges combined with a suspension of inter-term cases for six months would *per se* delay the Tribunal's decisions by months.

The law of 22 July 2016 was appealed to the Constitutional Tribunal with respect to its constitutionality by a group of opposition MPs, the Ombudsman and the Chief Justice of the Supreme Court. On 10 August 2016, a day before a sitting of the Tribunal was scheduled to consider those complaints, Jarosław Kaczyński, the leader of the Law and Justice party, announced in the media that the government would not publish the judgement of the Constitutional Tribunal¹⁶. On 11 August 2016, the Constitutional Tribunal, which sat as a bench of twelve, handed down a verdict stating that nine out of the ten appealed provisions of the law were unconstitutional¹⁷.

In the meantime, between 9 March 2016 and 11 August 2016, the Constitutional Tribunal handed down twenty-three judgements yet the government refused to publish them forthwith, in breach of art. 190.2 of the constitution. Those were judgements concerning matters as important for human rights protection as access to public information or deprivation of liberty of wards of legal guardians. Unexpectedly, on 15 August 2016, the government published twenty-one of the twenty-three verdicts, i.e. all except for those of 9 March 2016 and 11 August 2016, which referred to the "remedial statutes" concerning Constitutional Tribunal. The judgements were published under art. 89 of the amended law on the Constitutional Tribunal of 22 July 2016, which the Constitutional Tribunal found unconstitutional by judgement of 11 August 2016.

On 4 November 2016, the Sejm adopted another revision of the law on the Constitutional Tribunal, this time regulating the status of the Tribunal

¹⁶ The Modern opposition party filed a complaint with the prosecution office claiming that the statement by Jarosław Kaczyński was an act of incitement; the complaint was dismissed last October.

¹⁷ The tribunal held that unconstitutional were provisions such as the requirement of a full bench to sit on three judges' demand; the requirement to consider cases in the order in which they are received, with absolute priority given to certain categories of matters of not the highest rank; the fact that cases are suspended in the event that the Prosecutor General is not present; the obligation to defer the consideration of cases that require a full-bench sitting on four judges' motion; the obligation to close files of the suspended cases within one year, when combines with the requirement to defer a hearing date that has already been set and to collect a full bench; the government's authority to decide which verdicts are publishable as lawful; and the provision under which the three judges elected in breach of the law by the present parliament would take positions in the Tribunal.

judges. One of the changes it introduced was the obligation of the judges to make financial disclosures. Another novelty was restricting the active and retired judges' potential additional academic or teaching positions to one employer only (there had been no such restriction till then). Also, the law revised the grounds for disciplinary sanctions for the judges of the Constitutional Tribunal. Up till then they could be held liable in case of breach of law or other unethical conduct that might potentially undercut trust in their independence or impartiality. The new law provided for disciplinary measures in case the judges failed to comply with the "Code of Conduct of Constitutional Tribunal Judges" yet the text of the document has not as yet been made known. Additionally, the catalogue of disciplinary sanctions was extended: apart from the existing admonition, reprimand and resignation, it envisaged reduction of remuneration by ten to twenty percent over a period of up to two years. Moreover, a Tribunal judge was to take the office the moment the judge was sworn in by the President of Poland. This solution would work for the benefit of the ruling party as the President of Poland, as written above, took oaths from the three judges the election of whom was found unconstitutional by the Tribunal in December 2015 but the present President of the Constitutional Tribunal has not admitted them to sitting on the grounds of improper election. Criticism and scepticism were heaped on a set of regulations concerning former Tribunal judges to whom practically the same restrictions on participation in public life are to apply as to the judges currently sitting on the Tribunal. In particular, former judges cannot be members of political parties, trade unions or be publically active in a way that is incompatible with the rule of judicial independence and pressure-free working environment for the judiciary. According to the law, a violation of these rules would carry disciplinary liability with the same catalogue of sanctions as for the active judges, up to deprivation of the status of retired judges (and thus disentitling them of their pension). A lot of commentators point out that this number of restrictions against retired judges may have a lot to do with the fact that former Presidents of the Tribunal such as Andrzej Zoll, Jerzy Stepień or Marek Safjan have on many occasions spoken critically about the activities taken by the Law and Justice government with reference to the Constitutional Tribunal. The regulations described above are, above all, intended to gag them to prevent public criticism.

On 26 October 2016, another major revision of the law on the Tribunal was lodged, aimed at installing the three judges selected by the present parlia-

ment in positions already lawfully filled by assigning a decisive role to the act of swearing in by the President of Poland; it also seeks to nominate a person elected by the new majority for the position of the President of the Tribunal after the mandate of the incumbent President, Andrzej Rzepliński, expires this December. The bill states that when the incumbent President steps down, a judge with the longest seniority (including in institutions other than the Tribunal) will act in that capacity until a new President of the Tribunal is elected. In fact, among the judges now sitting on the Tribunal the one with the longest seniority is justice Julia Przyłębska, who was elected with the votes of Law and Justice in the current term of parliament. In terms of competencies, judicial service on the Tribunal seems a lot more important than the overall length of service. For that reason this proves to be another amendment that is intended to allow the ruling party to take control of the Constitutional Tribunal at any cost. Based on our experience so far, it is not unreasonable to anticipate it will be adopted at such moment in time and with such short *vacatio legis* that none of the competent authorities will be able to appeal it before it takes effect. An interview Jarosław Kaczyński gave in October for portal Onet.pl was a harbinger of the new law; he said: *“The situation must be finally cleared. There is already a law in place on the status of the judges, there is going to be a law on the organisation of the Constitutional Tribunal, perhaps some other [regulations] will be necessary to force the judges to abide by the law”*.

The constitutional crisis also caused the legislative and executive to retaliate against those state authorities that stood up for compliance with the constitutional rule. For instance, funding was cut down for the previously budgeted expenses of the Constitutional Tribunal, the Ombudsman or the National Council of the Judiciary, leading to an unprecedented situation where funds are too short to pay the retired judges. That is widely perceived as an attempt to exert pressure on those judges. What is more, since August 2016, if not earlier, Law and Justice MPs have been declaring to the media that the party is going to start working on a new law that will reduce the judges' remuneration and abolish their six months' severance payments they get after their mandates expire.

On a final note, this discussion of the current situation of the Constitutional Tribunal in Poland would not be complete without briefly presenting the reactions of some key international institutions. On 13 January 2016, the European Commission began the procedure of probing governance in Poland,

one of the reasons being the political and legal tussle over the Constitutional Tribunal. On 1 June 2016, the Commission adopted a negative opinion on the governance and democracy in Poland, setting a deadline of two weeks for the Polish government to reply and present its position on the objections raised. On 27 July 2016, the European Commission formulated Recommendations¹⁸, in which it found that there was a “*systemic threat to the rule of law*”, and set a deadline of three months for carrying out its recommendations by publishing and implementing the judgements of the Constitutional Tribunal of 3 and 9 December 2015 and 9 March 2016, ensuring that the Constitutional Tribunal can review the constitutionality of the law on the Constitutional Tribunal of 22 July 2016, and by publishing and implementing the judgement the Tribunal will hand down in that respect¹⁹. These recommendations of the European Commission were also pook-pooed by Law and Justice politicians in their media statements; one MEP said that the opinion is so “*...out of touch with reality*” that “*...breathalysers should be installed at the door to the Commission’s offices*”, and one of the senators referred to it as “*purely political*” and “*with no grounding in international treaties*”. As a result, the Polish government did not execute the European Commission’s recommendations within the prescribed period (i.e. by 27 Oct. 2016), replying instead with a 10-page paper which stated that “*The Polish authority finds it legally impossible to implement the recommendations presented*” claiming that “*...by implementing them Polish authorities would violate the Constitution and the law*”. The “legal argumentation” set out in the letter is absurd in implying, for instance, that while the Constitutional Tribunal does render constitutional justice, “*...the Tribunal’s interpretations of legal acts are not binding*”, and its judgements are immaterial for the way the Sejm or the President act in specific situations.

Furthermore, on 14 October 2016, the Venice Commission issued an opinion on the “remedial statute” on the Constitutional Tribunal of 22 July 2016²⁰, in which it states, for example, that the law does not take into account

¹⁸ Accessible on the Commission’s website ec.europa.eu.

¹⁹ Based on the discussion above, the Constitutional Tribunal completed a constitutional review of the law of 22 July 2016 by judgement of 11 August 2016. However, the judgement was never published by the government.

²⁰ Opinion of the European Commission For Democracy Through Law no. 860/2016 is accessible at www.venice.coe.int

the key principle of checks and balances, i.e. the independence of the judicial and the position of the Tribunal as the ultimate arbitrator in matters of constitutionality. The Commission appreciated the improvements over the previous versions of the statute yet it observed that they were insufficient as they “*could lead to a serious slow-down of the activity of the Tribunal and could make it ineffective*”, and put its independence at risk through overregulation and excessive control of its functioning by the executive branch of government. The Commission further noted that if the government continued to refuse to publish the judgements of 9 March and 11 August that “*would further deepen the constitutional crisis*” in Poland. This time the Commission’s session was not attended by a delegation of the Polish government, who boycotted the sitting yet nevertheless released a statement concerning the Commission’s opinion, claiming that “*...the opinion is unreliable and one-sided, and contains factual errors*”, “*discloses unambiguously the political involvement on the part of the experts who wrote it and who side with the opposition*”, and “*shows the hidden political purpose: to support the opposition and the unlawful conduct of the President of the Constitutional Tribunal regarding the naming of candidates for a future President of the Constitutional Tribunal*”.

When discussing the reactions of international institutions to the constitutional crisis in Poland we should also make note of a letter dated 19 October 2016 from ninety-one Polish and international non-governmental organisations that monitor human rights and democratic standards to the President of Poland and the Prime Minister, urging them to take the oaths from the duly elected judges of the Constitutional Tribunal and to publish all its judgements²¹.

At this point we should also quote art. 8 of the Concluding Observations of the UN Human Rights Committee of 31 October 2016 on the seventh periodic report of Poland: “*The State party should ensure respect for and protection of the integrity and independence of the Constitutional Tribunal and its judges and ensure the implementation of all its judgements. The Committee urges the State party to immediately publish officially all the judgments of the Tribunal; refrain from introducing measures that obstruct its effective functioning and ensure a transparent and impartial process for the appointment of its members and security of tenure, which meets all requirements of legality*”.

²¹ A Polish-English version of the letter is accessible at www.polityka.pl/tygodnikpolityka/kraj/_resource/multimedium/20100677

*under domestic and international law*²². Commenting on the document in the media, the Law and Justice Member of the European Parliament Ryszard Legutko referred to the UN Human Rights Committee as “...a UN agenda that does not really know where Poland is”.

3. Public Prosecutors Office

In Poland in October 2009 significant amendments were made to the Act on Public Prosecutors Office²³, resulting from taking into consideration, among others, recommendations of Committee of Ministers of the Council of Europe²⁴. In particular, they involved separation of previously joined positions of the Public Prosecutor General and the Minister of Justice, as a result of which the Public Prosecutor General has been recognized as the supreme body of Public Prosecutors Office, and the Public Prosecutors Office as the body of legal protection. Considering that, according to the regulations introduced at that time, the Public Prosecutor General was appointed for a 6-year term, this position could be taken up only by a person that has been an active judge or a prosecutor for at least 10 years. Dismissal of the Public Prosecutor General could be executed only by majority of the 2/3 votes of the statutory number of Deputies of Parliament in situation, where his annual report hasn't been accepted by the President of the Council of Ministers. These changes made the Public Prosecutors Office independent of the executive power in a significant way. Introducing tenure of official positions at various levels of Prosecutors Office was also a way of strengthening its independency. Changes made in 2009 increased the independence of the front-line prosecutors conducting preparatory proceedings by limiting the range of superior Prosecutors commands by excluding the possibility of giving that types of commands concerning the content of the specific procedural steps. Furthermore, considerable powers, in particular giving an opinion on candidates for positions in

²² The documents is accessible in English at www.tbinternet.ohchr.org

²³ they were introduced by the Act of 9 October 2009 amending the Act on Public Prosecution Office and other laws, Journal of Laws 2009, number 178, position 1375.

²⁴ In this context, one can mention, above others: Recommendation Rec(2000) 19 of the Committee of the Council of Europe on the Role of Public Prosecution in the Criminal Justice System, The Bordeaux Declaration of the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) on “Judges and Prosecutors in a Democratic Society”.

the Prosecutors Office, were granted to the National Council of Prosecutors. In summary, the changes made in year 2009 have helped in strengthening the independence of the Public Prosecutors Office as an institution, and individual prosecutors as its officers.

Public Prosecutors Office, alongside Constitutional Tribunal was an institution, which could be classified to a broadly understood bodies or agencies of legal protection, which have become the subject of changes shortly after the Law and Justice became a ruling party. Undertaking rapid²⁵ actions that made deep changes in the way the Public Prosecutors Office is functioning through “good change” was possible mainly thanks to the fact – contrary to Constitutional Tribunal or judiciary – that it is regulated by legal provisions which don’t have a constitutional rank, as a result of which making changes is possible by passing laws in Parliament by simple majority, where potential scope of the control of their constitutionality is narrow. Fundamental changes in this area were made by the “Act on Public Prosecutors Office” of 28 January 2016²⁶, which in significant way restricted the Public Prosecutions Office independency from the executive power, as well as independence of the front-line Prosecutors conducting preparatory proceedings.

Under the law in question the first action was to combine functions of the Minister of Justice and the Public Prosecutor General²⁷, by going back to the model which was in force before 2009 and undoing the effects of previously undertaken reforms. The union has been accompanied by a significant reduction in requirements for the candidates for the position of Public Prosecutor General, which allows to assign in this dual role active

²⁵ It should be noted that, while adopting the new Act on Public Prosecution Office the Law and Justice party made use of the so-called parliamentary path to propose a bill, which constitutes a much shorter and simplified way of proceeding in parliament.

²⁶ Published in Journal of Laws 2016, position 177, dated 15 February 2016.

²⁷ The role of Minister of Justice and Public Prosecutor-General has been combined when the Act on the Public Prosecutions Office came into force, i.e. on 4 March 2016. By itself, the joining of these two positions, while granting very broad supervisory and investigatory powers to the Public Prosecutor-General, causes that the same person on one hand, through subordinate prosecutors, becomes an actual participant of every criminal procedure, and on the other becomes an entity that supervises courts, which has become the basis for the complaint of National Council of the Judiciary of Poland to the Constitutional Court on the so-called “administrative supervision”. Hence one of demands of extraordinary congress of judges from 3 September 2016, according to which the administrative supervision of common courts should be given to the First President of the Supreme Court.

politicians²⁸. Trust for the institution of Public Prosecutor General, in the light of the Act of 2016, is undermined by the method of selection for the position (decision of the simple majority of the Lower Chamber of the Polish Parliament) and the potential liability which are strictly political²⁹. It is significant that embedding the position of Public Prosecutor General in the political mainstream is accompanied at the same time by significant increase of its powers, also in comparison with the law before 2009, when the positions of Public Prosecutor General and the Minister of Justice were one and the same. Currently the Public Prosecutor General in particular possess the ability to request, in a specific case, to carry out inquiry procedures directly related to the ongoing investigation (in terms of surveillance the content of correspondence or mail or use of telephone tap) and also get acquainted with the materials gathered during such activities, however the Act on Public Prosecutors Office does not provide any admissibility requirements to take this kind of action by the Public Prosecutor General, which raises the risk of abuse³⁰. The Public Prosecutor General has also the right to issue commands, likewise regarding the content of procedural actions in each individual case (art. 7 § 2 and 3 of the Act), to overrule or change the decision of a subordinate prosecutor (art. 8 of the Act)³¹ and the right to take over the cases conducted

²⁸ In particular under the Act of 2016 the requirement, that the candidate for the Public Prosecutor-General needs to have at least 10-years of work experience as a prosecutor or a judge adjudicating in criminal cases, has been given up. As a result, the requirements regarding qualifications of the Public Prosecutor-General are presently lower than these for prosecutors of the lowest level of the prosecutor's office, and even these for assessors of prosecutor's office.

²⁹ According to the Act of 2016, submitting an annual activity report is not required, therefore monitoring the activity of Public Prosecutor-General will only have an interventional nature, based on, inter alia parliamentary questions, and his/her removal from the office will be possible only when the Parliament holds a vote of no confidence for the Minister of Justice -Public Prosecutor-General.

³⁰ The art. 57(3) of the Act on Public Prosecutions Office, dated 2016, enables him to do this.

³¹ It has been legitimately pointed out in source literature, that equipping Public Prosecutor General with such wide capabilities to directly influence the course of pending proceedings causes him/her to become a "superprosecutor" equipped with broad investigatory powers, as a result of which a position of the current Minister of Justice – Public Prosecutor-General Zbigniew Ziobro, who is also a deputy in Polish parliament violates the of art. 103 § 2 of Polish Constitution, which provides that the public prosecutor cannot have at the same time a seat in Parliament.

by subordinate prosecutors (art. 9 § 2 of the Act)³². Every prosecutor, superior or subordinate, has the above-mentioned set of rights, which significantly reduces the independence of prosecutors conducting individual proceedings. To some extent the position of subordinate prosecutor is reinforced by the fact that the most “sensitive” commands, those concerning specific procedural actions, must be issued in writing and if the prosecutor does not agree with this type of command he may request for its change or to be excluded from its realization or from participation in the case. On the other side, in such a situation, after excluding the prosecutor who conducted the case so far, the superior prosecutor can appoint in his place a person more dispositional to superiors. In the opinions on the draft of the law of 2016 legitimately brought up the question that this type of solution can lead to “manual control” of individual proceedings by superior prosecutors³³.

The new Act on Public Prosecutors Office of 2016 also strengthens the power of General Prosecutor in the matter of staff policy, at the expense of weakening the positions of the heads of other levels of the Public Prosecutors Office. Namely, the Public Prosecutor General, at the request of the National Public Prosecutor, appoints and dismisses chief prosecutors of high regional, regional and district prosecutors offices (art. 15 § 1 of the Act on Public Prosecutors Office), which is tantamount to resignation from the requirement of tenure of the official positions of the prosecutor’s office, which allows the General Prosecutor to introduce any arbitrary changes in official positions in the prosecutor’s office, thus exposes official procurators to the risk of subjection³⁴. What’s more, although as a general rule according to the new law candidates for vacant positions in district prosecutor’s office are appointed after winning a competition for an opening, however

³² Granting the General Public Prosecutor mentioned privileges was appealed on 18.04.2016 by Ombudsman to the Constitutional Tribunal, as violation of the principle of citizen’s trust to the country and the right resulting from art. 2 of the Constitution.

³³ Michał Magdziak (in): “Zmiany w prokuraturze...”, the analysis of Aft on Public Prosecutor Office under the aegis of the Foundation for Civil Rights Forum from 03.03.2016, No. 7/2016.

³⁴ On the basis of the Act on Public Prosecutor Office of 2009 heads of the Appellate and Regional Public Procurator’s Office were appointed for 6-years terms, and the heads of District Public Procurator’s Office – for 4-years terms, while their dismissal before the expiry of the term could take place only in case exhaustively listed in the Act (eg. In the event of permanent incapacity to perform the duties due to illness).

art. 80 of the Act on Public Prosecutors Office gives the Public Prosecutor General the right to appoint “in justified cases” to this position a candidate without conducting a competition³⁵. While discussing the newly introduced possibilities for almost any and uncontrolled development of personnel policy in the public prosecutor office by the General Prosecutor it is impossible not to mention separate law accompanying the “Act on Public Prosecutors Office” called “Regulations implementing the Act on Public Prosecutors Office”³⁶. The provisions of this law seemingly introduce a reorganization of the public prosecutor office, in fact – apart from elimination of the military public prosecutor’s office – the structure of the public prosecutor’s office almost hasn’t changed, except for changes in terminology. Namely, going from the top of the hierarchy of the public prosecutor’s office the General Public Prosecutor Office has been replaced by the National Public Prosecutor’s Office and the Appellate Public Prosecutor’s Office by the Regional Public Prosecutor’s Office (reducing the number of units on this level of the Public Prosecutor’s Office). Carried out, in fact apparent reorganization of the public prosecutor’s office units has been treated as a pretext for the re-appointment of prosecutors to particular units, exchanging many superior prosecutors and justification to transfer “unwelcomed” prosecutors to different official positions. Accomplished in this way verification of employees (mainly official) of the public prosecutor’s office was carried out in an arbitrary manner by Public Prosecutor General, who decided whether the prosecutor will be appointed to the newly created, in place of abolished, unit of the public prosecutor’s office or transferred to another official post. In this mode, more than 100 prosecutors on managerial positions eg. in the appeal and regional prosecutor’s offices were transferred to the ordinary posts in the lower public prosecutor office (district). To avoid humiliation and politicization about 400 prosecutors, who were expecting degradation, decided to take advantage of early pension entitlements. Another group of

³⁵ In September 2016 General Public Prosecutor took advantage of this opportunity by appointing to the post of Regional Public Prosecutor in Krosno without an opening competition daughter of Stanisław Piotrowicz – the current deputy of Law and Justice party, and in times of communism prosecutor accusing the anti-communist opposition, who recently became famous by stating that he was the main architect of “repairing” law concerning the Constitutional Tribunal while representing in parliament during speeches a group of deputies from Law and Justice part, which prepared the bill.

³⁶ Published in Journal of Laws 2016, position 178.

50 prosecutors, who have been demoted, in response to implemented changes are going to establish an association. This association, called Lex Super Omnia (Law Above All) is currently in the process of registration, its aim is, among others, defending prosecutors against harassment and pressure, and to bring the independence of the public prosecutor office to be written down in the constitution³⁷. Members of the forming association submitted or will submit a complaint to the European Court of Human Rights in Strasburg in mater of their transfer to a lower positions, in connection with this year's reform of public prosecutor's office. The complaining prosecutors are bringing up that they have been demoted, among others, without any justification and without the opportunity to appeal from those decisions, which where arbitrary. The Ministry of Justice takes a position that the transfers to other official tasks were held in accordance with the regulation in force and preserving the rights of individuals whom the decisions concerned.

Proceedings against the law "Regulations implementing the Act on Public Prosecutors Office" has been taken by Ombudsman to the Constitutional Tribunal to verify its conformity with the Constitution³⁸. To this day the complaint hasn't been recognized by Constitutional Tribunal.

The new law authorized the Public Procurator General to pass on to media, without requirement to obtain the consent of the investigating prosecutor, information from ongoing preparatory proceedings, with the exception of classified information (art. 12 § 2 of the Act), whereas there is no record of the obligation to maintain, while passing on information, limitations resulting from the code of criminal procedure or the press law. This type of procedure

³⁷ The first application for registration of the association was rejected on formal grounds by court in Warsaw. It is significant that to the procedure for registration of the association joined the public prosecutor's office in Warsaw, whose representative acquaint oneself with the case files and asked for a photocopy of the memorandum of association and the list of its members. Although such activities are permitted under the law, it draws attention to the fact that during the registration of the other prosecutors associations during rules of previous government public prosecutor's office never used those powers.

³⁸ Ombudsman accused the appalled Act, among others, inconsistency with the principle of citizens trust in the country and law (Art. 2 of the Constitution), damage to the reputation of the prosecutors through their unjustified degradation (Art. 47 in conjunction with Art. 31 § 3 of the Constitution), and violation of the right to trial by the lack of possibility to appeal from the decision of degradation (Art. 45 § 1 of the Constitution).

does not protect against fraud³⁹, in particular before breach the presumption of innocence by giving the media information⁴⁰.

The law Act on Public Prosecutors Office also allows to release from disciplinary responsibility procurator who violates the law if he acts “in the interest of society” (art. 137 § 2 of the Act), which is the kind of exclusion of liability difficult to accept towards the person legally obliged to uphold the rules of law in country.

It should be noticed that the extension of the General Public Prosecutor competence and the subordination of the prosecutors to the political factor is accompanied by introduced on the basis of criminal procedure transitional legal rule art. 5 of the Act of 10 June 2016 Amending the Act Code of Criminal Procedure and other laws⁴¹, which significantly limits the cognition of the court in criminal cases in favour of the public prosecutor’s office. This legal rule gives public prosecutor’s office right, in respect of cases which were submitted to the Court before the entry into force of the Act, to demand the return of the case to the public prosecutor’s office in order to complete the investigation or probe, if there is a need to supplement the evidentiary proceedings. According to the amended version of the legal rule⁴² this type of application it is to be binding for the court and the parties are unable to appeal against court decision to return the case to the public prosecutor’s office. What’s more, the legal rule allows for the submission of such a request, even after passing an invalid judgment, but in such a case the appellate court is required to overrule the order and hand over the case to the public prosecutor. After returning the case the prosecutor has 6 months for submitting a new indictment or is-

³⁹ Vide: Opinion on the bill of the Helsinski Foundation of Human Rights No. 116/2016/MPL of 19 January 2016.

⁴⁰ Fear of abuse in the media policy is very likely due to the fact, that the current General Public Prosecutor – the Minister of Justice Zbigniew Ziobro, during his previous holding of this post in the years 2005–2007, became “famous” by giving a statement during press conference in 2007 in which, in a criminal case in which the doctor was suspected, among others, of medical malpractice, at an early stage of the proceedings, Mr. Ziobro suggested that the doctor was responsible for the deprivation of the patient’s life, which the European Court of Human Rights held to be a violation of the presumption of innocence (case Garlicki against Poland, judgment of 14 June 2011, appellation No. 36921/07).

⁴¹ Published in Journal of Laws 2016, position 1070.

⁴² The government draft of amendment of the provision in question was referred for consideration at a meeting of the Council of Ministers on 5 September 2016, then directed to further proceeding as a “print No. 851”.

sue another decision on the future course of proceeding. According to the apt written opinion of the Management of the Polish Judges Association “Iustitia” the legal rule, which – at the request of the prosecutor – obligates the court of first instance to overrule the order of the court of first instance violates the principle of a court of justice (art. 175 of the Constitution), furthermore violates the constitutional right to public hearing of their case (art. 45 of the Constitution). The resolution also highlights the fact that this legal rule can be used by politicized (the last word added by the authors of the article) public prosecutor office in an instrumental way, eg. In order to deprive defendant of the rights to obtain an acquittal judgment or on the contrary – to discontinue the case against a individual, after its returning, to prevent his conviction.

Another changes introduced in the last period of time, limiting the extend of the cognition of the court in favor of expending powers of the public prosecutor office relate to the introduction to the Code of Criminal Procedure art. 168 b and changes in art. 237 a⁴³. Under those legal rules, the so-called expression “subsequent consent”⁴⁴ for use in criminal proceeding the materials in the form of the recording (tapping) phone calls, which till now was within the competence of the courts, now has been granted to the public prosecutor’s office. Moreover, insofar as the term “initial consent” against a person for recording of telephone conversations is permitted only for fully and precisely defined in the act the catalogue of most serious criminal and tax offenses, whereas the phrase “subsequent consent”, towards interlocutor of the person towards who the “initial consent” was given, it is possible for any type of crime, and in addition the decision to use that evidence in criminal proceedings is not subjected to any time limitation. In this situation, there may not be surprising that the described amendment to the Code of Criminal Procedure has been appealed by the Ombudsman to the Constitutional Tribunal as violating the right to privacy guaranteed by Constitution (art. 47 of the Constitution), freedom and protection of the secrecy of communication (art. 49 of the Constitution) as well as the ban on obtaining and collecting

⁴³ They were introduced on the basis of Art. 1 (35 and 42) of the Act of 11 March 2016 on Amendment of the Act on Code of Criminal Procedure and others acts (Journal of Laws 2016, position 437).

⁴⁴ The so-called “subsequent consent” allows in criminal proceedings the use of telephone records against other persons, that talked with the people against whom the Court, at the request of the Public Prosecutor, has previously applied operational control in form of recording telephone conversations.

information on citizens that are not necessary in a democratic country ruled by law (art. 51 § 2 of the Constitution).

In summary, it can be stated that under the act on public prosecutor office of 2016 the personal union of the positions of the Minister of Justice and the General Public Prosecutor was introduced, simultaneously with extension of the General Public Prosecutor power including within his competence the possibility to directly interfere in the typical investigation activities. Taking in the account that the independence of the prosecutors conducting various proceedings was limited, as a result the model of public prosecutor's actions was achieved, where the political factor in form of ruling party can influence the actions of public prosecutor's office. In this way the public prosecutor's office can become a tool of political struggle. If you add to that the exchange of personnel on the level of heads of the higher level of public prosecutor's office made on the pretext of reorganization we receive the image of public prosecutor office potentially fully dispositional towards the ruling camp. These circumstances, in conjunction with the ability to "pull" by public prosecutor's office the criminal cases from cognition of court (even though invalid), as well as a lot of freedom in collecting and using of the operational materials in form of tapping telephone conversations, must arouse a deep concern from the point of view of protecting freedom and civil rights.

4. Courts of common law

Changes in courts of common law in Poland, which could arise constitutional doubts, are from the formal point of view much more difficult to introduce than changes concerning public prosecutor's office. It's due to the fact that constitutional rights guarantee independence of judicature from executive authority and the independence of the judiciary, hence realizing the triple division of the authority. These rights ensure that, until Constitutional Tribunal remains independent from executive authority and its actions have not been totally paralyzed, the activities of courts of common law are constitutionally protected. Present Minister of Justice-Public Prosecutor General Zbigniew Ziobro, gave an interview in a right-wing TV program in September this year in which he clearly stated that changes in the administration of justice will be introduced after: "*the dispute concerning Constitutional Tribunal has been settled*". Judges generally treat it as a signal that planned changes may be against valid constitutional order, especially violating the triple divi-

sion of the authority, the independence of judicature and the independence of the judiciary. According to the information coming from the governmental circles the plan of the reform of courts of common law is almost ready, however no projects have been sent for opinion to proper organs, especially, to the National Council of Judiciary. In the same interview Minister of Justice-Public Prosecutor General introduced only some general aspects concerning the planned changes. In particular, he mentioned that rules of disciplinary proceedings would be changed in such a way as to exclude the competence of corporation of judges; and he presented two possibilities being discussed. The first is the introduction of so-called people's courts in which: "*social lay participant*" would state "*whether breach of rules has occurred, and not the colleagues from the corporation*". The second is the idea to set up disciplinary chamber in the Supreme Court (likely with "*social lay participant*") to settle up disciplinary matters. Also, Jarosław Kaczyński indicated that "*Corporation judicature of judges has not fulfilled its promises. Verdicts concerning guilt are very rare.*" It's interesting to note that according to a study, performed by National Council of the Judiciary, since 2007 only 12.8% of all disciplinary cases were found innocent while 87.2% were found guilty. Another change would concern "*rules of introducing judges into their profession and promoting them*". One of basic changes would concern the organization of administration of justice itself. Now-existing three-level structure of courts of common law includes district courts, regional courts and appeal courts is to be replaced by 2-level structure. However, it's not clear which level would be liquidated; the lowest one, namely district courts or the highest one – the appealing courts. Another plan is to create a "universal" position of "a judge of common court" which will enable one to verify all judge's appointments. Other idea is to connect all district courts into one big regional court where the district courts would become only non-resident departments which would allow to transfer judges from one to another without any problems. If such a solution is introduced, then, the constitutional rule stating that judges must not be transferred will become illusion. There is a common belief among judges that this future re-organization is only an excuse – the same situation was with re-organization of public prosecutor's office – in order to employ as court presidents only judges who are trusted by the minister and degrade those who "are treated by a good change as not trustworthy and too individual".

Until now, the government formed by the party Law and Justice has not conducted a basic reform of judicature system yet, as they have announ-

ced. However, it does not mean that the government and parliament do not take numerous actions which influence the functioning of courts of common law. These actions can be divided into two categories. The first one means different activities by the President and Minister of Justice which are aimed at widening the competence of executive authority over the judiciary one. The interpretation of existing rules and regulations makes it easier to execute it. These activities arouse serious legal doubts, and are undoubtedly in contradiction with present legal customs, which results in a change of balance in authority which has been worked out for years. The most important example of such action is granting a pardon by President to ex-director of Central Anti-corruption Bureau, President's refusal to nominate 10 judges of common courts and withdrawal of delegation to a judge to the Regional Court in Warsaw. The second category of actions taken so far includes legislation changes, both already introduced and prepared in official planned dispositions or other legal acts.

Moving on to more precise description of the action concerning the first, mentioned above category, the first one-chronologically – was granting a pardon by President to ex-director of Central Anti-corruption Bureau – Mariusz Kamiński – and his three employees. They were convicted by District Court in Warsaw for transgression of powers and illegal operational actions for which Mariusz Kamiński was sentenced to prison for three years together with interdiction to take any position in state administration for 10 years⁴⁵. After that sentence the appeals were lodged. However, in November 2015, before the appeals were examined, President granted a pardon to Mariusz Kamiński and three others who were invalidly sentenced in this case. President's decision caused a lot of controversy; not only concerning its justification but also legal permission for such action. Although no one has denied the President's right to grant a pardon to convicted people, but it was the first case in a post-war history of Poland to grant a pardon to somebody whose judgement of the court of the first instance has not become final and valid,

⁴⁵ In fact, in 2007 when the party "Law and Justice" had ruled for the first time, Central Anti-corruption Bureau directed by Mariusz Kamiński carried out provocation against the leader of a coalition party-Samoobrona (Self-defence) – which was to lead to a controlled bribery. In justification to a sentence concerning this case the court stated that Central Anti-corruption Bureau incited the corruption whereas there was no legal and factual basis to start such anti-corruption operation.

so the criminal responsibility of a given person has not been settled⁴⁶. What's more, this decision was passed without following the mode of proceedings described in the code of criminal procedure, moreover, President or the employees of his chancellery did not read the dossier, so it was quite arbitrary. What seems to be rather tricky is the fact that President commenting his decision in media said: *"...I have decide, in a special way, to release administration of justice from this case, in which one could always say that courts had political supervisors, and to end the problem once and for ever"*. The problem is that it is much easier to suspect President, being a nominee of a ruling party, of having political motivation of action than courts which are independent. By the way, one should add that just after granting a pardon to Mariusz Kamiński, without a final and valid verdict, he was appointed as Minister-Coordinator of Secret Service which position is immanently connected with operational techniques, and that's why it arouses objections concerning protection of human and civil rights.

Another controversial decision of President Andrzej Duda was a refusal to nominate 10 judges of common courts introduced by National Council of Judiciary on 22 June 2016. According to common practice President of Polish Republic has had only a honorary right to hand in judge's nominations to those who took part in competitive selection in given courts and, then, were appointed by National Council of Judiciary. The only similar situation in the post-war history of Poland took place in 2007, during the reign of Law and Justice, when President Lech Kaczyński refused to nominate 9 judges. President's right to refuse nomination arouses serious legal doubts, as it is not directly stated in Constitution. One should notice that the judges whom Lech Kaczyński refused nominations in 2007 used up all legal measures to change the decision, however, both the verdicts of Constitutional Tribunal and Supreme Administrative Court were negative for them. One way or another, only those Polish Presidents appointed by the party "Law and Justice" have usurped the right to turn down the judge's nominations. Coming back to President Andrzej Duda's decision one should point out that it was absolutely arbitrary due to the fact that it had no justification whatsoever.

⁴⁶ One should point out now that a very general regulation art.139 of Constitution does not settle when granting a pardon can be introduced, however, the only implementing rules of statutory rank are included in the code of criminal procedure, especially in Chapter XII, entitled "Procedure after the verdict is valid and final".

This very type of decision led to media speculations where we could learn that at least some of the non-nominated judges could have been engaged in legal procedures where the verdicts were adverse for members of “Law and Justice” party. President’s desire to strengthen his influence on the process of judge’s nominations is clearly seen in changes in the act of National Council of Judiciary which are discussed below.

Potential motif of revenge on judges who gave adverse verdicts for the members of the ruling party is even more obvious concerning the individual decision of Minister of Justice-Public Prosecutor General Zbigniew Ziobro. It followed a withdrawal of delegation to a judge of District Court in Warsaw to adjudge in a court of higher rank in October 2016. This decision was quite astonishing as there was no slightest objection to the work performance of this judge; there was no legal procedure against her and her work was highly appraised by her superiors. However, journalists have established that some years ago she conducted proceedings in which Minister of Justice-Public Prosecutor General Zbigniew Ziobro was one of the parties. He lost the case and was fined for absence without serious excuse, and on top of that, she decided to charge him with the costs. It is significant that the decision concerning the withdrawal of delegation was signed personally by Zbigniew Ziobro, not by any of his deputies. Ministry of Justice commented on these press articles and gave an official statement in which they claimed the delegation was withdrawn due to the fact the judge “showed her extraordinary incompetence” in conducting proceedings in a simple case which made the headlines. As it turned out later, the judge had only a brief contact with the case, namely, it was a road accident and she refused to deal with it in a speeded-up procedure, due to the fact that she doubted the soundness of mind of the accused. It is worth mentioning that later medical examination of the person who had caused the accident proved her limited soundness of mind, so judge’s incompetence must not be raised. The statement concerning this case was issued by National Council of Judiciary in which we can read: *“National Council of Judiciary expresses their negative opinion concerning the activities of Minister of Justice as they undermine the trust that citizens have towards the legal system and the decision concerning the withdrawal of delegation has no legal basis at all”*.

Some weeks before, there was a complaint case brought by private prosecution in a court in Warsaw. A parliament member sued Patryk Jaki – Deputy Minister of Justice, because the latter one accused him in public. During

the trial Jaki made an attempt to threaten the leading judge to start a disciplinary procedure against her after she had given a negative for him verdict. Again, National Council of Judiciary issued a statement in which they stated: *“the respondent Patryk Jaki, being a member of Polish parliament and keeping the position of deputy minister of justice, has made an inadmissible attempt to put pressure on the Court by his statements addressed to the judge(...) Taking into consideration his profession and public function supervising the courts in respect to administration, Patryk Jaki should restrain himself from any actions which could be treated as violation of the independence of the judge or the court (...). In the evaluation of National Council of Judiciary, by his behaviour, Patryk Jaki violated the dignity of the mandate of Member of Parliament of the Republic of Poland and his position in the Ministry of Justice”.*

Moving on to the second category of actions taken so far by the government of “Law and Justice”, concerning legislation changes, both already introduced and prepared in official planned dispositions or other legal acts, one should point out that, while each of these legislative initiatives could seem quite natural in itself, however their amount in such a short time must arouse anxiety. Moreover, one can observe a general tendency to increase the influence on courts’ activities together with clearly greater reprisal activities towards judges (in comparison to other categories of public servants) which is a worrying factor. On the one hand no one questions the necessity of change in the administration of justice leading to greater efficiency, but it is hard to justify mentioned above changes.

One of novelties introduced by a new act concerning public prosecutor’s office is the creation, on the level of General Prosecutor’s Office, a Department of Internal Affairs whose task will be *“to conduct and supervise the preparatory proceedings in cases concerning intentional crimes prosecuted by indictment committed by judges, public prosecutors or assistant judges.”* The staff of the Department of Internal Affairs will be employed by Minister of Justice-Public Prosecutor General. The fact of placing this new unit on the very top of the prosecutor’s administration may suggest that corruption among judges and public prosecutors is a serious problem in Poland which needs definite action. However, the statistics shows definitely there is no such need. As it turns out, after over 6 months of functioning, including the cases started before the Department of Internal Affairs was created, there are only 24 proceedings, 19 of which concerns public prosecutors and only 5 concerning judges. Taking into account that in Poland there are about 10 000 judges and

7 000 public prosecutors, mentioned above number of cases should be treated as tiny and insignificant⁴⁷. Therefore, the fact of creation of such a unit cannot be treated otherwise than as an attempt to depreciate or even to threaten the judges and public prosecutors. This solution, according to National Council of Judiciary, violates art. 32 of Constitution which guarantees every citizen equal treatment⁴⁸. However, the introduced solution excludes proper public prosecution offices from settling the matters concerning judges and public prosecutors and sends them to special branches, following the arbitrary decision. That is why National Council of Judiciary has brought a suit against it to Constitutional Tribunal.

As it seems, similar categories should be taken to evaluate the project of an act of September 2016 in which we can see a new type of crime: a passive bribery. According to, it taking a material or personal profit by a judge, lay judge or public prosecutor in connection with the ongoing proceedings will be a crime (so the strongest category of criminal offences in a Polish criminal code) where the punishment can be a 3–15 – year sentence⁴⁹. On the one hand, we should agree that accepting a bribe by a judge is a serious offence, but, on the other, looking back from 1989 such a situation was so rare that criminal policy in this respect gives no justification for tightening the rules. It is significant that GRECO report distinguishes Poland as a post-communist country which has no problem with corruption in the administration of justice. Besides that, it is difficult to find any justification for clear “distinction” of judges, public prosecutors and lay judges when comparing to other public servants who, potentially, can be also given a bribery. Moreover, their decisions and actions may influence a lot more people than judges, who usually settle individual disputes (as it concerns the government, parliament or chief executives in public administration).

⁴⁷ One should point out that the creation of the Department of Internal Affairs is not the only example of a new structure of public prosecutor's office which has no proper justification in a factual structure of crime. Equally untypical is the creation; on the level of Regional Public Prosecutor's Offices (so a high one), units whose main aim is to deal with matters concerning medical mistakes, while these units are often created also in Regional Public prosecutor's Offices.

⁴⁸ This regulation states: “Everybody is equal before the law. Everybody has the right to be treated equally by state authorities”.

⁴⁹ Following the ordinary type this crime is charged with 6-month to 8-year sentence.

On 5 September 2016 the government accepted a project of an act assuming that judges' statements concerning their property are to be public, while intentionally untruthful statement would be treated as a criminal offence. Nowadays, judges do present statements about their property, however they are sent to a proper tax office – not for public knowledge – and if the statement contains untrue facts; there is only disciplinary responsibility. Critics of the project claim, quite correctly, that publication of judges' statements concerning their private properties may be a threat to their safety, especially in relation to judges who deal with organized crime. The same project of the act introduces also general increase in the disciplinary responsibility of judges by lengthening the period during which a disciplinary procedure may be started: from 3 to 5 years. At the same time it introduces a disciplinary penalty, not known before, which means a decrease in judge's earnings ranging from 5–15%, from 6 months to 2 years. If such a penalty is applied the judge could not be promoted for 5 years and could not hold any public positions.

National Council of Judiciary – a collective organ created in accordance with the constitution – has an essential significance for protecting the independence of judges and courts in Poland. It consists of: judges elected by judges' self-government, parliament and senate members chosen by Parliament and Senate, President of Supreme Court, President of Supreme Administrative Court, Minister of Justice and President's representative. The Council has their rights to act which are guaranteed by constitution and some of them are: to choose candidates for judges and present them to president for approval, to resolve a set of rules of professional ethics of judges and to express their opinion concerning legal acts. Besides that, the Council has a right to address Constitutional Tribunal to investigate whether the acts concerning the independence of judges and courts are in accordance with Constitution. Taking into consideration Council's rights mentioned above and its function, all the changes concerning its rights or the status of its members might easily violate the balance among different forms of power. Therefore, one becomes more and more concerned with the type of changes introduced by the parliament majority. According to a planned project of the act, the principles of choosing judges who are to become Council's members, have been changed and it was connected with the expiration of mandates of present members. These changes include only judges; not other members of National Council of Judiciary. Another change increases President's competence concerning the

judge's nomination process, so that it obliges the Council to present two candidates for the position of a judge in a situation where more than one candidate has applied. According to the opinion of National Council of Judiciary both of mentioned above changes are in discrepancy with constitution. Especially, the expiration of mandates of present members violates art.187 part 3 of Constitution where we can read that the term of judges – chosen members of the Council – lasts 4 years. As for another planned change, namely the obligation to present at least 2 candidates for every judge position leaves President the choice of the right candidate, (without presenting any requirements how to choose and without a possibility of questioning the President's decision). However, according to constitution only National Council of Judiciary has the competence to choose judges and President can only appoint them for their position. Finally, the Council claimed that a project of the act rejecting Presidents and Vice-Presidents of Courts the right to be members of the Council violates Constitution as well. One may suppose that the Parliament will be discussing the act concerning National Council of Judiciary after having taken control over Constitutional Tribunal.

The role of National Council of Judiciary is even more essential as it also appoints vacant positions in the Supreme Court which, in turn, controls and supervises, for example, validity of general and presidential elections. Jarosław Kaczyński in his interview for Onet.pl – the internet site – stated that: *“After flattening of the structure (of courts – authors’ remark) the function of Supreme Court will have changed. It will have become a second appeal instance for some cases. Therefore it will have to include more members because, as it is now, it will not be able to deal with so many new matters.”* The Courts of Appeal, which are now the second instance for more serious matters, deal with over 100 000 cases a year which means that after introducing a suggested “flattening of legal structure” the Supreme Court may receive 10 times more cases than now. Such a solution will either paralyse the performance of the Supreme Court or result in the necessity to increase its personnel, so present judges will become its meaningless minority. Possibility of “taking control” over the Supreme Court quickly becomes more and more probable due to the fact that the leader of Law and Justice party, speaking at a press conference in mid-September this year, stated: *“Supreme Court played a very negative role during the years 1990–2016 – a role of a defender of old order and it is responsible for the decisions that one cannot punish criminals in judges’ togas, one cannot sue them; and many of them should deserve the strictest pu-*

nishment. Today we do not have the capital punishment, however they surely deserve a life sentence as they are common murderers.” It is worth mentioning that Jarosław Kaczyński did not present any example which could justify his statement, not to mention more shocking fact, that the Extreme Court is probably the most verified public institution in Poland. It is proven by the fact that it includes only one judge who had been there before 1990 and was positively verified after the regime change.

Another legislative changes which will increase the impact of Minister of Justice on the activities of courts concern the directors of courts who take responsibility for the courts' finances. Nowadays, directors are supervised the court presidents and are chosen in special competitions. According to a project of an act court directors will be directly supervised by Minister of Justice who will appoint them without any competition procedure. This project of an act does not present any base for withdrawing the directors, leaving it to an arbitral decision of Minister of Justice. A minister who gets a decisive and uncontrolled influence on courts' finances will be able to paralyse the work of every court which has been evaluated as working not in his way.

Another characteristic legislative change, introduced lately in administrative of justice, is the change of the Regulations of Courts' Working Activities introducing the increase in working hours of the court spokesmen which results in much greater workload for them. A great number of spokesmen definitely claimed that triple division of authority and independence of judges must be unchanged. Mentioned above change has led to the fact that many spokesmen, especially in big courts where their workload is enormous, are not able to fulfil their duties properly, so, the courts are becoming “silent”. Apart from that another change has been introduced lately in the code of penal procedure (art. 360 § 2) according to which during the judicial proceedings, in which the given court has been a formal host, however now it is the public prosecutor who *de facto* has a full control over making a decision concerning the openness of the trial. Many people think it to be a sign which means that public prosecutor's office would like to conduct so-called “show trials” and in such cases the control over the openness of the trial is essential.

All the mentioned above legislative activities of present parliament, together with factual actions of the president and executive authority; not to mention the increasing crisis concerning Constitutional Tribunal, led to great concern and anxiety among judges. They fear that their status which enables

them to fulfil their duties concerning the administration of justice with independence is endangered to great extent. That is why, under the supervision of National Council of Judiciary together with judge societies, there was held an extraordinary congress of Polish judges in Warsaw on 3 September where about 1000 judges were present out of 10 000 judges working in courts of common law⁵⁰. After very long discussions the congress passed 3 resolutions which contained, among others, the postulates to transfer the administrative supervision over courts to the First President of the Supreme Court (at present they are supervised by Minister of Justice-General Public Prosecutor), to introduce a rule of creating and dissolving the courts only by a legal statute, to limit the influence of political factors on the choice of judges, to increase the rights of judges' self-government and to respect the right to protect the rights acquired by judges earlier. All these matters have to be taken into consideration when introducing future changes in the judiciary structure. In another resolution the Congress appealed to the executive authority to respect and publish the verdicts of Constitutional Tribunal and objected to an arbitral president's refusal not only to appoint the judges who were introduced by National Council of Judiciary, but also to receive the swear from the judges who were legally chosen to be the members of Constitutional Tribunal. After the resolutions of the Congress were published, a numerous number of assemblies of judges from Regional Courts and Appeal Courts also passed resolutions in which they gave their full support to the position taken by the Congress. However, at the same time, some of mass media connected with the present parliament majority started attacking judges' circles. The politicians from the ruling party have been using so-called "war rhetoric" such as: " *we won't move even one step back*" (Joachim Brudziński – deputy speaker of the Parliament), or: " *we are in a state of war with juridical elites*" (Ptryk Jaki-deputy minister of justice). All those activities of politicians provoke mass attack on judges in the internet and some mass media. The described situation led to the fact that one of non-governmental institutions "Institute of Law and Society" (INPIR), together with "Amnesty International" agreed to monitor and record the acts of hatred against Polish judges.

⁵⁰ The number of judges who were keen on taking part in the congress was much bigger, but limited accommodation possibilities made it impossible to organise a congress with more participants.

5. Conclusion

The aim of this work has not been a complex discussion concerning all the introduced changes and undertaken activities in the administration of justice by the government and parliament which have exercised authority in Poland since last October. Such a discussion within one, however big article, would not be possible. It is also worth mentioning that, besides the changes mentioned above, there have been some other ones which should have positive evaluation, at least as having good intentions and the right direction⁵¹.

The above ascertainment does not change the fact that a definite majority of either introduced or planned changes which have been presented above arouses anxiety in judges' circles to such an extent that the atmosphere in Polish administration of justice is getting from bad to worse. The ruling party "Law and Justice" has been acting consistently for the last year not only to subordinate or paralyse the work of Constitutional Tribunal, but also to introduce changes in the act concerning Public Prosecutor's Office which will lead to its subordination to political factor. Finally, having taken into consideration factual action aiming at the increase of power of executive authorities towards courts of common law, together with legislative solutions which contain repression elements concerning the judges working in courts of common law, one may easily state that the reform of judiciary system will be directed into limitation of the independence of judges and courts. What's more, the work on the reform of judiciary system is being carried out in secrecy and without any consultation; not to mention National Council of Judiciary. There is even more concern relating to the fact that solutions introduced in the future into judiciary system will seriously violate present, binding constitutional standards which can be deduced from the announcement of Minister of Justice-General Public Prosecutor who stated that: "the right" reform of judiciary system will take place after "*the crisis concerning Constitutional Tribunal has been settled*". According to his nomenclature it means either taking control

⁵¹ The example of such changes is, among others, the change in the act concerning Public Prosecutor's Office or the Regulations of performing official duties by judges, which aims at increasing the workload of judges and public prosecutors who hold public functions. However, it seems that these acts do not take enough consideration in respect to the problem that in bigger units supervised by particular post-holders it may be difficult to run them efficiently when more and more extra tasks are being added to their duties.

over the tribunal by a ruling party or paralysing its activities; whatever the case may be – newly passed acts will have no effective control regarding their accordance with constitution. Taking all that into consideration one can be deeply concerned with the fact that, on 19 December this year, the term of present President of Constitutional Tribunal Andrzej Rzepliński comes to an end. It was him who, quite firmly, has protested against numerous trials of political forces to influence the Tribunal activity, so this moment is naturally seen by the politicians of Law and Justice party as the right one to take their control over the Tribunal actions.

It may seem that some idea about the intentions of the ruling party towards judicial authority is given in the project of a new Polish constitution, prepared by the party Law and Justice and published in the internet. The project did not come into force after it had been publicised by journalists at the end of 2015, as aiming at introduction of authoritarian government, and was removed from the internet site. The spokeswoman of the party Law and Justice gave a comment then that it was only one of many discussed suggestions which were no obliging. According to art.128 part 2 of mentioned above project of the constitution, a judge “*whose behaviour states that they are unable or unwilling to perform their duties in a reliable and serious way which is consistent with constitution*” may be withdrawn from their function by the President. Considering the fact that mentioned above article enables the President to withdraw the judge on the base of not fully specified clause, one may come to the conclusion that this rule not only limits, but in fact, cancels the judge’s independence.

During a special congress of Polish judges on 3 September this year professor Andrzej Zoll; one of the most outstanding legal authorities in Poland, ex-President of Constitutional Tribunal, ex-Ombudsman, when analysing the actions of a ruling party described them as “*creeping assault on Constitution*” and stated that “*we are approaching the authoritarian system very fast*”. One is clear: no matter how far the present parliament majority will manage to go in order to destroy the grounds of democratic rule of law in Poland, especially triple division of authority and independence of courts for Polish lawyers who respect the rules, one can say that the curse “I wish you lived in an interesting era” has come true.

* * *

Dariusz Mazur is a penalty judge, now holds the position of the Chief of III Penalty Division of Regional Court in Cracow. Has become a member of “Themis” Polish Judge Society recently. He specializes in international cooperation in criminal matters. As a lecturer concerning these matters he cooperates with Polish National School of Judiciary and Public Prosecution, and with European Judicial Training Network (EJTN). In the past he cooperated with Academy of European Law (ERA, based in Trier). This year he has been honoured with the title of European Judge of the Year 2015 which is appointed by the Polish Section of International Commission of Jurists (ICJ). This reward was for a written motives of a decision concerning extradition of Roman Polański to the USA.

Waldemar Żurek is a civil judge adjudicating in II Civil Appeal Division of Regional Court in Cracow. He holds the position of a spokesman of the National Council of Judiciary. At present he has been a member of National Council of Judiciary for 2 terms. In 2016 he has been chosen the Best Judge in the plebiscite called “Golden Paragraphs” organised by Legal Journal newspaper. In their justification, the Jury of the Rewards pointed out that *“he has always been present when it was necessary to defend the grounds of democratic rule of law of the state, and he has a gift of talking about complicated matters in an easy way”*.

* * *

Both the authors of this article have been the judges of common courts of law for many years and they have never had any connections with political parties or political groups in Poland. They claim that, although judges cannot get involved in any political action, but they have a right; sometimes even a duty, to take part in a public debate concerning the protection of democratic rule of law, especially the separation of powers and independence of courts and judges. This article shows that that they are deeply concerned with the fact that these principles may not be followed in Poland.