

# The situation of the judiciary in Poland

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## Summary

- Poland has been facing the constitutional crisis since 2015. The crisis has affected the position and works of the courts of all ranks - from the common courts up to the Supreme Court and the Constitutional Court.
- Since 2015, the governing majority adopted 15 pieces of legislation widening political influence over judiciary system and affecting its works. The changes also aimed at undermining judges' independence. Currently, there is no effective mechanism protecting judges' from political influence. Judges' independence depends only on their professional skills, knowledge and courage.
- None of the adopted changes aimed at solving any of the on-going problems of the Polish judiciary system such as e.g. excessive length of the proceedings or protection of the right to fair trial. To the contrary, the introduced changes destabilised the works of top-rank courts (such as the Supreme Court and the Constitutional Court).
- The changes concerning judiciary system were usually adopted at accelerated pace and without proper social consultations. This process was also accompanied by smear campaigns against judges orchestrated by the governing majority and public media.

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## THE CONSTITUTIONAL TRIBUNAL

In 2015, right after the parliamentary elections in Poland, the new governing majority started the process of undermining the position of the Constitutional Tribunal. First, the governing majority did not recognise the fact that the previous governing majority appointed legally three judges of the Tribunal and annulled the entire process. Furthermore, the President of Poland sworn into office three new persons who were appointed for the position of judges without a valid legal basis (these persons were assigned to cases in 2018 after the change in the position of Tribunal's president). The situation in which three persons appointed without a legal basis sit in benches of the Constitutional Tribunal provoked concerns regarding the legality and binding force of Tribunal's decisions.

### **Appointing the new President of the Tribunal**

The changes in the composition of the Tribunal were accompanied by the legal changes that affected its position and works. Since 2015, the Parliament has adopted seven acts regulating the work of the Constitutional Tribunal. If the amendments to the Act on the Constitutional Tribunal adopted in November and in December 2015 aimed at paralysing the Tribunal's works, the regulations adopted in 2016 primarily aimed at the securing for the governing majority the chance to appoint the new President of the Tribunal. The term of office of the previous President of the Constitutional Tribunal, Judge Andrzej Rzepliński, expired on 19th December 2016. A day later, the act changing the procedure of appointing the new President of the Court came into force. The Act introduced a function of a "judge acting as the President of the Constitutional Tribunal" - the Polish Constitution, however, includes provisions regarding the position of Deputy President of the Constitutional Tribunal and does not foresee the possibility of appointing another judge who might have a power to act as the President of the Constitutional Tribunal. Regardless these concerns, Justice Julia Przyłębska was appointed by the President of Poland for the position of the "judge acting as the President of the Constitutional Tribunal" and was given the power to organise the General Assembly of Judges of the Constitutional Tribunal in order to appoint candidates for the position of the President of the Constitutional Tribunal. Even though the General Assembly of Judges of the Constitutional Tribunal has never adopted a resolution appointing Judge Przyłębska as a candidate for the position of Tribunal's president, still the President of Poland appointed her for this post.

### **Undermining the position and work of the Tribunal**

As a result of these changes, a significant decrease in the number of cases decided by the Constitutional Tribunal should also be noted. In 2017 the Tribunal received the smallest number of cases since the entry into force of the Constitution of 1997. The decrease refers to all of the most crucial types of cases decided by this institution; for instance, the number of individual applications in 2017 has fallen by 33% (when compared to 2015), while the quantity of preliminary questions has lowered from 135 (in 2015) to 21 (in 2017). Also, in 16 cases, the applications, questions or motions were withdrawn before the hearing. The trust to the Constitutional Tribunal might have been undermined due to numerous mutual visits of high-rank politicians of the governing party and the president of the Tribunal (in its premises or in the Parliament). It is worth mentioning that the Tribunal closed year 2017 with a backlog of 148 unheard cases, which is not a satisfactory result, given the drastically smaller number of incoming cases (to compare, the backlog for 2015 was 174 cases).

The Constitutional Tribunal adjudicated, after the new law had come into force, several politically sensitive cases, ruling on some of them (supposedly) according to political will of the governing party. For instance, it decided that the new provision of the Law on Assemblies, introducing a new category of “*cyclic assemblies*” that take precedence over the other for a period of three years, is consistent with the Constitution.

### **Disciplinary proceedings against former judges of the Tribunal**

Disciplinary proceedings against retired judges of the Constitutional Tribunal are also an issue. Two notable cases can be provided to exemplify this problem. The first one relates to justice Jerzy Stępień, a former judge (1999-2008) and president (2006-2008) of the Tribunal. In May, 2017, during a march organised by the opposition parties and trade unions in Warsaw, he gave a speech, saying inter alia that “*the government hung up the constitution on a peg*”. Although the disciplinary officer did not find grounds to indict him, a successful complaint against the decision to discontinue the proceedings was filed by the Tribunal’s vice-president (twice). Justice Stępień stands accused of “*an active participation in a political rally*” and is facing the prospect of admonition, reprimand, lowering of his pension by 10-20% for 2 years or even being deprived of the judge-emeritus status. He was long known for speaking critically of the reforms of the judiciary enacted by the ruling party. The second example pertains to justice Andrzej Rzepliński, whose term of office as the Tribunal's president ended in December, 2016. In November, 2015, he criticised the amendments to the Act on the Constitutional Tribunal in a TV interview, calling the Parliament's actions “*a bad farce that lowers the rank of Poland as a state*”. The Minister of Justice soon announced that he was going to file a motion to the Tribunal, demanding the disciplinary proceedings against justice Rzepliński (yet, it never happened, despite numerous other critical views of the government’s policy expressed by the judge).

## **THE SUPREME COURT**

In July 2017, after massive social protest the President of Poland decided to veto two out of three controversial Acts reforming the justice system in Poland. Once vetoing the Act on the Supreme Court and Act on the National Council of Judiciary, the President also announced that he would prepare his own draft laws regarding these two institutions and direct them to the Parliament.

On 25 September 2017, the President of Poland presented his two draft Acts on the Supreme Court and the National Council of Judiciary. Almost immediately, the Acts were directed to the Parliament without any social consultations with experts or stakeholders. The Act was adopted a couple weeks later, in December 2017.

### **Amendment to the Act on the Supreme Court**

Similarly, to the Act vetoed in July 2017, also this one includes numerous provisions that widen the political supervision over this institution. Furthermore, the Act introduces legal mechanisms which are new to the Polish legal system and lead to further violations of rule of law. The Act introduced several controversial provisions including:

- Retirement age of judges

Initially, the Act lowered the retirement age of judges. In the light of the Act the judge who turns 65 years old should submit a motion to the President of Poland upon allowing them to stay in the office for next 3 years. Such a permission could be granted only twice. The provision affected 40% of the sitting judges of the Supreme Court – including the First President of the Supreme Court whose 6-year tenure is guaranteed by the Constitution.

In July 2018, when the Act came to force, the President of Poland notified all 27 judges of the Supreme Court older than 65 years that they have retired. The judges (with an exception to the First President of the Supreme Court Małgorzata Gersdorf) left the office. However, in October 2018 the European Court of Justice issued an interim measure in the proceeding concerning the new Act on the Supreme Court. The Court ordered the Polish government to suspend changes in the Supreme Court. In the light of this decision, the judges affected by the new provisions concerning retirement age are back in the office.

- **New chambers of the Supreme Court**

The Act of December 2017 creates two new Chambers of the Supreme Court - the Disciplinary Chamber and the Chamber of the Extraordinary Control and Public Affairs. All the judges sitting in these two chambers are appointed by the new National Council of the Judiciary.

The Disciplinary Chamber is responsible for hearing the disciplinary proceedings in the case of judges of the Supreme Court and appeals against the decisions issued in the disciplinary proceedings of attorneys at law, solicitors and prosecutors. The Chamber of the Extraordinary Control and Public Affairs will be responsible for among other hearings in the cases concerning extraordinary appeal and declaring the validity of the elections.

- **Extraordinary appeal**

The Act on the Supreme Court introduces a mechanism which was not known in the Polish legal system before. The extraordinary appeal is an appeal which a party can submit to the Supreme Court via among others the Prosecutor General, the Ombudsman or Child's Rights Commissioner. The appeal can be submitted in cases which have already been closed and the judgements become final. In general, the extraordinary appeal can be submitted within 5 years in criminal cases and 1 year in civil cases since the judgement became final. However, the Act also stipulates that within 3 years of Act's coming into force such an appeal could be submitted in reference to all judgements issued in last 20 years.

## **Infringement procedure and preliminary questions**

In September 2018, the European Commission decided to refer Poland to the Court of Justice of the EU due to the violations of the principle of judicial independence created by the new Polish Law on the Supreme Court. In the opinion of the Commission Polish law on the Supreme Court is incompatible with EU law as it undermines the principle of judicial independence, including the irremovability of judges, and thereby Poland fails to fulfil its obligations under Article. In response to the interim measure issued by the Court in this proceeding, the governing majority amended the provisions concerning judges' retirement age and abolished the provisions forcing judges older than 65 years old to retire. Nevertheless, the proceeding before the ECJ is still pending.

Earlier this year, the Polish Supreme Court asked the European Court of Justice for preliminary rulings and clarify whether the new provisions on judges' retirement age and the National Council of Judiciary violate the EU law. The proceedings in these cases are still pending.

## THE NATIONAL COUNCIL OF THE JUDICIARY IN POLAND

Simultaneously to the works on the draft Act on the Supreme Court, the Parliament worked also on the President's draft Act on the National Council of Judiciary in Poland. The National Council of the Judiciary in Poland is an administrative body composed of judges and representatives of the Parliament and the President. Its pivotal responsibilities are to protect the independency of the justice system, nominate the candidates for judges and present opinions on the draft legislation concerning the justice system.

### **Changes in the process of appointing judges-members of the Council**

The Council is composed of 15 judges (so far appointed by the courts of different ranks), 6 representatives of the Parliament, one representative of the President, Minister of Justice and Presidents of the Supreme Court and the National Administrative Court.

Until 2018, the judges-members of the Council were appointed by their peers. However, after the changes adopted by the Parliament the judges-members of the Council are appointed by the Parliament whereas the candidates are presented by 25 judges (including these judges who were delegated by the Minister of Justice to work in the Ministry) or a group of 2.000 citizens. Such a regulation widened the political supervision over the process of appointing the judges-members of the Council.

In the light of the new provisions, Council's previous term of office was terminated in January 2018, and the Parliament started the process of appointing new members of the Council. The process was highly politicised and non-transparent as the Chancellery of Sejm refused to release the information on the list of judges supporting the candidates to the Council. According to [the Forum of Civic Development](#), a Warsaw-based think tank, all the candidates have certain ties (either professional or private) to the Minister of Justice.

### **Appointing new judges by the National Council of the Judiciary in Poland**

In mid-2018, the National Council of Judiciary started recruitment process for the vacant position of judges in the Supreme Court. Two of the candidates who did not receive positive recommendation from the Council appealed against these decisions to the Supreme Administrative Court. The Court issued an interim measure in a light of which the recruitment process should be suspended until the case is decided by the Court. Nevertheless, the President of Poland decided to complete the process and appoint for the position of judges all the candidates selected by the Council.

## COMMON COURTS

### **Changes in courts' leadership**

In 2017, the governing majority continued its efforts in implementing the so-called reform of the justice system. In July 2017, the Parliament adopted the Act on the System of the Common Courts. The law changed the process of appointing and dismissing the presidents of the courts – the presidents of the courts are appointed by the Minister of Justice without any form of consultations with the general assemblies of the judges of each courts (such a consultation

process was required in the light of the previous version of the Act on common courts). The process of dismissing courts' presidents and vice presidents was not supported by a holistic analysis of the situation in the courts. The Minister of Justice dismissed court presidents and vice presidents on the basis of one-sentence decisions that had no explanation. Simultaneously, in the case of decisions concerning more than 80 courts, the Ministry of Justice published press releases with fragmentary information that supposedly justified the decisions. Altogether, the Minister replaced almost 150 presidents in the courts of every rank across the country.

The posts of courts' presidents were filled in by candidates selected by the Ministry. The entire process was conducted in a non-transparent way and based on irrelevant criteria – the Ministry of Justice did not conduct any open consultations with the judicial community on the appointment of new presidents. Although the amendments to the act did not introduce such a requirement, such consultations should still have been expected from the ministry, as best practice in court management.

### **The results of the changes**

The amendments to the act on the System of Common Courts broadened the opportunities for politicians to influence courts. The changes in the area of appointing court presidents and vice presidents, as well as the restriction on their competences, in practice aim to broaden political influence on the justice system. The appointment of court presidents by the Minister of justice without consultation with the judicial community deprives court presidents of their essential legitimacy to manage the courts, and additionally makes them dependent on the Ministry of Justice.

Moreover, the effects of the amendment to the Law on the System of Common Courts may violate the right to a fair trial. The amendments will not make court proceedings more efficient; on the contrary, they may have a negative effect on the implementation of the right to a fair trial. Insofar as in the majority of cases citizens will not sense any change in the way the courts function, the mechanisms of influencing courts and judges that were introduced may be used in political cases or in those that arouse public interest, which can be used for purposes devised by those in power.

### **Proceedings before the European Court of Justice**

It should be mentioned that the amendments to the law on common courts resulted also in a number of preliminary questions addressed to the Court of Justice of the European Union by Polish common courts (who followed example of the Supreme Court in this regard) in 2018. Two notable instances can be provided to illustrate this phenomenon. The first one was lodged by the Regional Court in Łódź in September 2018 and pertained to the matter of judges' independence in the light of new provisions on disciplinary proceedings. The court expressed fears that, if the case between the state and the local municipality is ruled on in favour of the latter, a judge might – according to the new provisions – face disciplinary charges. The second preliminary question came from the Regional Court in Warsaw. It also tackled the matter of disciplinary proceedings, specifically – the problem of political influence on the proceedings and the possibility they can be used as means of political control of jurisdiction. Both cases have been registered by the CJUE and are pending.

## THE PROSECUTION

In 2016, the new provisions regulating the prosecutor's office came into force. The introduced changes primarily combines the offices of the General Public Prosecutor and Minister of Justice, yet it is not accompanied by any guarantees of independence from political influence over prosecutors. The manner of adopting the legislation and lack of *bona fide* consultations might indicate this solution was politically motivated to a great extent and constituted another step meant to further centralise supervision of the justice system in the hands of the government. It is further noteworthy that the General Public Prosecutor – Minister of Justice also has oversight authority over the common courts. As such, a single individual who is not subject to any substantive review, now possesses excessive authority to shape the judicial system.

The amended Law on the Prosecution Service allows the politician holding the office of General Public Prosecutor to influence particular criminal proceedings. Therefore, it opens the possibility to initiate and conduct politically motivated investigations. The law also provides no guarantees with respect to shaping human resource policy, which should be based on transparent criteria for promotion and demotion. Human resource changes implemented after March 2016, in connection with the ability to delegate prosecutors anywhere, indicate a dangerous trend in which a prosecutorial career may be dependent on non-substantive criteria.

Several examples of supposedly politically-influenced decisions of public prosecutors, issued after March 2016, can be provided in support of the abovementioned.

- In August 2017 an investigation into exceeding the statutory authorisation by the Minister of Justice (with regard to unjustified payments for prosecutors) was discontinued. The same prosecutor later discontinued the proceedings related to nepotism on the part of the Minister of Agriculture.
- An investigation, instituted in August 2016, concerning the decision of Andrzej Rzepliński, the then president of the Constitutional Tribunal, not to assign the three wrongfully appointed judges to the cases.
- Discontinuation of proceedings against an ex-secret service agent (and later – a member and MP of the ruling party), accused of violating the law during a police provocation.
- Withdrawal of indictment and discontinuation of proceedings, in June 2017, concerning bribery allegedly committed by the president of a large state-owned company.
- An investigation, instituted in 2018, into propagating fascism by a reporter of a private TV station who took part (undercover) in a secret neo-Nazi event while preparing a documentary.

## GROWING PRESSURE ON THE JUDICIARY AND THE PROSECUTION

The systemic changes in the judiciary are also accompanied by disciplinary proceedings against judges and prosecutors who openly criticised the reforms. Several recent examples of disciplinary proceedings against judges can be provided to illustrate the growing pressure on the judiciary as a whole:

- Justice **Olimpia Barańska-Maluszek**, a member of the Association of Polish Judges *Iustitia*, was one of the authors of the association's recently-issued resolution on the independence of the judiciary. She is also an active commentator on legal matters in the social media, where she tackles the topics such as the organisation of common courts, the rule of law or constitutional law. The Deputy Disciplinary Officer for Common Courts' Judges requested in September,

2018 an insight into the files of cases that justice Barańska-Małoszek was supposed to examine – from the time period of last three and a half years. No formal complaint regarding to the judge’s judicial work has been made so far. The disciplinary officer decided to institute disciplinary proceedings and raise a charge related to delays in the preparation of written reasonings to ten judgments on the part of justice Barańska-Małoszek.

- Justice **Bartłomiej Przymusiński**, a judge and the spokesman for *Iustitia*, was summoned to testify as a witness before the Disciplinary Officer for Common Courts’ Judges. The judge has been long known for speaking critically of the recent changes in the judiciary (for instance, he called the process of appointing new members of the Supreme Court “*a beauty contest*”, or described the creation of the new National Council of Judiciary as “*fully dependent on the Minister of Justice*”).

- Justice **Igor Tuleya**, a judge with over 20 years of professional experience, is a defendant in the disciplinary proceedings. He was summoned to testify on September 21st. In his opinion, the charge he is facing is very enigmatic. Apart from that, there are other five cases pending, in which he is involved (some of them regarding to, for instance, public lectures on legal matters such as constitutional freedoms or tripartition of power). Justice Tuleya has been very critical of the newly-appointed National Council of the Judiciary. In the past, he also delivered a judgement convicting one of the high-rank officials of the present government and, since then, has been an object of constant criticism for the part of the ruling party members.

There are also recent instances of disciplinary proceedings against public prosecutors:

- **Krzysztof Parchimowicz** is an experienced public prosecutor and the president of prosecutors’ association Lex Super Omnia, known for speaking against the Minister of Justice – General Prosecutor. He used to work in the General Prosecutor’s Office but then, after the criticised new law came into force, he was moved to the lowest-level district prosecutor’s office. The disciplinary proceedings in his case concern a comment he made in an interview, referring to the political grounds of the degradation of two other prosecutors (their refusal to indict an opposition politician). The second charge pertains to the remarks he made publicly on the working conditions in his office (“*stuffiness, narrowness, dirt*”). Recently, Mr Parchimowicz was summoned by the disciplinary commissioner to present explanation concerning his participation in a conference on criminal proceeding organised by Ombudsman’s office.

- **Beata Mik** is a prosecutor and the long-standing author of many columns published in press titles, including Rzeczpospolita, a popular national daily newspaper. In March, 2018, she was accused of not having notified her superiors of her further collaboration with the title, which had allegedly “*weakened public trust in the independence of the prosecution service and prosecutors*”. The accusation related to the articles published in 2016 and 2017, whereas Beata Mik started writing for Rzeczpospolita in 2008. Already in 2000, the prosecutor obtained the consent of then-incumbent Prosecutor General for engaging in the work of a columnist. In November 2016, she informed the National Prosecutor of her intention to conclude a contract for the assignment of copyrights to her columns with the newspaper’s publisher. Ms. Mik did not sign this contract, complying with the National Prosecutor’s objection, which was not accompanied by any statement of justification. The Disciplinary Tribunal ruled that Ms. Mik had not performed her obligation to notify the National Prosecutor of her engagement in a different professional activity. The Tribunal considered her behaviour a violation of professional integrity.

- **Wojciech Sadrakula**, a retired public prosecutor, participated as a lecturer in an event organised to promote constitutional law knowledge among school students. The NGO that organised the event then received a letter from the disciplinary officer for public prosecutors,

demanding the details about Mr Sadrakuła's involvement in the event for the purpose of an ongoing investigation regarding to a disciplinary misconduct. Wojciech Sadrakuła, a lawyer with a 40-year professional experience, has already been found guilty of a misconduct in other proceedings (he appealed and awaits the ruling). He is known for his critical and public opinions pertaining to the reform of the Constitutional Tribunal in Poland.

Apart from the disciplinary proceedings, judges (and – to a lesser extent – public prosecutors) have been under constant pressure coming from two main sources. The first one is public media (the television in particular), whose coverage is aimed at stigmatising and exaggerating every case of judges' misconduct (even though, in one case, it was committed by a retired judge with a diagnosed mental illness) and extrapolating them to the entire group of Polish judges. The second wave of unjustified criticism comes from the members of the ruling party, who call the judges *"a caste"* or *"a group of cronies"*, or, like Mr Marek Suski MP, accuse the former judge-members of the National Council of the Judiciary of hiding gold in their gardens.

Below are presented several statements of the representatives of the ruling party and the government which may be perceived as attacks on the independence of the judiciary or exertion of political pressure on it.

- *„Polish justice system is a huge scandal, and it has to be ended”* (Jarosław Kaczyński, leader of the PiS political group, public radio interview, February 10<sup>th</sup>, 2017);
- *<<We replace “judgecracy” by democracy. In the name of the superior authority of the nation, these changes are necessary. Judges do not rule in their own names but in the name of the state, the society, in the name of all citizens. And these citizens should have impact, even the smallest one, on who and how becomes a judge”>>* (Marcin Warchoł, undersecretary of state in the Ministry of Justice, a speech during the session of the Parliament, April 5<sup>th</sup>, 2017);
- *“The question is: who rules in Poland? Is it the democratically elected Sejm or is it the Constitutional Tribunal? The Sejm deputies, members of the Government are accountable for their actions to the citizens, for example during the next elections. And what is the accountability of the Tribunal judges for their decisions? None. Even if they don't perform their basic duties properly”* (Andrzej Duda, President of Poland, *“wSieci”*, January 23<sup>rd</sup>, 2016).

Moreover, in September 2017, Polish National Foundation (an organisation launched by 17 state-owned companies) started a social campaign *„Fair Courts”*. The campaign was supposed to be an answer to the massive protests which took place in July 2017 (the protests were organized under the slogan *„Free Courts”*). The campaign's aim was to explain the necessity to reform the justice system. The main communication channel of the campaign, whose total budget was almost 19 million PLN (ca. 5 million EUR), were billboards presenting the cases of the most controversial decisions of the courts or cases of judges against whom the disciplinary or criminal proceedings were initiated. The Supreme Court has issued several statements referred to the specific pieces of content of the campaign and correcting the facts.

## ABOUT HFHR

The Helsinki Foundation for Human Rights is one of the biggest and oldest non-governmental organisations dealing with the human rights protection in Poland. HFHR's mission is to promote human rights protection in democratic state ruled by law. HFHR undertakes

educational, legal and monitoring activities both in Poland and the countries of the former Soviet block. HFHR has a consultative status at ECOSOC and is a member of numerous research networks and platform.

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