



SUPREME COURT

of the Republic of Poland

First President of the Supreme Court

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Prof. Dr hab. Małgorzata Gersdorf

Opinion on the White Paper on the Reform of the Polish Judiciary

I. General comments

On 8 March 2018, Prime Minister Mateusz Morawiecki presented in Brussels the White Paper on the Reform of the Polish Judiciary (94 pages) and its Executive Summary (8 pages). Those documents put forth arguments intended to justify the implemented and pending changes of the judicial system.

Before sharing specific comments, it must be noted that those documents include distorted and even untrue information which must be corrected. The analysis offered therein is methodologically inconsistent as it unreasonably and tendentiously combines themes relating to different and separate areas of the Polish judiciary, including in particular the Supreme Court as well as common courts. Many of the assertions therein are unfounded and some of the claims are contradictory and mutually exclusive.

First and foremost, it should be noted that the recent legislative initiatives are of concern not because of the powers of the Polish legislator to structure the judicial system in Poland but because the Polish legislator abuses such powers in violation of clear constitutional standards and in conflict with their interpretation laid down in the case law of the Constitutional Tribunal, the Supreme Court and the legal doctrine that has developed since the adoption of the 1997 Constitution of the Republic of Poland. In this context, references to solutions that are in place in other Member States are irrelevant as the judicial system in such other Member States operates, more often than not, in a completely different constitutional or systemic context and political culture.

Therefore, it should be stressed that the current situation of the judicial system is a consequence of legal amendments, which are clearly and beyond any doubt in conflict with the binding Constitution of the Republic of Poland. These regulations result in:

1. termination by statute of the tenure of members of the National Council of the Judiciary defined in Article 187(3) of the Constitution of the Republic of Poland, and having members of the National Council of the Judiciary elected directly by the Sejm rather than by judges as expressly provided in Article 187(1)(2) of the Constitution of the Republic of Poland;

2. termination of the six-year tenure of the First President of the Supreme Court defined in Article 183(3) of the Constitution of the Republic of Poland, which cannot be terminated by statute, even by imposing a lower retirement age of judges of the Supreme Court;
3. reduction of the retirement age of judges of the Supreme Court in order to have them removed from office, which is in conflict with Article 180(1) of the Constitution of the Republic of Poland which provides that judges shall not be removed; it should be noted that reduction of the retirement age would be acceptable but only prospectively: otherwise, the regulation has retroactive effect and amounts to removal of judges;
4. establishment of a Disciplinary Chamber and a Chamber for Extraordinary Review and Public Affairs in the Supreme Court, which are “Chambers of the Supreme Court” only by name; from the perspective of the new regulations, they are two separate courts independent of the Supreme Court. This is clearly in conflict with Article 175(1) of the Constitution which authorises the Supreme Court, common courts, administrative courts and military courts to administer justice;
5. failure to publish judgments of the Constitutional Tribunal in contravention of the clear provisions of Article 190(2) of the Constitution.

These concerns are augmented by the fact that the current Constitutional Tribunal of Poland, which in a democratic state ruled by law would be authorised to review actions of the legislator, has not been properly appointed. Although three judges were elected legally to the Constitutional Tribunal by the Sejm in 2015, the President of the Republic of Poland has not sworn them in to this date. As a result, the composition of the Constitutional Tribunal is defective.

Equally untrue is the allegation put forth in both documents to the effect that the recent amendments are intended to prevent the excessive length of proceedings as the draft regulations contain no provisions that could accelerate proceedings. Moreover, according to statistics, the Supreme Court has for years operated efficiently and the average waiting time for a case to be closed is slightly more than six months. In this context, it seems evident that the main intention behind the newly approved regulations are judge replacements rather than the facilitation of proceedings.

In view of the foregoing, regretfully, the arguments raised in the White Paper circumvent the gist of the issue and ignore the fundamental matters. Nevertheless, in order to reply to those insinuations and assertions, below please find a list of allegations directed against the Supreme Court and the National Council of the Judiciary of Poland together with a correction.

II. Detailed comments

Detailed comments presented below follow the structure of the Executive Summary and the arguments put forth therein and address issues raised in the White Paper (full text).

1. Low public trust in the judiciary (Point 1 of the Executive Summary, pp. 7-8 of the White Paper)

The figures provided in the White Paper as the basis of assertions concerning trust in the judiciary are extremely selective. For example, according to Research Communiqué no. 18/2016 of the Public Opinion Research Centre (CBOS) of February 2016, 45% of respondents

trust judges and 42% do not trust judges.¹ According to Kantar Public's report K.068/16 of November 2016 "Trust in Public Institutions. Comparison of 2006, 2011 and 2016," 40% of respondents in 2006, 55% in 2011, and 45% in 2016 trusted judges.² The decrease was caused not so much by the opinion of the general public about judges of the Communist era being "responsible for the judicial administration" as by unprecedented attacks on the judiciary combined with negative image campaigns. For instance, according to CBOS surveys, 40% of respondents were negative about the judiciary in September 2016 compared to 45% in September 2017.³ According to a 2017 CBOS survey, 50% of respondents had a positive opinion of the judiciary.⁴ It should be stressed that no research is available on the reasons for the prevailing level of distrust in judges.

Incidentally, it should be noted that according to public opinion polls, the Sejm enjoys much less popular support than the judiciary. For example, according to CBOS research of August 2017, 24% of respondents had a positive opinion of the lower house of the Polish Parliament while a high 64% had a negative opinion.⁵ However, no public proposals have been put forth to reform the Sejm.

2. Inefficiency of proceedings, excessive length of proceedings, staffing of the courts (Points 2 and 3 of the Executive Summary, pp. 9-12 of the White Paper)

The White Paper claims that judicial proceedings in Poland are excessively long, which supposedly justifies the legal amendments, including those affecting the Supreme Court. This is untrue. As concerns common courts, according to the Commission Communication 2017 *EU Justice Scoreboard*, Poland ranks in the EU's top five by the time needed to resolve litigious civil, commercial, administrative, and other cases in 1st instance, ahead of such countries as the Netherlands, Finland, and Sweden.⁶ The rate of resolving litigious civil and commercial cases in 1st instance puts Poland in the middle of the EU ranking on a par with such Member States as Germany and very close to Denmark.⁷

The assertion at stake is particularly unfounded with respect to the Supreme Court, which has for years operated efficiently. The average waiting time for a case to be closed is slightly more than six months, which is well in line with European standards. Furthermore, neither the Act on the Supreme Court nor the amendment of the Act on the National Council of the Judiciary of Poland contain any provisions that would accelerate proceedings before the Supreme Court. On the contrary, by having a large number of judges retired and by adding to the Act on the Supreme Court extraordinary appeals which, at least in theory, will be available in approximately 60,000,000 cases closed since 1997, it is almost certain that the timing of proceedings will be extended.

As concerns the staffing and funding of the courts, the documents claim that only Germany has more judges than Poland and that public spending on the system of justice is

¹ See http://www.cbos.pl/SPISKOM.POL/2016/K_018_16.PDF, p. 14.

² http://www.tnsglobal.pl/archiwumraportow/files/2016/11/K.068_Zaufanie_do_instytucji_O10a-16.pdf, p. 7.

³ See http://www.cbos.pl/SPISKOM.POL/2017/K_124_17.PDF, p. 10.

⁴ *Ibidem*.

⁵ *Ibidem*, p. 3.

⁶ Communication from the Commission to the European Parliament, the Council, the European Central Bank, the European Economic and Social Committee and the Committee of the Regions – The 2017 EU Justice Scoreboard COM (2017)167 (available at <http://ec.europa.eu/transparency/regdoc/rep/1/2017/PL/COM-2017-167-F1-PL-MAIN-PART-1.PDF>), p. 10.

⁷ *Ibidem*, p. 11.

relatively high. However, the full picture of spending on the system of justice is available from Council of Europe statistics, which show that the budget allocated to the Polish judicial system in 2014 was below the EU average (average of the surveyed member states of the Council of Europe = 60 EUR per capita v. Poland = 49 EUR per capita).⁸ The assertions also suggest that the excessive length of court proceedings is not caused by staff shortages or underfunding but by other factors. Unfortunately, the White Paper fails to enumerate such factors, which makes the argument hard to contest.

The arguments put forth in the White Paper do not take into account differences in the jurisdiction of courts in different countries, i.e., the types of cases examined by courts. Courts in Poland are responsible for cases including, without limitation, minor offences such as letting a dog run free without a leash in the woods (Article 166 of the Misdemeanour Code), swearing in public (Article 141 of the Misdemeanour Code), disturbing animals (Article 78 of the Misdemeanour Code), swimming in unauthorised areas (Article 55 of the Misdemeanour Code). In many countries, such cases are handled by lay magistrates (for instance, in the UK), which cuts the time of proceedings in more serious cases. Consequently, there can be no simple comparison of the number of judges or the length of proceedings. Importantly, the matter of court jurisprudence and the genuine issue of a heavy workload of courts flooded with minor cases are not being addressed by the legislator at all.

The speed of judicial proceedings has been affected by the fact that the Minister of Justice published no announcements of vacant position of judges for two years, which is a necessary condition to fill judicial vacancies. Only in February and March 2018 were the first announcements published for 79 vacant positions in regional courts⁹ and 65 announcements for positions in district courts.¹⁰ This is indicative of the scale of vacancies which, for reasons unknown, could not be filled because of omissions of the Minister of Justice.

3. Communist past, influence on the system, accountability for totalitarian past (Points 4, 5 and 6 of the Executive Summary, pp. 13-18 of the White Paper)

The assertions concerning the Supreme Court are untrue. According to Article 9 of the Act of 20 December 1989 amending the Act on the Common Court System, the Act on the Supreme Court, the Act on the Supreme Administrative Court, the Act on the Constitutional Tribunal, the Act on the Military Court System and the Act on the Notary System (Journal of Laws of 1989, item 73, item 436), the tenure of all 108 judges appointed to the Supreme Court in 1987 was terminated as of 30 June 1990. New judges of the Supreme Court were appointed on 1 July 1990, including only 22 judges of the previous term. Of all those judges, only one is still active.

The arguments put forth in the White Paper to substantiate the “communist past” of the Supreme Court are misleading and contradictory. On the one hand, the Executive Summary (Point 4) claims that the “Polish judiciary has never accounted for its communist past. Only some most compromised judges of the Supreme Court were expelled in 1990.” On the other hand, according to the White Paper (pp. 87-88), “[a]fter the collapse of communism, the only court that was subject to personal changes was the then Supreme Court. 80% of its judges

⁸ European judicial systems. Efficiency and quality of justice. CEPEJ Studies No. 23 (available at <https://www.coe.int/t/dghl/cooperation/cepej/evaluation/2016/publication/CEPEJ%20Study%2023%20report%20EN%20web.pdf>), p. 24.

⁹ *Monitor Polski* 2018, item 274.

¹⁰ *Monitor Polski* 2018, items 256 and 261.

were dismissed," which supposedly "shows the scale of involvement of judges from communist Poland in the totalitarian regime." This implies an instrumental interpretation of an obvious fact: the thorough selection of the judges of the Supreme Court in the 1990s. It does not seem reasonable to claim that over 80% of judges of the Supreme Court represent only a small fraction of the most compromised judges. In the light of the foregoing, it is hardly convincing that the replacement of more than 80% of judges of the Supreme Court is not sufficient proof of accountability for the communist past.

Furthermore, it should be noted that, contrary to what the White Paper purports, the selection of judges was thorough and multi-faceted. Apart from the aforementioned termination of the mandate of all judges of the Supreme Court, the National Council of the Judiciary of Poland regularly rejected applications of objectionable judges for extension of the mandate beyond retirement age (65 years). Applications of 511 judges were refused in 1990-2000 alone. As a separate selection criterion, judges were required to submit mandatory self-vetting declarations under the Vetting Law. Moreover, the National Council of the Judiciary of Poland was authorised to cancel retirement benefits of judges active in the Stalinist era in specific courts and divisions deemed to be oppressive. In addition, proceedings against several dozen judges were instituted under the Act of 3 December 1998 on Disciplinary Liability of Judges Who Violated Judicial Independence in 1944-1989 (Journal of Laws of 1999, No. 1, item 1, as amended). The White Paper fails to mention that many judges voluntarily stepped down in fear of the selection process. With time, a significant number of judges who could be accused of having violated the independence of judges have passed on.

The ample examples provided in the White Paper of political judgments issued in the communist times, i.e., in the 1950s and 1960s, cannot be used to discredit the current judges of the Supreme Court. The enumeration of those cases in the White Paper is intended to create the impression that the current judges of the Supreme Court share the accountability for the vile rulings passed 50 or 60 years ago. For obvious reasons, this is a manipulation. At the same time, the White Paper fails to mention that the Supreme Court played an important role in the 1990s in the rehabilitation of victims of the communist regime, among others by giving judgments under the Act of 23 February 1991 Invalidating Judgments against Persons Oppressed for Activities Furthering the Independence of the Polish State (Journal of Laws of 2017, item 1987). It was the Supreme Court that acquitted Captain Witold Pilecki posthumously and annulled the death penalty of Ryszard Kukliński.

As concerns judges who were active during martial law, there are only a few such judges currently serving on the Supreme Court. Their judgments from the times of martial law could be appraised on a case-by-case basis, not least from the perspective of their upholding the dignity of the office of a judge. Instead, the current systemic reform deprives some 40% of the active judges of the Supreme Court of the constitutional safeguard of being irremovable as they are being forced out from office.

Furthermore, media reports often confuse current judges of the Supreme Court with judges who were in office during martial law because their names are by coincidence the same as the names of persons listed in the register of criminal cases on the educational portal of the Institute for National Remembrance (IPN). An extreme case is that of Justice Józef Szewczyk, who was allegedly Chief Corporal and Juror of the Military Court of Warsaw and sentenced Mateusz Wierzbicki to eight months of imprisonment suspended for two years for distribution of leaflets about the reasons for martial law and the situation in Poland offending the supreme state authorities. However, Justice Józef Szewczyk was never in the military. His military grade was E, which made him permanently and completely ineligible for active military service in times

of peace, mobilisation, and war. Józef Szewczyk was never a Juror of the Military Court of Warsaw.

4. Imbalance between powers, redressing the balance, safeguarding independence, disciplinary cases (Points 7 and 9 of the Executive Summary, p. 35 of the White Paper)

According to the Executive Summary, “the principle of checks and balances between the legislative, the executive and the judiciary [i]n Poland... has been distorted for years – judges enjoy wide immunity... but there was no real accountability if they were in breach of conduct.” This is untrue because checks and balances are not reducible to the issue of judicial immunity. It is not true that judges have “no real accountability if they were in breach of conduct.” Disciplinary proceedings in Poland have been public for many years and complete details of accountability are publicly available.

The White Paper claims further that a “peculiar bureaucratic corporate culture... has emerged in the Polish administration of justice” due both to convoluted procedural laws and distorted checks and balances. According to the White Paper, checks and balances will be restored with amendments to disciplinary proceedings.

However, the amendments entail not so much more efficiency as a more oppressive nature of disciplinary proceedings. Furthermore, they put the accused judge in a less favourable procedural position than that of an individual accused of a crime in criminal proceedings. Most importantly, perhaps, the amendments largely extend the powers of the Minister of Justice, who is in fact to become responsible for handing disciplinary proceedings (see point 11 below for details). This clearly undermines the balance of powers between the executive and the judiciary, especially that the prosecutor in disciplinary proceedings and the members of disciplinary courts may be dependent on an agent of the executive.

It is not true that judges have “no real accountability if they were in breach of conduct.” The White Paper quotes penalties imposed in disciplinary proceedings without making reference to the actions of judges so penalised or the circumstances of each case, which distorts the full picture. It should be noted that the vast majority of disciplinary proceedings concern minor infractions, such as delayed preparation of the reasoning or participation in training without the prior consent of the court president. Examples of alleged leniency shown by disciplinary courts towards accused judges, which are broadly publicised, fail to take into account circumstances such as the mental condition of a retired judge, which in a democratic state ruled by law excludes fault and liability.

Rather than respecting the principle of checks and balances, the changes of the judicial system manifestly undermine that principle. It should be noted that, following the reform, the Sejm appoints judges as members of the National Council of the Judiciary of Poland; the Minister of Justice arbitrarily dismisses and appoints court presidents and deputy presidents; and the Minister of Justice arbitrarily delegates judges to courts.

5. Cult of formalism (Point 8 of the Executive Summary)

The White Paper refers to the “cult of formalism” (Point 8 of the Executive Summary) without any reference to methodologically sound evidence. It is quite unclear on what grounds the Executive Summary evokes a “common perception that for some judges the verdicts should be in the first place justified on formal grounds, even if they are not actually fair.” No reference is made to any research, such as surveys of judges or the accused or reviews of court

files. It is a complete misunderstanding to imply the existence of “actually fair” verdicts. This suggests that there is a special category of court judgments which are fair in the perception of an unspecified audience, and then there are judgments that are deprived of that quality. Last but not least, the degree of formalism of judicial procedures is decided by the legislator, not by the courts.

6. European standards are met (Point 10 of the Executive Summary, pp. 25-27 of the White Paper)

According to the White Paper, “[i]t is widely overlooked that the Venice Commission and other international bodies that were critical of Polish reform did not take into account certain arguments that justify it. The Venice Commission repeatedly urged... to assure that the judiciary councils would not be overly dominated by judges – as it may lead to cronyism... illegitimate self-protection... Polish reform of the National Council of the Judiciary (NCJ) is carried out in the spirit of these suggestions.”

The key issue here is that the White Paper chooses to ignore the fact that the National Council of the Judiciary is governed by the Constitution of the Republic of Poland. Consequently, in the absence of a majority of votes necessary to amend the Polish Constitution, the current government must not pass unconstitutional laws by statute. In fact, however, the recent amendments are manifestly in conflict with the Constitution (see point 8 below for details).

7. Many Polish judges demanded the reform for years (Point 11 of the Executive Summary)

The White Paper quotes the opinions of a small number of judges calling for a reform of the judiciary and suggests that they were voiced in support of the 2017 reform. However, the authors of the opinions referred to in the White Paper have publicly raised major objections about the “reform.”

The White Paper completely overlooks the fact that the legislative and the executive have ignored the unanimous position of the judiciary from the very beginning. They ignored not only the proposals put forth during the legislative process but also the resolutions passed collectively by judicial self-government bodies at all court levels, raising strong objections against the “reform.”

Not only were the proposals of judges ignored; so was the position of other parties. This was evident in the legislative process, where arguments raised by judges, academics, civic organisations, the Polish Ombudsman, organisations of barristers and legal counsels, remained unanswered by the legislative, serving as a fig-leaf of social consultations. Laws of fundamental relevance to the system of government were processed in Parliament hastily and chaotically, which precluded a genuine debate. Therefore, arguments to the effect that proposals of judges who demanded a reform for many years were finally heard, and references to compliance with European standards which after all cover the legislative process as well, seem to be misguided.

8. The National Council of the Judiciary will be more balanced (Point 12 of the Executive Summary, pp. 53-69 of the White Paper)

The National Council of the Judiciary is discussed in section V of the White Paper, which attempts to provide ample grounds for the reform, including the appointment of judges as members of the National Council of the Judiciary by the Sejm. It is not true that Article 187 of the Constitution fails to provide explicitly who should elect the 15 members who are judges. According to the minutes of the Constitutional Committee of the National Assembly preceding the publication of the draft 1997 Constitution and according to the interpretation and practical application of Article 187 of the Constitution of the Republic of Poland since its adoption, judges shall be appointed members of the National Council of the Judiciary by judges. Election of judges as members of the National Council of the Judiciary by the Sejm contravenes those provisions and the constitutional principle of independence and separation of the judiciary. According to the Polish Constitution, it is the National Council of the Judiciary, not the Polish Sejm, who is the guardian of the independence of judges. Furthermore, the new solutions do not address the expectations of the judiciary as to broader representation on the National Council of the Judiciary. The election by the Sejm does not follow a transparent procedure that could be reviewed. The termination of the mandate of members of the National Council of the Judiciary, which is enshrined in the Constitution, is clearly unconstitutional.

It should be noted that the appointment of judges as members of the National Council of the Judiciary on 6 March 2018 confirmed all those concerns.¹¹ The appointment of judges by the Sejm deprives the National Council of the Judiciary of any shred of independence.

9. The reform is inspired by good practices of other Member States (Point 13 of the Executive Summary)

References to solutions that are in place in other EU Member States in isolation from the constitutional context of those Member States are misleading. The issue is not whether there is a council of the judiciary in a given country or how many judges sit on it; the issue is what is required under the Polish Constitution. References to other countries made in isolation from the specificity of their legal systems are misguided and biased, as demonstrated by the examples quoted in the White Paper.

Particularly misguided is the reference to the Spanish model, which has been criticised in a report of the Group of States against Corruption (GRECO), a body of the Council of Europe responsible for monitoring national laws under anti-corruption standards of the Council of Europe. In its report GrecoRC4(2017)18 of 3 January 2018, the Group of States against Corruption recommends that Spain change the procedure of election of 12 members of the General Council of the Judiciary and ensure that they be elected directly by judges.¹²

Likewise, the National Council of the Judiciary of Poland and the Council of the Judiciary of the Netherlands (Raad voor de Rechtspraak) are incomparable. The latter has an advisory function for the Government and Parliament on matters concerning the judicial system and it is responsible for the budgets of the Council and of courts and for operational support for courts.¹³ For this reason alone, a simple reference to the proportion of members who are judges in comparison with members who represent other authorities is an oversimplification and a manipulation. A reference to the composition of the Judicial Appointments Council of

¹¹ For example, representatives of a political party that participated in the appointment of members of the National Council of the Judiciary explicitly admitted that their position on a candidate depended on the candidate's declaration of support for their proposals of systemic changes.

¹² See <https://rm.coe.int/fourth-evaluation-round-corruption-prevention-in-respect-of-members-of/1680779c4d>

¹³ See artikel 91.1 van de Wet op de rechterlijke organisatie.

Denmark (Dommerudnævnelsesrådet) is also misguided because it is comprised of one judge of the Supreme Court, one judge of the Appeal Court, one judge of a regional court, one representative of the bar association, and two representatives of the public appointed by independent civic organisations.¹⁴ Judges are formally appointed to the Council by the Minister of Justice but they are nominated by the Supreme Court, the District Court and the Danish Association of Judges,¹⁵ and in practice such nominations are always respected.

Concerning the UK law, which allows judges to be retained after retirement age, it should be noted, first, that the retirement age is 70 years, which is the same as the retirement age before the reform of 8 December 2017. Second, the decision is made by the Lord Chief Justice of the relevant part of the UK.¹⁶ The same is true of the French law, which provides that the decision to retain a judge beyond retirement age is made by the Supreme Council of the Judiciary.¹⁷ Thus, both in the UK and in France, the retention of a judge is decided by an authority other than the executive or the legislative, i.e., other than the President or the Minister of Justice, as decided in the 2017 “reform” of the judicial system.

Equally misleading is the reference made in the White Paper to public participation in administering disciplinary justice in the UK. It is true that disciplinary cases of judges are examined by a bench of four members, half of whom are judges and the other half are not lawyers;¹⁸ however, it should be noted that the latter are nominated by the executive (Lord Chancellor) in agreement with the President of the Supreme Court. According to the Polish Act of 8 December 2017, jurors of the Supreme Court are to be appointed single-handedly by the Senate (upper house of the Parliament) with no participation of the judiciary.

Contrary to the allegations put forth in the Executive Summary (Point 14), the White Paper cherry-picks solutions that operate in the legal systems of other countries while ignoring their broader context. Such systems must be considered from a broader perspective because the risks to judicial independence generated by those solutions, as quoted in the White Paper, are mitigated by other solutions, which is not true of the solutions implemented in Poland in 2017.

10. Random allocation of cases (Point 16 of the Executive Summary, pp. 40-42 of the White Paper)

It is not true that the new system improves the transparency of the allocation of cases. Quite the opposite is true. The new system impairs the transparency. This is mainly due to the fact that the centralised random allocation system is controlled by the Minister of Justice, who is also the Prosecutor General. Considering that the Minister of Justice may be a party to litigation, the system is definitely in breach of European standards, as acknowledged by the European Court of Human Rights.¹⁹

Furthermore, it should be noted that the Ministry of Justice has refused to disclose the random allocation algorithm and the source code, which implies that the allocation of cases remains a mystery.

¹⁴ See § 43b skt. 1 Bekendtgørelse af lov om rettens pleje.

¹⁵ See § 43b skt. 2 Bekendtgørelse af lov om rettens pleje.

¹⁶ See Section 26 subsection (6) of the Judicial Pensions and Retirement Act 1993 in conjunction with section 228 subsection 4 of the Constitutional Reform Act 2005.

¹⁷ See article 76-1-1 du ordonnance n° 58-1270 du 22 décembre 1958 portant loi organique relative au statut de la magistrature.

¹⁸ See Paragraph 11 of the Judicial Discipline (Prescribed Procedures) Regulations 2014.

¹⁹ See judgment of 10 October 2000, application no. 42095/98, case of *Daktaras v. Lithuania*.

Moreover, the system has not been put in place either in the Supreme Court or in the Constitutional Tribunal. Given that politicians control the appointment of presidents of both those bodies and that their presidents have been given the powers of allocating cases, cases will be allocated in the Supreme Court and are already being allocated in the Constitutional Tribunal at the sole discretion of the court president.

11. Prohibition of transfers, stronger independence of individual judges, external independence, presidents of the courts do not affect independence, proportionate measures, retirement (Points 17, 18, 19, 20 and 21 of the Executive Summary, pp. 42-45, 48-51 of the White Paper)

Concerning the prohibition of judge transfers, referred to in the White Paper, it should be noted that the White Paper fails to mention three major exceptions from the prohibition that are provided for in the July 2017 law. First, a judge may be transferred without his or her consent to another division which examines cases within the same scope, which does not necessarily mean the same type of cases.²⁰ Furthermore, a judge so transferred must, as a rule, continue to examine cases opened in the previous division.²¹

Second, the law allows for a judge to be delegated to another division for a period up to 12 months if no other judge of the division agrees to be transferred or delegated to such division for such period of time.²² Furthermore, a judge may be transferred without his or her consent if the judge is assigned to the land and mortgage register division or the commercial division of the court.²³ In fact, the transfer of a judge to another division for a period up to 12 months may be an indirect form of disciplinary penalty. Clearly, a judge who has been active for 20 years in the criminal division may find it difficult to immediately switch to the civil division. Where the professional experience of a judge focuses on broadly understood criminal law, criminal law is the main area of expertise gained in training, postgraduate programmes, and conferences. The transfer of such judge to another division without his or her consent would impair the efficiency of judgments and affect the constitutional right to a fair trial.

Transfers of judges to another division are decided by court presidents. Evidently, unlimited control of the Minister of Justice over the appointment of court presidents and potential pressure that could be exerted by the Minister of Justice on court presidents under pain of dismissal could result in unreasonable influence of the Minister of Justice on transfers of judges whose judgments are inconvenient to the executive.

Contrary to the assertions put forth in the White Paper, the 2017 "reform" of the judicial system neither eliminates nor lessens potential pressures exerted by court presidents on judges. On the contrary, the exceptions from the prohibition of judge transfers without the judge's consent, as provided for in the law, in combination with practically unlimited influence of the Minister of Justice on the appointment of court presidents augment the risk of such pressures.

Furthermore, it should be noted that under the legal regime which is to take effect as of 3 April 2018, the Minister of Justice will be authorised to delegate judges to disciplinary courts

²⁰ See Article 22 (4b) (1) of the Act on the Common Court System in the wording in effect as of 12 August 2017.

²¹ See Article 47b (4) in conjunction with (6) of the Act on the Common Court System in the wording in effect as of 12 August 2017.

²² See Article 22 (4b) (2) of the Act on the Common Court System in the wording in effect as of 12 August 2017.

²³ See Article 22 (4b) (3) of the Act on the Common Court System in the wording in effect as of 12 August 2017.

at appeal courts.²⁴ Importantly, a “judge of a common court” may be appointed to a disciplinary court, which means a judge of any level, including judges of a court whose seat is located far from the appeal court / disciplinary court. Considering that the appointment to a disciplinary court will be mandatory for the judge, irrespective of all other professional duties,²⁵ and that the mandate of a judge of a disciplinary court is to be six years,²⁶ there is a potential risk that appointments to disciplinary courts could be used as a tool of oppression against individual judges.

These regulations are not accompanied by any means that would help judges to combine their on-going duties of an active judge with the duties of a judge of a disciplinary court. It is possible that the seats of such courts could be located far from each other. This could result in an excessive workload of judges and affect the quality of their judgments. It could also extend the length of “home” court proceedings handled by judges appointed to a disciplinary court.

In this context alone, the assertion put forth in the White Book to the effect that the 2017 legislative amendments strengthen the external independence of judges (Point 19 of the Executive Summary) is untrue. The key threat to such independence derives from the new model of disciplinary proceedings. It seems that the prosecutor in disciplinary proceedings as well as members of disciplinary courts could be dependent on an agent of the executive. The Minister of Justice will not only appoint judges of disciplinary courts of first instance but may also appoint the Disciplinary Prosecutor of Judges of Common Courts and two Deputy Disciplinary Prosecutors of Judges of Common Courts.²⁷ The Minister of Justice will decide the number of judges of each disciplinary court.²⁸ The Minister of Justice may appoint the Disciplinary Prosecutor of the Minister of Justice, which is tantamount to an order to open investigative proceedings or disciplinary proceedings to the exclusion in such cases of powers of the other Prosecutors.²⁹ Moreover, in case of disciplinary misconduct which is an intentional crime prosecuted by public indictment, the Disciplinary Prosecutor of the Minister of Justice may be appointed from among prosecutors nominated by the National Prosecutor while such prosecutors report to the Prosecutor General, who is the Minister of Justice. This creates the risk of intentional influence being exerted on specific disciplinary proceedings in order to put individual judges under pressure. Obviously, the Disciplinary Prosecutor of the Minister of Justice could press charges against judges of common courts, which in some cases, including cases of such judge being subsequently acquitted by the disciplinary court and cases of disciplinary proceedings being stayed, could hamper the professional career of the judge and indirectly affect his or her judgments.

The risk that individual judges may be put under pressure is augmented by the fact that, in addition to the power to appoint the Disciplinary Prosecutor of the Minister of Justice, the Minister of Justice will, as of 3 April 2018, have the power to object against a decision of a disciplinary prosecutor refusing to open disciplinary proceedings or a decision staying

²⁴ See Article 110a (1) of the Act on the Common Court System in the wording of the Act of 8 December 2017 on the Supreme Court.

²⁵ See Article 110a (2) of the Act on the Common Court System in the wording of the Act of 8 December 2017 on the Supreme Court.

²⁶ See Article 110a (3) of the Act on the Common Court System in the wording of the Act of 8 December 2017 on the Supreme Court.

²⁷ See Article 112 (3) of the Act on the Common Court System in the wording of the Act of 8 December 2017 on the Supreme Court.

²⁸ See Article 110c (3) of the Act on the Common Court System in the wording of the Act of 8 December 2017 on the Supreme Court.

²⁹ See Article 112c (1) of the Act on the Common Court System in the wording of the Act of 8 December 2017 on the Supreme Court.

disciplinary proceedings. Furthermore, the Minister of Justice will have the power to appeal to a disciplinary court against a decision staying proceedings in cases where the Minister of Justice has filed for the disciplinary proceedings to be opened. In this connection, the Minister of Justice may in fact become the body handling disciplinary proceedings.

Moreover, the power in question will be completely arbitrary and the option of filing multiple objections in any single case could, in extreme cases, indefinitely prolong the period when disciplinary charges are pending against a judge. Combined with the fact that the statute of limitation does not run for the duration of disciplinary proceedings from the filing of a motion with the disciplinary court to the legally valid closing of the disciplinary proceedings,³⁰ this will give the Minister of Justice unlimited power to influence disciplinary proceedings and keep charges pending against individual judges for many years. This undermines the independence of judges because a judge against whom disciplinary proceedings are pending may be suspended, which implies that the judge's remuneration will be reduced by 25% to 50% for the duration of the suspension. Having direct influence on the initiation of disciplinary proceedings, the Minister of Justice may indirectly cause a judge to become inactive for the duration of the proceedings and reduce the judge's remuneration.

Under the Act of 8 December 2017 on the Supreme Court, the Minister of Justice will have the power to request the reopening of any disciplinary proceedings closed with a legally valid decision given by the disciplinary prosecutor before the effective date of the Act. The practically unlimited power to reopen proceedings closed with a legally valid decision, both in favour of and to the disadvantage of the defendant, not only undermines the core principles of the legal order but may also be used as a tool of oppression against judges for judgments they issued before the reform.

The foregoing should be considered in combination with the fact that the Act of 8 December 2017 on the Supreme Court introduces other regulations which substantially restrict the procedural rights of defendants in disciplinary proceedings, putting them in a position that is much worse than that of defendants in criminal proceedings. One of the many means with that effect is the power of disciplinary courts to continue disciplinary proceedings in the excused absence of the notified accused and his or her lawyer, provided that this is not in conflict with the interests of the disciplinary proceedings.³¹ This provision turns disciplinary proceedings into an inquisition as it precludes defence of persons who cannot appear before the disciplinary court for reasons beyond their control but excuse their absence and whose lawyer also fails to appear before the court for justified reasons.

In view of the foregoing, it should be noted that the mere concern with unreasonable disciplinary proceedings, reduction of the remuneration, and restrictions imposed on the right of defence may have a "freezing" effect on judges and affect their judgments in cases that are of interest to the executive and the legislative.

As concerns the argument that court presidents do not affect judicial independence, it should be noted that court president and deputy presidents have a number of powers relating to functions performed by courts (e.g., assignment of judges to divisions). In this connection, unlimited influence of the Minister of Justice on the appointment of court presidents as well as pressures that could be exerted on court presidents under pain of dismissal could result in unlimited influence of the Minister of Justice on case law through the appointment of the court president.

³⁰ See Article 108 (5) of the Act on the Common Court System in the wording of the Act of 8 December 2017 on the Supreme Court.

³¹ See Article 115a § 3 of the Act on the Common Court System in the wording of the Act of 8 December 2017 on the Supreme Court.

The provisions of the July 2017 Act governing the appointment and dismissal of court presidents are highly questionable in the context of the Constitution. According to the case law of the Constitutional Tribunal, where the position of court president is combined with adjudicating functions, the power of an administrative body to appoint and dismiss court presidents is in breach of the principle of judicial independence.³² While this position emerged in a different legal context, it remains applicable to the extent that the Minister of Justice may arbitrarily dismiss a court president without asking the opinion of the National Council of the Judiciary.³³ The Constitutional Tribunal decided explicitly that given the systemic position and functions of the National Council of the Judiciary, its power to object to the dismissal of court presidents is an indispensable safeguard of judicial independence.

In this context, arguments evoking the purported proportionality of dismissals of court presidents without any criteria being defined in the period from 12 August 2017 to 12 January 2018 ring hollow. Besides, it should be noted that the new restrictions were assessed *ex post* while the proportionality of regulations must be assessed *ex ante* in a democratic state ruled by law.

12. Constitutional control works well, the issue of non-publication of judgments does not affect Polish law (Points 22 and 23 of the Executive Summary, pp. 71-80 of the White Paper)

As concerns the dispute around the Constitutional Tribunal, the White Paper claims as follows:

1. all judges of the Constitutional Tribunal were appointed lawfully; it was the previous term of the Sejm (Sejm of the 7th term) that broke the law;
2. resolutions of the 7th term of the Sejm to nominate 5 judges were made “in the dark”, as the Sejm could not have known when the new term would begin, which breached the rule of “legislative silence”;
3. 8th term the Sejm lawfully declared that the resolutions of the Sejm of the 7th term were null and void from the beginning and properly nominated 5 judges to the Constitutional Tribunal;
4. only those judgements were not published which pertained to statutes that were already repealed; since the only legal effect of CT judgments is just that – a repeal of the provisions deemed unconstitutional – their publication would not have any practical meaning for the legal system.

The claim that all judges of the Tribunal were appointed lawfully because the Sejm of the previous 7th term appointed 5 judges unlawfully is untrue. It should be recalled that even before the results of the 2015 parliamentary elections were announced, a group of Deputies of the currently ruling party filed an application with the Constitutional Tribunal for the declaration of unconstitutionality of the provisions of the Act on the Constitutional Tribunal of July 2015 to the extent that they allowed for the appointment of two judges of the Constitutional Tribunal whose mandate was to expire in December 2015. The appointment of judges of the Constitutional Tribunal by the Sejm of the 7th term for positions that became

³² See the judgment of the Constitutional Court of 9 November 1993, case K. 11/93, OTK 1993, section II, item 37.

³³ See the judgment of 18 February 2004, case K 12/03, OTK ZU 2004, No. 2A, item 8.

vacant in November 2015 was not contested at that time. That idea emerged only after Law and Justice (PiS) won the majority of seats in the Sejm of the 8th term, and after the constitutional mandate of three judges appointed by the Sejm of the 7th term had already begun as of 7 November 2015. At that time, the provisions of the Act of July 2015 were not considered unconstitutional. According to judgment K 34/15 of the Constitutional Tribunal of 3 December 2015, the provisions of the Act on the Constitutional Tribunal were unconstitutional to the extent that they allowed the Sejm of the previous term to appoint two new judges of the Constitutional Tribunal replacing the judges whose mandate expired in December. Otherwise, i.e., as concerns the other three judges replacing judges whose mandate expired in November, the provisions were declared consistent with the Constitution. It follows that the appointment of three judges by the Sejm of the 7th term was lawful and could not be challenged.

It is misleading to make reference to “the rule of legislative silence, under which no amendments to statutes regarding elections to major official posts should be made less than 6 months before these elections” (White Paper, p. 73) because that rule concerns amendments to the electoral law rather than appointments to official posts by the Parliament. It is likewise misleading to base that claim on the case law of the Constitutional Tribunal as it concerns legislative silence to the extent of local government electoral law (K 31/06) as well as the Act on the Election of the President of the Republic of Poland, the Act on National Referenda, and the Act – European Parliament Electoral Law (KP 3/09).

The Sejm of the 8th term was not empowered to pass a resolution to the effect that resolutions of the Sejm of the 7th term were null and void. No provisions of the Polish legal system allow the Sejm to pass resolutions declaring that the appointment of judges of the Constitutional Tribunal is null and void. This is explicitly corroborated by the Act of 20 July 2000 on the Promulgation of Normative Acts and Certain Legal Acts (Journal of Laws of 2017, item 1523, as amended): the list of legal acts subject to promulgation enumerated therein does not include resolutions declaring the appointment of judges of the Constitutional Tribunal to be null and void.

As concerns the unpublished judgments of the Constitutional Tribunal, these include:

1. judgment of 9 March 2016 (case K 47/15) declaring the amendment of the Act on the Constitutional Tribunal tabled by PiS in December 2015 to be unconstitutional;
2. judgment of 11 August 2016 (case K 39/16) declaring the Act on the Constitutional Tribunal tabled by PiS in July 2016 as partly unconstitutional; and
3. judgment of 7 November 2016 (case K 44/16) concerning regulations governing the nomination of candidates for President of the Constitutional Tribunal.

The ruling parliamentary majority decided not to consider those to be judgments. By decision of Prime Minister Beata Szydło, upheld by Mateusz Morawiecki, they were not published in the Journal of Laws. However, according to Article 190(1) of the Constitution, judgments of the Constitutional Tribunal shall be of universally binding application and shall be final. According to Article 190(2), judgments of the Constitutional Tribunal shall be required to be immediately published in the official publication in which the original normative act was promulgated. If a normative act has not been promulgated, then the judgment shall be published in the Official Gazette of the Republic of Poland, *Monitor Polski*. Therefore, in the light of those regulations, it is clear beyond any doubt that those judgments should have been published. The argument that the provisions subject to the judgments were no longer in effect is irrelevant, especially that the Constitutional Tribunal may decide and has actually decided about provisions that are not in effect. Most importantly, when the Constitutional Tribunal

issued those judgments, they did have a direct impact on the constitutional system of Poland. As such, they had an effect on the functioning of the Constitutional Tribunal and the statute of judges. Due to the failure to publish those judgments, the Constitutional Tribunal was unable to perform its functions.

It is not true that the current Constitutional Tribunal functions as required. According to statistics, the number of cases filed with the Constitutional Tribunal dropped by 55% in 2017 (the number of cases dropped by 54% year on year in 2016 and by 32% in 2017). The number of decisions also dropped (173 decisions in 2017, including 63 judgments; 88 decisions in 2017, including 36 judgments). In view of the legal amendments affecting the Constitutional Tribunal, the Constitutional Tribunal is widely believed to have lost its independence. Many appeals filed with the Constitutional Tribunal have been withdrawn.

13. The procedures change (Point 24 of the Executive Summary, pp. 29-35 of the White Paper)

The information provided in the White Paper about the planned reform of civil proceedings aimed to accelerate proceedings is untrue. Contrary to those assertions, the draft amendment of the Code of Civil Procedure and certain other Acts (UD309) provides only for an option, not an obligation, of organising proceedings at the very outset. However, the impact of that option could be the opposite of what was intended.³⁴ Due to the degree of formalism, casuistry and extensive legislative structure of provisions governing proceedings, the focus of proceedings could shift from the examination of the merits of the case to organisational matters. Furthermore, the requirement of holding a preparatory meeting would impose a system where pleadings and evidence would be subject to statute of limitation. This implies that, where a preparatory meeting is ordered, the parties could present pleadings and evidence until the hearing schedule is approved. Pleadings and evidence submitted after that date would be excluded unless the party could prove that they could not be presented earlier or that they became necessary at a later date. This is a case of far-reaching procedural formalism. Parties who do not avail themselves of the assistance of professional lawyers (barristers, legal counsels, etc.) could find it difficult to meet such strict requirements, especially that the draft allows no other exception for parties to present evidence late (e.g., where its presentation does not delay the proceedings).

The foregoing implies that the speed of proceedings, which is to be ensured by restrictive exclusion of evidence presented after a cut-off time, has a greater priority than the need to correctly determine the truth and the facts of the case. If courts were to exclude late evidence, they would need to limit themselves to evidence presented within the time limit, even if it does not reflect the facts of the case. Consequently, if the amendment were to take effect, the legislator would expect judges to follow the very approach that is criticised harshly in the White Paper as a “cult of formalism.” The arguments put forth in support of the “reform of the judiciary” are clearly contradictory.

³⁴ This has been pointed out by the Legislative Council to the Prime Minister in its opinion RL-033-9/18 of 8 February 2018 r. on the draft Act amending the Act – Code of Civil Procedure and certain other Acts (available at <http://radalegislacyjna.gov.pl/dokumenty/opinia-z-8-lutego-2018-r-o-projekcie-ustawy-o-zmianie-ustawy-kodeks-postepowania-cywilnego>).

14. Rule of law as the foundation of common European values (Section III Points 26 – 32 of the Executive Summary, pp. 81-90 of the White Paper)

According to the arguments raised in the White Paper concerning rule of law as the constitutional foundation, “[a]ll Member States have specific constitutional solutions that are rooted in their history and legal traditions. These differences are protected by the Treaties” (Point 26 of the Executive Summary). This statement represents the gist of the conflict as the ruling parliamentary majority does not respect constitutional solutions. In this light, the White Paper is contradictory as Point 7 of the Executive Summary refers to different solutions in different Member States. The problem is not that the current government is changing the functioning of the Polish judicial system; the problem is that it evidently does so in conflict with the Constitution, for which it has no democratic legitimacy. In full awareness of that fact, disrespecting the Polish Constitution, it passes statutes to impose solutions that are unacceptable from the perspective of the Polish constitutional tradition.

Therefore, it follows that the current situation is not one of tensions between different branches of power, as the White Paper claims; rather, this is a genuine revolution in the judicial system which annihilates the independence of the judiciary in breach of the provisions of the Constitution.

A handwritten signature in blue ink, appearing to read 'Luzendof', with a long, sweeping flourish extending to the right.