RESPONSE

to the non-paper

“Polish judiciary regulations – current state of affairs”

of 8 June 2018

This document has been drafted as a response to the non-paper “Polish judiciary regulations – current state of affairs” that is being distributed in Brussels among the EU actors by the Polish government.

It has been consulted with the most relevant non-governmental organisations that deal with issues concerning threats to the rule of law in Poland as well as ongoing amendments to laws on Polish judiciary.

The response follows the structure of the non-paper and regards some of its most controversial parts. It concerns legislation in force as of 18 June 2018. To improve readability, all responses are presented as bulleted lists.

Warsaw, 18 June 2018

Introduction

Government

As you are certainly well aware, Poland and the European Commission have been in dialogue over the Article 7 (1) of the Treaty on European Union procedure and the rule of law for quite some time now. During this dialogue, Poland has explained the ideas behind its judiciary reform, and introduced many changes indicated by the European Commission as guarantees for the independence of justice. So far, the dialogue with the Commission continues, yet the Article 7 (1) procedure is still in course.

We wish that you are best informed about the developments of situation and amendments to the Polish judiciary laws that we have already introduced (or that are still being adopted). For your convenience, we present them in a table below.

Response

- The amendments do not address some of the Commission's recommendations – in many cases they went directly against their explicit wording.
- What is entirely misleading is that the government suggest many changes have been introduced and they were made as indicated by the Commission.
- Real world: while the Polish government is undertaking a charm offensive in Brussels, the situation in Poland is continuing to worsen with recent statements by top Polish officials making crystal clear the real rationale underlying the so-called "reforms" regarding Polish judiciary":
    - *We can't step back from something that is an essence of [our] reforms* – S. Piotrowicz, PiS-MP mainly responsible for judicial reforms,
    - *Judges should always stand on the side of the State because they are State authority, they administer State authority.* […] *Among 10 000 judges there have always been and will be black sheep, bur our task is to make sure that there is as few of*

them as possible, and those that can be found should be eliminated mercilessly – M. Warchoł, deputy Minister of Justice,

- *[The Supreme Court] promotes totalitarian system, where the supreme cast of judges fully control society trying to supervise all areas of public and private life, as much as possible* – M. Warchoł, about recent Supreme Court judgment in favour of LGBT group,

- *Supreme Court took the side of those, who – using the mechanisms of state – forcefully aim to violate the freedom of the people* – Z. Ziobro, Minister of Justice about the LGBT case.

- The structure of this non-paper is designated to mislead as it does not follow the structure of the Commission's rule of law recommendation of December 2017.

- By not following the Commission's list of recommendations and not reproducing them, it makes it intentionally difficult for the reader to quickly identify which of them have been completely ignored by Polish authorities as well as the extent to which the "amendments" simply do not answer the Commission's concerns.

Publication of judgments of the Constitutional Tribunal

Government

All the acts of the Constitutional Tribunal have been published in the journal of laws. Some of them were issued with breach of law – however, Polish parliament decided that for the sake of legal stability it will be better to have them promulgated, too.

The law on amending the statute of the Constitutional Tribunal entered into force on 22 May and the judgments were published on 5 June 2018.

Moreover, the government has no power to decide on publication of any verdicts of the Tribunal – this competence remains solely at the hands of the President of the Tribunal (for the future as well).

Response

- Although three judgments of the Constitutional Tribunal of 2016 have been published, the government constantly claim they are not "judgments" – as mentioned in Article 190 of the Constitution.

- The recent amendment to the act on the Constitutional Tribunal defined them as "findings", suggesting their lack of lawfulness.

- The mentioned act allowed the government (for the first time) to interfere in their wording – each of these judgments, when published in the journal of laws, had been given a disclaimer stating that the "finding was issued with a breach of [former] act on the Constitutional Tribunal".

- The government constantly acts in bad faith, claiming three mentioned judgments of the Constitutional Tribunal lack legal bindingness. It still poses threat to Article 190 of the Constitution, according to which judgments of the Tribunal are of universally binding application and final.

- Officially published comment that judgements were adopted unlawfully shows that government constantly intervenes into the scope of powers of judiciary. Such situations directly undermines the separation of powers and independence of judiciary, in particular the Constitutional Tribunal.

- The government had never power to decide on publication of any judgments of the Constitutional Tribunal – pursuant to acts on Tribunal of 1997, 2015 and 2016 (that is now in force) the President of the Tribunal orders publication in the journal of laws.

- In 2016, prof. Andrzej Rzepliński, the former President of the Tribunal, ordered three mentioned judgments be published but the government refused until 5 June 2018.

- Three mentioned judgments were illegally removed from the official Constitutional Tribunal Reports by the current presidency and still haven't been published there.

- It is important to recall that the judgment of 9 March 2016 concerned former act on the Constitutional Tribunal, passed by ruling majority, that at the same time was the legal basis of the Tribunal's judicial activities. In order to resolve this legal paradox,

judges of the Tribunal resorted to Article 195(1) of the Constitution that allows them, in certain circumstances, to refuse to apply the binding statute as they are "independent and subject only to the Constitution". As a result, judges directly applied provisions of the Constitution as well as the act on the Constitutional Tribunal (the subject of adjudication) – with the exclusion of certain provisions of this act.

- As in case K 47/15 the Tribunal decided that the former act on the Constitutional Tribunal is – as a whole – inconsistent with the Constitution, in cases K 39/16 and K 44/16 (two other recently published "findings") the course of proceedings before the Tribunal was regulated by the even former act on the Constitutional Tribunal.

- The fact that judges of the Tribunal had applied the Constitution directly was the main reason for the government not to publish this judgment in the journal of laws. Consequently, ruling majority refused to publish two other judgments – as in cases K 39/16 and K 44/16 the Tribunal based on the act on the Constitutional Tribunal which preceded the one that was adjudicated unconstitutional on 9 March 2016.

Case distribution between judges of the Constitutional Tribunal

Government

The Tribunal is working pluralistically, and the cases are allocated in alphabetical order. Some exceptions are allowed, but the judges appointed during previous terms of parliament are fully involved in sentencing. Contrary to some unfounded claims these judges were never excluded from administering justice and they often form majority in adjudicating panels (in over 40% cases under current CT President).

It is a significant improvement in comparison to situation under the previous CT President, who composed benches in a way that would secure majority for the judges he preferred (all the benches composed under his rule granted majority to judges appointed during previous terms of parliament).

Also the judges appointed during current term of parliament often rule against the position of parliamentary majority (e.g. cases K 17/14, SK 48/15, K 36/15, SK 37/15, K 39/15, SK 25/15, K 2/17, P 7/16 – some of them on very "sensitive" topics, as Police search regulations in case K 17/14). All of CT judges enjoy very wide guarantees of independence: they are irrevocable, very highly remunerated (for life) and there are no mechanisms of influencing their decisions.

Response

- The government ignores key problems concerning the Constitutional Tribunal – there are still three "anti-judges" elected by current majority for positions that are already occupied by three legitimate judges. One "anti-judge", Mariusz Muszyński, was chosen as the "Vice President" of the Tribunal. Moreover, the election of current "President" of the Tribunal, Julia Przyłębska, raise doubts about whether she was chosen with a breach of already-in-force act on the Constitutional Court passed by the ruling majority.

- Despite the act on the Constitutional Court (Article 38) obliged the President of the Tribunal to distribute all cases alphabetically, it also stipulated they must be allocated by "taking into account the category, number and order of applications received by the Tribunal". This criteria seem unclear since – under the current presidency – there is no direct relationship between applications sent to the Tribunal and the case-distribution among its judges. Additionally, the President of the Tribunal is allowed, for justified reasons, especially due to the subject-matter of a case, to appoint a judge-rapporteur regardless of the mentioned criteria. All this provisions give power to the President of the Tribunal to allocate cases individually to judges selected at her discretion.

- Such unclear criteria raise doubts about whether the Tribunal's case-distribution is motivated politically. Since 2017, the most important cases were adjudicated by judges (or "anti-judges") regardless of the alphabetical order. Moreover, the current "President" of the Tribunal – contrary to the statute – constantly modifies the allocation of cases that have already been distributed among judges.

- In particular, the Tribunal composed mainly (or entirely) of judges and "anti-judges", elected by the current ruling majority, ruled in the most sensitive cases concerning: public gatherings,

the composition of the National Council of the Judiciary, the correctness of the election of the President of the Tribunal, the position of the First President of the Supreme Court and the act on the Constitutional Tribunal.

- What is more, judges elected by the Sejm during its previous term are being excluded from adjudicating in vast majority of cases. One of them, judge Marek Zubik, has not taken part in any ruling since December 2016. Such situation is a consequence of the Prosecutor's General motion of January 2016 arguing that three judges have been elected unlawfully in 2010. In result of the motion, the Constitutional Court – composed mainly of judges elected by the current Sejm – excluded them from ruling. It is against the government statement that all judges are "fully involved in sentencing".

- Despite judges of the Tribunal enjoy independence, the current "President" of the Tribunal, Julia Przyłębska, participated in several events in which the ruling majority also took part. Moreover, at least three prominent members of the ruling party secretly visited the Tribunal under current presidency. It suggests the Tribunal (in particular judges elected by the current majority) lacks political independency.

- As the credibility of the Tribunal has been undermined, the former National Council of the Judiciary as well as the Ombudsman withdrawn their applications sent to the Tribunal. Also the number of motions brought to the Tribunal by common and administrative courts has significantly declined.

- One remark made by Mariusz Muszyński – the "Vice President" of the Constitutional Tribunal and an "anti-judge" must be quoted. In one of his dissenting opinion he stated that "To ensure the efficiency of the Tribunal also means to assign judges to cases in circumstances not explicitly listed in the statute (…) for example when a panel of judges does not agree with draft judgment prepared by a judge-rapporteur".

Dismissals of presidents of common courts

Government

Poland has changed the regime for dismissal of the presidents of the common courts. It is still a competence of the Minister of Justice (who oversees the courts – but only in their administrative aspect). However, he must now obtain a consent of the college of the court that would be affected by a dismissal – and in case the college does not grant such consent, an approval of the National Council of the Judiciary is needed.

There are also pre-established criteria that must always be taken into account: presidents of the courts may only be dismissed in case of flagrant or persistent failure to carry out their duties if their performance does not benefit the interest of the judiciary if there is exceptional ineffectiveness in court organization or in case of voluntary resignation.

The law containing the above amendments entered into force on 22 May 2018.

It is also worth noting that until 2012 the Minister of Justice had absolute discretion in dismissing court presidents if he believed that they failed to exercise their duties. This regulation was in force when Poland joined the EU, and it remained there for the next 8 years – with no concerns from the Commission about any threat to the rule of law whatsoever.

Response

- The mentioned amendment, that used to secure the independence of judges, after previous "reforms" does not guarantee anything. Despite court's colleges (composed of judges) issue negative opinions of candidates, the already-captured National Council of the Judiciary has the right to give final opinion.

- The Minister of Justice has already appointed many presidents and vice president of common courts so he can count on their loyalty and has no reasons to dismiss them. He still has unlimited power to appoint them – the above-mentioned opinions are not binding.

Composition of the National Council of the Judiciary

Government

The National Council of the Judiciary is composed with a vast majority of judges (17 out of 25 members, more than 2/3). 2 of these judges are ex-officio members, and 15 were elected by the Parliament – with a very wide democratic mandate (over 3/5 majority in Sejm). After they are elected, there are no mechanisms on influencing NCJ decisions by the parliament or the government – the judges are irrevocable and there are no effective means to exert any pressure on them.

Apart from 17 judicial members there are also two members of the opposition parliamentary groups in the Council. Any undue influence can be easily exposed, since all the sessions are carried out in public, with active presence of members independent from the ruling majority (either the current one or any other in the future).

Response

- The Constitution does not allow the parliament to appoint judges to the National Council of the Judiciary – as it has been confirmed in several opinions issued throughout this and previous year.

Transparency of the National Council of the Judiciary

Government

For the first time in the Council history, the law provides that its sessions are publicly transmitted on-line, so that all decisions on judicial nominations and promotions would be as transparent as possible – it further eliminates any possibility of undue influence (either political of or any other nature). Apart from the Parliament, no other public body is as transparent for the public.

We believe that it is currently in the best interest of the judiciary to allow the NCJ to work in tranquility – and observe how it carries out its competences. New members will be elected to the Council in 2022 – and it will be the next term of Sejm that will do it (so there is

no incentive for the Council members to act in favour of – or against – any political group).

The NCJ has been convened by the First President of the Supreme Court and commenced its duties on 27 April.

Response

- Despite sessions of the National Council of the Judiciary are transmitted on-line, the Speaker of the Sejm and the Minister of Justice refused to publish information regarding judges who supported the candidates elected to NCJ. Their refusal has been challenged of the administrative court and these cases are pending to adjudicate.

- It must be stressed that the mentioned cases may be ruled by judges who supported the candidates to NCJ, so currently there is no way to exclude them from adjudicating as only two politicians (mentioned above) and judges themselves know the supporters.

Transferring the Supreme Court judges to Disciplinary Chamber

Government

In the Supreme Court, an amendment was introduced allowing the judges currently sitting in other chambers to request a transfer to a newly created Disciplinary Chamber – all of the judges in this chamber shall be fully independent, as all other judges in the Supreme Court, too.

Response

- Judges of the Supreme Court may be transferred to Disciplinary Chambers but after obtaining the consent of the President of the Republic and the politically-dependent National Council of the Judiciary.

Prerequisites for the extraordinary appeal

Government

An additional prerequisite is introduced for the extraordinary appeal – in order to use it, it will have to be necessary to ensure conformity with the rule of law (to be exact, it is the principle of "democratic state ruled by law and implementing the principles of social justice" is enshrined in the Article 2 of the Polish Constitution).

This principle has been thoroughly explained in the verdicts of Polish courts, including the Supreme Court and the Constitutional Tribunal – and its interpretation allows refers to a very limited range of situations, thus making the new remedy extraordinary indeed.

Response

- In its opinion, the Supreme Court noticed that the referral to Article 2 of the Constitution may result in that anytime when the Supreme Court adjudicates the extraordinary appeal it may be forced to request the already-captured Constitutional Tribunal for a preliminarily ruling. This request will concern provisions of statutes taken into account by a common court in its judgment that is now challenged with the extraordinary appeal.

Limited right to lodge the extraordinary appeal

Government

As to the verdicts issued before the extraordinary appeal became available, only two institutions (instead of eight) will now be able to lodge it: the Ombudsman and the Attorney General.

Other bodies (President of the General Counsel to the Republic of Poland, the Commissioner for Children's Rights, the Commissioner for Patients' Rights, the Chair of the Polish Financial Supervision Authority, the Financial Ombudsman, and the President of the Office of Competition and Consumer Protection) will only be allowed to file it against future verdicts, and only if the case lies within the scope of their competence.

Response

- Whereas the Ombudsman and the Prosecutor General are now able to lodge the extraordinary appeal regarding judgments issued from 1997 to the entry into force of the act on the Supreme Court, this procedure may be used politically as the Prosecutor General is at the same time the Minister of Justice, a member of parliament and one of the leaders of current ruling majority.

- Moreover, the extraordinary appeal may be lodged even when a common court ruling was based on the EU law. It poses a real threat to the stability and efficiency of the EU law.

Limits of the extraordinary appeal

Government

Moreover, if a verdict challenged by the extraordinary appeal would have already led to irreversible legal effects (such as transfer of ownership of a real property to a third party), the Supreme Court should limit itself to declaring that the verdict was issued with breach of law – but it will not be repealed for the sake of legal stability.

Response

- This limit is not unexceptional as the Supreme Court is allowed to repeal a judgment when "the principles, or freedoms and rights of persons and citizens support the need to issue a judgment". This criteria are so unclear that a politically-influenced panel of judges is allowed to make a judgment virtually in any case.

Appointment of assistant judges

Government

Another group of amendments concerns appointment of the judges on probation. The power to nominate them would be transferred from the Minister of Justice to the President, and they will be appointed on the basis of a ranking list from judicial exam. The National Council of the Judiciary would make its recommendations and pass it to the President – in a procedure very much alike to the one for the judges appointed for life.

Response

- Since the National Council of the Judiciary is already captured and filled by loyal judges, the ruling majority has a power to influence NCJ not to recommend particular candidates.

- The government may also interfere in the mentioned procedure as the Prime Minister is obliged to countersign of the President's decision whether to appoint an assistant judge.

Dismissal of the Supreme Court judges

Government

It is worth noting that 13 out of 27 judges that have already reached the retirement age declared their will to continue their service – which contradicts the claim that the judges decided to boycott the procedure. On the other hand, the judges who have not expressed such a wish cannot be forced to remain in office.

In the end, earlier retirement age may only affect from 1/6 to 1/3 of the 76 judges of the Supreme Court. It should also be noted that all judges of the Supreme Court who reach the standard retirement age and do not wish to continue their service will keep their existing guaranteed rights, and none will be deprived of their right to retirement benefits, on the same terms and conditions as before the reform, i.e. an emolument equal to 75 percent of the basic salary and seniority allowance received in at the most recent post (amounting to a six-month salary). They also retain a special legal status related to their service for the rest of their lives – including full immunity, also for criminal proceedings.

Response

- The majority of the Supreme Court judges, who reached the retirement age, have not requested the President to prolong their mandates because of an unconstitutional and humiliating procedure introduced by the parliament.

- Apart from the above, the constitutional term of the First President of the Supreme Court will be shorten.

The reform of the European Court of Human Rights

Government

As far as the retirement age of the Supreme Court judges is concerned, it is worth noting that similar doubts as the European Commission is referring today to the Polish reform appeared in the 1990s. At that time, member states of the Council of Europe took action to establish a permanent Tribunal in place of the then existing European Commission on Human Rights and the European Court of Human Rights.

The scope of the reform also included the status of judges. It introduced the principle that the term of office of the judges ends when they reach the age of 70 years. As a result of the adoption of the new provisions on 1 November 1998, the term of office of all the judges expired. The composition of the newly established full-time Tribunal in only one third was identical to that before the reform.

Response

- The case of the European Court of Human Rights is not suitable for comparison. The Council of Europe decided to reform the Court, sitting periodically, and establish a permanent Court of Human Rights. Member states made a decision by signing Protocol 11 to the European Convention on Human Rights.

EU case-law

Government

Similar matter was subject to a ruling off the European Court of Justice in 2011 (joined cases Gerhard Fuchs (C-159/10) and Peter Köhler (C-160/10) v. Land Hessen). The issue in question concerned the possibility to use a reform of mandatory retirement age for a purpose of rejuvenating the structure of civil servants (the case concerned public prosecutors that usually enjoy similar guarantees to those of judges).

And the ECJ ruled that it may be done – because "the aim of establishing an age structure that balances young and older civil servants

in order to encourage the recruitment and promotion of young people, to improve personnel management and thereby to prevent possible disputes concerning employees' fitness to work beyond a certain age, while at the same time seeking to provide a high-quality justice service, can constitute a legitimate aim of employment and labour market policy."

Response

- The mentioned case concerned prosecutors, not judges, and the refusal of prolongation their service, not shortening their retirement age.
- The way in which the ruling majority captures the Supreme Court resembles the *Commission v. Hungary* case (C-286/12).

Constitutional basis for retirement of judges

Government

It must be also noted that the Article 180(4) and (5) of the Polish Constitution leaves it for a statute to establish the judicial retirement age – and it even allows for a forced retirement of judges when there is a reorganization of the court structure (which currently takes place in the Supreme Court).

This regulation has been present in the Polish legal system since 1997 and was never contested by the Commission – also at the time when Poland was joining the EU. It is therefore even more surprising that it is subject to such criticism now, after over a decade since the 2004 enlargement.

Response

- According to the Ombudsman, the act on the Supreme Court does not reorganises it at all. After the "reform" its main tasks remain the same.
- Apart from that, Article 180 of the Constitution cannot force the First President of the Supreme Court to leave – since Article 183(3) guarantees her 6-year term of office, which ends in 2020.