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THE JUDICIARY IN POLAND AT THE THRESHOLD OF 2017: CHALLENGES AND THREATS*

I. The aim of this article is to present the main developments currently being implemented and action planned for the near future concerning the judiciary by the government of Law and Justice and the parliament in which this party has a majority. In view of the fact that there is no possibility of changing the Constitution, the current governing party frequently makes political changes by adopting ordinary laws, violating the Constitution. In this paper, we would like to focus our attention on the challenges and threats faced by the judicial system.

II. In the light of the provisions of the current Constitution, Poland is a democratic legal state (a state under the rule of law) based on a tripartite system and strict observance of the principle of the independence of the judiciary as well as an extensive catalogue of civil rights and freedoms. In the absence of the possibility of changing the Constitution, the ruling Law and Justice Party has decided to carry out systemic changes by means of passing ordinary laws, failing to ensure their compliance with the Basic Law. Thus, the primary objective of the party has become to paralyse the work of the Constitutional Tribunal.¹ Changes in the common courts of law in Poland, that would raise constitutional doubts, are from a formal point of view much more difficult to implement than, for example changes affecting the prosecutors' office, since the provisions of the Constitution guarantee the independence of the judiciary from the executive and the independence of judges, in line with

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¹ Also see: *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 78(1), 2016: H. Suchocka, Opinion of the Venice Commission on the place of the constitutional judiciary in a democratic state, pp. 5–18 <[doi:http://dx.doi.org/10.14746/rpeis.2016.78.1.1](http://dx.doi.org/10.14746/rpeis.2016.78.1.1)>; J. Stępień, Revolution—conscious or unconscious, pp. 19–33 <[doi:http://dx.doi.org/10.14746/rpeis.2016.78.1.2](http://dx.doi.org/10.14746/rpeis.2016.78.1.2)>; M. Safjan, Politics and the Constitutional Tribunal. The Constitution—the last line of defence against politics, pp. 35–42 <[doi:http://dx.doi.org/10.14746/rpeis.2016.78.1.3](http://dx.doi.org/10.14746/rpeis.2016.78.1.3)>; A. Zoll, The method of appointing judges to the Constitutional Tribunal, pp. 43–50 <[doi:http://dx.doi.org/10.14746/rpeis.2016.78.1.4](http://dx.doi.org/10.14746/rpeis.2016.78.1.4)>; W. Łączkowski, Comments on the current developments concerning the Polish Constitutional Tribunal, pp. 51–56 <[doi:http://dx.doi.org/10.14746/rpeis.2016.78.1.5](http://dx.doi.org/10.14746/rpeis.2016.78.1.5)>.

the principle of the separation of powers.² Consequently, as long as the Constitutional Tribunal remained independent of the executive power, and its work was not totally paralysed, the constitutional guarantees in respect of the activities of the common courts were in place and effective.

Zbigniew Ziobro, the minister of justice and prosecutor general, has announced that changes in the judicial system in Poland will be implemented once 'the dispute about the Constitutional Tribunal has been resolved.' Judges have generally understood this as a signal that the planned changes may be inconsistent with the constitutional order in force, and that in particular they may violate the principles of tri-partition of power, the independence of courts and the independence of judges. These changes concern the rules of disciplinary proceedings in such a way as to exclude the competence of a judicial corporation in this respect, while the Minister mentioned two possibilities here. One would be the introduction of a certain type of people's court in which it would be the 'social factor and not the colleagues from the corporation' who would decide 'whether a principle had been broken or not.' According to the other concept, a disciplinary chamber would be formed at the Supreme Court (perhaps also with participation of a 'social element') to deal with disciplinary cases against judges.

Another major change would concern the organisation of the system of justice itself. The three-level structure of the common judiciary currently in place comprises district courts, regional courts, and appellate courts, is to be replaced by a two-level structure, but it is not clear whether as a result of this reorganisation it would be the lowest common courts (the district courts) or the highest level courts (the courts of appeal) that would be abolished. It is also proposed that a 'universal' position of 'common court judge' be created which would make it possible to verify all nominations of judges. Another idea is to bring together all the district courts within the framework of large regional courts, and this may mean that the existing district courts could merely become external branches of these large courts, which would allow judges to be moved freely from one to another. If this solution is implemented, the constitutional principle of the non-transferability of judges will be an illusion. The common view that prevails among judges is that the announced reorganisation is intended to be only a pretext, as it was in the case of the reorganisation of the prosecution, allowing the posts of presidents of courts to be filled by judges whom the minister trusts and the removal from office of those who disagree with and question the policy of change in the judiciary adopted by the current government established by Law and Justice, which has not yet, however, carried through the reforms of the judiciary it announced in the electoral campaign. However, this does not mean that the current government and parliament are not involved in implementing measures intended to affect the way in which common courts operate. These activities can be divided into two categories. One includes Presidential and ministerial measures aimed at

² Also see: D. Zawistowski, Independence of the courts and judicial independence from the European Union law perspective, *Ruch Prawniczy, Ekonomiczny i Socjologiczny* 78(2), 2016: 7–13 <doi:http://dx.doi.org/10.14746/rpeis.2016.78.2.2>.

widening the scope of the authority of the executive at the cost of the judiciary, which is now being done based on an interpretation of the existing provisions which is favourable to the executive. Actions of this kind are raising serious legal doubts and are most certainly contrary to the existing custom, leading to a distortion in the balance of power that has been being built over the years. The main recent ones include the pardoning by the President of the former Head of the Central Anti-Corruption Bureau, the blocking by the President of the nomination of 10 judges of common courts and the withdrawal of the secondment of one of the judges to the District Court in Warsaw. The other category of measures aimed at changing the judiciary in Poland involve legislative changes already implemented and others in the form of parliamentary drafts or other legislative acts.

Moving on to a more detailed discussion of the first category indicated above, the earliest chronologically was the pardoning by President Andrzej Duda of the former Head of the Central Anti-Corruption Bureau Mariusz Kamiński and his three colleagues. They had been convicted by the District Court in Warsaw of having acted beyond their powers and taking illegal operational measures, for which Mariusz Kamiński was sentenced to 3 years of imprisonment and a 10-year ban on appointment to posts in the public administration.³ Appeals were then filed against the judgment. However, in November 2015, before the appeal had been heard, the President pardoned Mariusz Kamiński and the other three convicted in this case, with their convictions still pending. The President's decision to pardon aroused much controversy, not only in terms of the legitimacy of granting pardon, but also in terms of the lawfulness of such an action. While it has never been disputed that the President has the right to pardon persons who have been validly convicted, this was the first time in the post-war history of Poland, in which a pardon had been granted to a person on whom the judgment of the court of first instance had not become legally binding (absolute), so the issue of the criminal liability of that person had not been finally resolved.⁴ Moreover, the decision on pardoning was issued without adherence to the relevant procedure provided for in the Code of Criminal Procedure, and even without the President or his legal counsel(s) familiarising themselves with the case files, so it was entirely arbitrary. It should be added, as well, that immediately after the pardon, Mr Mariusz Kamiński, previously convicted among other things of illegal operational measures, was appointed to the position of minister-coordinator of Special Services, which is a position inherently related to the use of operational

³ The actual state of affairs was as follows: in 2007 when Law and Justice first came to power, the Central Anti-Corruption Bureau headed by Mariusz Kamiński commenced provocations against the chief of the Law and Justice's coalition party Samoobrona, which were to culminate in handing over a controlled bribe. The rationale of the court's ruling in the case pointed to the fact that the Central Anti-Corruption Bureau incited corrupt behaviour in the absence of legal and factual grounds to instigate such an anti-corruption operation.

⁴ It must be noted here that the very general provision of Article 139 of the Constitution does not resolve at which stage a pardon may be given, and the only provisions of executive authority are contained in the Code of Criminal Procedure in the detailed section XII 'Proceedings after a decision becomes valid' ('Postępowanie po uprawomocnieniu się orzeczenia').

techniques. This must raise concerns from the point of view of the protection of civil rights and freedoms.

Another controversial decision of President Andrzej Duda was the refusal to nominate 10 judges presented by the National Judiciary Council, which took place on 22 June 2016. In accordance with previous practice, nominating as judges persons who had previously taken part in competitions for the position of judge held by individual courts, and who were subsequently endorsed by the National Judiciary Council, was an honorary right of the President of Poland. The only situation similar to this one in post-war Poland was in 2007, also under the rule of Law and Justice, when the then President Lech Kaczyński refused to appoint 9 judges. The President's right to refuse to award judicial appointments raises serious legal doubts, as it is not expressly provided for in the Constitution. It should be noted here that the judges, who in 2007 Lech Kaczyński refused to appoint as judges, had exhausted their legal remedies to change this decision, and the Constitutional Tribunal's ruling⁵ as well as the decisions of the Supreme Administrative Court were also negative with respect to their plea. However, this does not change the fact that the only presidents of Poland who usurped the right to refuse to appoint judges were nominees of the Law and Justice party. When discussing President Duda's decision, it is also important to emphasise its completely arbitrary nature, which is due to the fact that it does not contain any justification. This kind of decision opened the way to media speculation, which shows that at least with regard to some of the judges whose nomination was refused, the reason for the President's decision may have been the fact that they had conducted proceedings in which judgments they delivered were unfavourable to members of the Law and Justice party. The efforts to strengthen the President's influence on the process of judicial appointments are also reflected in the amendments to the Act on the National Judiciary Council which will be discussed below.

The potential motive of retaliation against judges who have issued decisions unfavourable to members of the ruling party appears even more clearly in relation to the individual decision of Zbigniew Ziobro, the Minister of Justice and Procurator General, where a right to adjudicate in a higher court was withdrawn from a judge of the District Court in Warsaw at the beginning of October 2016. It was surprising in that case that there were no objections to the judge's work, there had been no disciplinary proceedings and her work was highly rated by her superiors. As was established, however, several years earlier, the judge had been investigating a case in which one of the parties was the present Minister for Justice and Prosecutor General Zbigniew Ziobro. The current minister lost the case, during which the judge punished Zbigniew Ziobro with a fine for unjustified failure to appear, and at the end of the pro-

⁵ Three justices of the Constitutional Tribunal delivered dissenting opinions, emphasising that conducting a comprehensive and multi-stage procedure of selecting judges would have been pointless in a situation when its result could simply be annulled by an arbitrary decision taken by the President. What was more, vesting the President with such a right would have undermined the competences of another constitutionally established body, the National Council of the Judiciary.

cedure she decided that he would have to bear the costs of the proceedings. It is significant that Zbigniew Ziobro personally signed the decision to withdraw the delegation of the judge to appear in higher courts. In response to press publications on the President's refusal to appoint judges, the Ministry of Justice issued an official announcement stating that the reason for the refusal was that in conducting a simple, case, albeit one that attracted a great deal of media attention, the judge showed 'exceptional incapacity'. However, as it then turned out, in this particular case the judge had only refused to investigate the traffic accident summarily because she had doubts as to the mental capacity of the perpetrator.

It should be stressed that a later court examination of the mental health of the suspect confirmed her limited capacity and therefore there could be no reason to cite the judge's incapacity. The National Judiciary Council took a position on this matter and issued a statement in which it stated that: 'The National Judiciary Council has assessed negatively the actions of the Minister of Justice, as they undermine citizens' trust in the court and the decision to revoke the delegation is not justified.' Moving on to the second category of actions in the area of the judiciary taken so far by the Law and Justice government, and which consist of legislative changes that have already been implemented or are in the process of being drafted, it should be noted that while each of these legislative initiatives could seem natural in itself, their accumulation within a short period of time, combined with an overall trend towards increasing the possibility of influencing the working of the courts and a clear increase in the repressiveness of these measures must give rise to serious concerns and worries. While no one questions the need for changes in the judiciary aimed at increasing the efficiency of the courts, it is difficult to find any justification for this direction of change. One of the innovations introduced by the new law on prosecution is the creation, at the level of the National Prosecutor's Office, of a Bureau of Internal Affairs, for the purpose of dealing with 'the conduct and supervision of preparatory proceedings in cases related to premeditated crimes committed by judges, prosecutors or judicial or prosecuting assessors, prosecuted on indictment.' The composition of the Bureau of Internal Affairs is established by the Minister of Justice-the General Prosecutor. The fact that this new unit has been placed at the highest organisational level of the prosecution seems to suggest that corruption among judges and prosecutors is a serious problem in Poland, requiring decisive action. However, the statistics utterly undermine the argument that it was necessary to create a specialised unit to address the problem. As it turns out, after more than 6 months of operation, there are only 24 cases underway, of which 19 concern prosecutors and only 5 judges, and anyway they include cases instituted before the Bureau of Internal Affairs was set up. Taking into account the fact that there are about 10,000 judges adjudicating in Poland and about 7,000 prosecutors performing their own duties, this number of proceedings must be considered negligible,⁶

⁶ It should be noted that the creation of the Bureau of Internal Affairs is not the only example of the new organisation of the prosecution, which is not properly justified in the actual structure of criminality. It is equally unusual to set up at the regional prosecutor's office level (which means

while the very fact that such a unit has been created cannot be interpreted in any other way but as an attempt to undermine and perhaps even to intimidate judges and prosecutors. In the opinion of the National Judiciary Council this solution also violates Article 32 of the Constitution which guarantees every citizen equal treatment.⁷ This arrangement excludes the competent prosecutors' offices from handling cases against judges and prosecutors and transfers the cases, on the basis of an arbitrary decision, to a special unit. That is why the National Judiciary Council appealed against this decision to the Constitutional Tribunal.

It would appear that in similar areas, the draft law of September 2016, on the basis of which a qualified type of passive bribery offence is introduced, should be assessed. According to the proposed provision, the acceptance of financial or personal benefits in connection with ongoing proceedings by a judge, juror or prosecutor is to constitute a crime (the most serious category of offences provided for in the Polish Penal Code), punishable by 3 to 15 years imprisonment.⁸ While it has to be accepted that bribery is a very serious offence for a judge, since 1989 bribes accepted by judges have been so rare that there has been no reason whatsoever to justify the proposed tightening of the provisions. It is significant that the GRECO report distinguishes Poland as a post-communist country, where corruption in the judiciary does not pose a problem. It would also be difficult to explain why judges, prosecutors and jurors should be specifically 'honoured' and picked out from other officials of the public administration who are potentially equally likely to be the recipients of corruption proposals, and whose decisions and actions may have a much greater impact on the situation of a significantly larger number of people (such as members of government, parliament, or managers in the public administration) than decisions of judges who as a rule adjudicate in individual disputes.

III. On 5 September 2016, the Council of Ministers adopted a draft law stipulating that judges' declarations of financial assets owned by them are to be disclosed, and that judges may be held criminally liable for fraudulent misrepresentation of the assets in their possession. Currently, judges also make declarations of assets, but these are not publicly available as they are handed over to the relevant tax office and the judges are only liable for providing false information in the declaration of assets. The critics of the draft rightly argue that the introduction of a general disclosure of the declarations of assets made by judges may put them at risk, which may be particularly risky for those adjudicating in organised crime cases. The same draft law also introduces a general tightening of the disciplinary liability of judges, extending the period during which disciplinary proceedings may be initiated from 3 to 5 years

at a very high level) units specialising in dealing with cases of medical errors, which are often also duplicated at the level of district prosecutors' offices.

⁷ The provision referred to here states that: 'All are equal before the law. All have a right to equal treatment by public authorities.'

⁸ In ordinary proceedings a crime is punishable with imprisonment of between 6 months and 8 years.

and introducing a disciplinary penalty of 5–15% reduction of the judge's remuneration for a period from 6 months to 2 years, together with a disciplinary penalty of exclusion from the possibility of being promoted for 5 years. At the same time every disciplinary penalty is to entail a 5-year ban on appointments to positions with special functions.

IV. Crucial for the protection of the independence of courts and the independence of judges in Poland is a constitutionally empowered collegiate body in the form of the National Judiciary Council, composed of judges elected by judicial self-governing bodies, members of parliament and senators elected by the Sejm and Senate, President of the Supreme Court, President of the Supreme Administrative Court, Minister of Justice and a representative of the President. The constitutionally guaranteed powers of the Council include, among other things, the selection of candidates for judges and subsequent presentation of a motion requesting their appointment by the President, adoption of a set of rules on the professional ethics of judges, as well as the formulation of opinions on draft legislation concerning the judiciary. The Council is also entitled to submit motions to the Constitutional Tribunal requesting examination of the constitutionality of normative acts concerning the independence of courts and the independence of judges. Taking into account these powers of the Council and the functions it performs, any change in the scope or status of its members may easily undermine the principle of the mutual balance of powers. The direction of the changes undertaken in this area by the current parliamentary majority is all the more worrying. Under the draft Act, a number of amendments have been made, among them changes in the rules for the election of judges who are members of the Council, which has been combined with the (often premature) termination of the term of office of the previous members. This provision is intended to apply to judges only, and not to other members of the National Judiciary Council. Another change also broadens the President's powers in the process of the appointment of judges in such a way that it obliges the Council, should there be more than one candidate applying for a given position, to present to the President at least two candidates for a given judicial position. In the opinion of the National Judiciary Council, both of these amendments are unconstitutional. In particular, the termination of the term of office of the existing members of the Council violates the provision of Article 187 clause 3 of the Constitution. The term of office of the elected members of the Council, who are judges, shall be four years. On the other hand, the requirement that the Council shall present at least two candidates for each judicial position leaves the right to choose the competent candidate in the President's hands (without any selection criteria and without the possibility of an appeal against the President's decisions) in a situation where, according to the Constitution, only the National Judiciary Council is competent to choose judges, while the President has the competence merely to appoint the selected ones. The Council also regards as unconstitutional the decision to deprive Presidents or Vice-Presidents of courts of the right to sit on the National Judiciary Council. It is expected that the draft Act on the National Judiciary

Council will be presented to the Sejm for debate once the government takes control of the Constitutional Tribunal.

The role of the National Judiciary Council is all the more important as it also fills vacant positions in the Supreme Court, which in turn controls, for example, the validity of parliamentary and presidential elections. The appellate courts, today the second most important courts for more serious cases, handle more than 100,000 cases a year, which would mean that the Supreme Court could have up to 10 times as many cases as at present. Such a solution would either paralyse the Supreme Court's work or would make it necessary to increase its number of judges in such a way that its current judges would become nothing but a significant minority in its composition.

On 26 January 2017, the National Judiciary Council received a draft amending the Act on the National Judiciary Council with a request to formulate an opinion on the draft. The proposed amendments change fundamentally and contrary to the Constitution the basis of the political system of the Republic of Poland. Interestingly enough, Deputy Minister Marcin Warchol specified the deadline by which the National Judiciary Council was to submit its opinion as 31 January 2017. This meant that the Council was expected to deliver an opinion on such an important matter in four days, including Saturday and Sunday. The Council, as is generally known, is a collegiate body, made up also of judges who judge in their respective courts. The Minister is very well aware of this and is also familiar with the timetable of monthly Council meetings. This clearly means that the Ministry is only interested in complying with formal requirements and sending the draft to the National Judiciary Council, as is required by the law, but without giving it any real possibility of issuing an opinion on such a fundamental issue.

This draft of the amended Act provides for the termination of the term of office of all judges on the National Judiciary Council within three months of the new regulations coming into force, but its provisions do not apply to politicians or representatives of the President sitting on it. This indicates a clear failure on the part of the drafters to notice that since the Constitution of the Republic of Poland provides that the Sejm elect its members and the Senate its senators, judges—members of the Council—should be elected by judges. And, it must be emphasised here, contrary to the Minister of Justice's suggestions, district court judges are currently taking part in the election of Council members. This is the case because district court judges are also members of any general assembly of judges. Hence it is not true, as the Minister of Justice put it, that currently it is the 'judicial elite that decides' on the election of the members of the National Judiciary Council.

The proposal of the Minister of Justice, which provides for the election of 15 judges—members of the Council—by the Sejm, infringes Article 187 point 2 of the Constitution of the Republic of Poland. The candidates are to be proposed by the Presidium of the Sejm or its 50 members, but even then the Marshal of the Sejm would decide which of them to present to the Sejm. In doing so he may, should he wish so, consult judicial associations and receive non-binding opinions from them.

The Constitution requires the National Judiciary Council to safeguard the independence of courts and judges, and the separation of the judiciary from other authorities. The announced intention to amend the existing provisions in such a way that judges too—members of the Council—be elected by a parliamentary majority, will lead to the politicisation of the Council and will deprive the judiciary's self-governing bodies of any real influence over the process of selecting candidates for judges. It should be stressed here that members of the Council to whom Article 187 clause 1 point 2 of the Constitution of the Republic of Poland refers, combine the exercise of the mandate of a member of the Council with judicial work, performed on daily basis, and that these judicial duties constitute the main body of their work as a judge. According to the proposed solution, they will have to obtain the support of the politicians sitting in the Sejm. If this proposal is accepted, this will undermine the public's confidence in the independence of judges and the independence of the judiciary. The proposal is also incompatible with the recommendations of the European Network of Councils for the Judiciary (ENCJ), which clearly state that judges should be appointed by judges. Moreover, it is the judges who should constitute the majority on the National Judiciary Council.

It would also be very dangerous to put an end to the term of office of members of the Council already in office. This is because each subsequent government will then be able to invoke this and claim that it may amend by an ordinary law the four-year term of office of the Council judges laid down in the Constitution, each time the composition of the existing National Judiciary Council is not to its liking. What is more, the proposed amendment provides for the termination of the current term of office of judges only. In this way the institutional memory of the Council will only be passed on by politicians.

The draft bill also provides for changes to the organisation of the Council and its transformation into two assemblies (chambers). One (the First) Assembly of the National Judiciary Council would consist of 10 members (First President of the Supreme Court, President of the Supreme Administrative Court, Minister of Justice, one representative appointed by the President of the Republic of Poland, four Sejm members and two senators), and the other (Second) Assembly would consist of 15 members elected from among judges of the Supreme Court, common courts, administrative courts and military courts. According to the proposal, a resolution, in order to be adopted by the Council, will require earlier adoption by both Assemblies, meeting separately. This proposal infringes blatantly and clearly Article 186 and Article 187 of the Constitution as it gives unequal status to individual members of the Council, whereas the Constitution defines the National Judiciary Council as a unified body with a clearly defined composition and does not differentiate between the status of the Council members.

This provision may also constitute an attempt to circumvent the provisions guaranteeing the equality of votes of the members of the Council. The proposed provision provides for the vote of each of the 10 members of the First Assembly of the National Judiciary Council to be stronger than that of each of the 15 members of the Second Assembly. In this it will violate the principle of

material equality of votes of the members of the National Judiciary Council. However, what raises the greatest objections is that the Minister's proposal means that in order to adopt any Council resolution, it will be necessary to obtain the support of the First Assembly, in which the vast majority will always be politicians (Minister of Justice, four Members of the Parliament and two Senators). Such an internal organisation of the Council will render impossible the performance of its fundamental duty to safeguard the independence of the courts and the independence of the judiciary. At the same time, there is a possibility that the two chambers would block the Council's work if, for instance, it turned out that judges elected by politicians wished to act too independently.

The Minister's draft also duplicates the solution concerning the amendment of the principles for the appointment of judges provided for in the government draft law amending the Act on the National Judiciary Council of May 2016 (which the Minister withdrew because, in his words, the Constitutional Tribunal issue must first be 'resolved').

Pursuant to Article 179 of the Constitution of the Republic of Poland and the currently binding legal regulations of the judiciary, the President of Poland appoints judges at the motion of the National Judiciary Council. The draft of the Minister of Justice, without amending the Constitution, aims to introduce the principle that the President of the Republic of Poland would appoint a judge from among at least two candidates presented to him by the National Judiciary Council. This proposal clearly infringes Article 179 of the Constitution of the Republic of Poland quoted above, since the Constitution clearly distinguishes between the appointment of judges by the President of the Republic of Poland 'at the motion of the National Judiciary Council' and the 'appointments from among candidates proposed' by the appropriate body. Therefore, the President does not 'elect' but 'appoints'. The other appointment procedure is foreseen by the Constitution, but for filling the positions of the First President of the Supreme Court, President of the Supreme Administrative Court and President and Vice-President of the Constitutional Tribunal. Had the legislator wished to formulate the procedure for appointing judges in such a way, he would have used the same wording in Article 179 of the Constitution of the Republic of Poland as that used in Article 183, clause 2, Article 185 or Article 194 clause 2 of the Polish Constitution. Interestingly, the President himself spoke negatively about this proposal at a meeting with the Presidium of the National Judiciary Council in September 2016.

V. Further legislative changes, which increase the Minister of Justice's influence on the way courts operate, concern directors of courts who are responsible for the financial aspects of the work of individual courts. At present, directors are accountable to the presidents of courts, and judges are elected by means of competitions. According to the draft law, court directors will be directly subordinate to the Minister of Justice, who will appoint them without a competition procedure. The draft law also fails to specify the grounds for the dismissal of directors, leaving this to an arbitrary decision of the Minister of

Justice. The Minister, who will gain a decisive and uncontrolled influence on the finances of courts, will also be able to paralyse the work of any court which he considers not to be acting in line with his own wishes.

Another legislative change in the field of justice, characteristic of the recent period, is the amendment of the Rules on judges' working practices, which imposed a greater workload on judges who acted as press spokespersons, and of whom a significant number strongly supported the principles of the separation of powers and judicial independence. In consequence of this, particularly in large courts with an enormous workload these judges are now unable to perform their duties properly and the courts have become 'silent'. At the same time, a recent amendment has been introduced to the Code of Criminal Procedure (Article 360 para. 2), according to which at the stage of court proceedings (the court is formally the host of the proceedings), it will nevertheless be the prosecutor who will eventually decide whether the court trial will be closed to the public. Many believe that this is a sign that the prosecutor's office will want to conduct show trials, for which it is necessary to control the transparency of the hearing.

The Ministry has also prepared a project amending the rules for the selection of an assessor. It would be the Minister of Justice who would elect him/her. Such a solution has already once been declared unconstitutional by the Tribunal, because the European Court of Human Rights in Strasbourg stated that such a procedure for the selection and appointment of an assessor does not meet the condition of an 'independent court'. It should be noted that the Minister may already at any time appoint and dismiss the Director of the National School of the Judiciary and the Prosecution and decide upon the hiring of lecturers. At the same time, the Minister wants to introduce explicit changes that would give him complete freedom to appoint and dismiss court presidents. A law is currently being debated concerning court directors, who are to be appointed and dismissed by the Minister at his discretion, without any prior competition.

In January 2017, the Law on the publication of the declarations of personal assets of judges on the internet came into force. Interestingly, the same legislator, in the rationale for the last draft on the Constitutional Tribunal, points out that Tribunal justices elected at a time when there were no provisions regarding their public declarations of assets, may retire voluntarily, as the provision on the transparency of declarations is a profound intrusion into their personal lives and their right to privacy. At the same time, it has been recognised that in relation to judges, such declarations will be a good step towards building confidence in the courts, despite the fact that when judges took office, they did not have to make any public or non-public statements.

VI. All this legislative work of the current Parliament as well as the actual actions of the President and the executive authorities, combined with the growing crisis surrounding the Constitutional Tribunal have led to a situation in which judges feel concerned that their status as an independent judiciary and the possibility of acting independently in adjudicating cases are threat-

ened. Therefore, under the auspices of the National Judiciary Council and judicial associations, an extraordinary Congress of Polish judges was held in Warsaw on 3 September 2016, in which about 1,000 out of 10,000 judges of common courts took part.⁹ After many hours of debate, the Congress passed 3 resolutions, among other things, proposing that the administrative supervision over the courts be transferred to the First President of the Supreme Court (currently this supervision is in the hands of the Minister of Justice-Prosecutor General), implementation of the principle that courts are set up and abolished only by means of a statute, lesser influence of politicians on the selection of judges, greater powers of (the) judicial self-governance and protection of the rights already acquired by judges when implementing further changes in the judicial structure. Another resolution passed during the Congress called on the executive authority to respect and publish the judgments of the Constitutional Tribunal and objected to the arbitrary refusal by the President to appoint to judicial positions candidates proposed by the National Judiciary Council, or the refusal to swear in the justices of the Constitutional Tribunal elected in accordance with the law. Following the publication of the resolutions of the Congress, several assemblies of judges of district and appellate courts adopted resolutions that fully supported the position of the Congress.

It is also worth mentioning here that the 12th National Congress of Advocature held on 26 November 2016 in Kraków, adopted a resolution with the following wording:

[...] Limiting the independence of the judiciary, the independence of judges, including that of the justices of the Constitutional Tribunal, undermines the principles of modern democracy. The Constitution of the Republic of Poland does not give any legislative or executive authority the right to interfere in the process of issuing and publishing decisions of the Constitutional Tribunal, or to assess the correctness of the choice of judges of the Constitutional [...] The permanent process of amending the statutory regulation of the rules governing the Constitutional Tribunal is contrary to the political foundations of the Republic of Poland; it undermines the principles of law-making and the stability of the law, and, in effect, results in the dysfunctionality of the pillars of a democratic state governed by the rule of law. Objections are also raised against law made in haste in order to achieve immediate political objectives. Any legislative change requires consultation and the active participation of representatives of civil society, as well as respect for the principle of the separation and balance of powers [...] The principles that protect the individual from the 'democratic dictatorship' of the majority derive from constitutional norms. The limits of constitutional democracy are determined by the law, which is an autonomous and equal value. Any violation of these, limitations, regardless of the legitimacy on which they are based, must be seen as an attack on fundamental constitutional values. Their protection in any event and at any time is our primary duty, from which no one can release neither the Advocature as an institution nor any of the advocates.

VII. The aim of this article was not to discuss comprehensively all the changes introduced and actions taken by the government and parliament in Poland in the area of justice since October 2015. This would not have been at all possible even in a much more lengthy article. It should also be noted apart from the

⁹ There were many more judges interested in taking part in the Congress but their number had to be limited owing to the limited size of the premises in which the Congress was organised and the impossibility of accommodating everyone interested.

changes mentioned above, other changes have been introduced which may be assessed positively or at least good intentions regarding their implementation may be recognised and the right direction of change acknowledged.¹⁰

However taking into account the direction of the consistent efforts made throughout the past year to subordinate or paralyse the Constitutional Tribunal and implementation of the amendments to the Law on the Prosecution aimed at subordinating it to political factors, and finally, the actual measures taken to extend executive power over common courts as well as to secure legislative solutions with a repressive effect on the judges of common courts, it is not difficult to guess that the reform of the judiciary will be aimed at restricting the independence of courts and judges. Moreover, the work on the reform of the general judiciary is carried out in secret and without consultation with the National Judiciary Council. The draft law amending the Act on the National Judiciary Council, unquestionably contrary to the Constitution, which came to light in recent days, introduces a new procedure for the election of judges, members of the Council, who are to be elected by the Parliament. This move aims at politicising this constitutional body which is the Council, whose objective is to safeguard the independence of the courts and the judges. It gives the ruling party the power to influence the election of judges, decide upon the way they are promoted and to instigate disciplinary proceedings. Such actions cannot be seen as other than an open attack on the independence of the judiciary and the independence of the common courts.

It seems that a certain view on the further intentions of the ruling party towards the judiciary can be obtained from the draft of a new Constitution of the Republic of Poland developed by the Law and Justice party in 2010 and published on the Internet. The draft did not become law and was removed from the website at the end of 2015 after journalists publicised it and claimed that it was aiming to introduce authoritarian rule in Poland. The spokeswoman of the Law and Justice Party commented at the time that the removed draft was only one of many proposals discussed, and was not binding. According to Article 145 clause 2 of the draft:

A judge whose previous proceedings prove his/her incapacity or lack of willingness to perform his duties reliably may be dismissed from office by the President of the Republic of Poland upon a motion of the Council for the Judiciary, expressed in a resolution adopted by a majority of three fifths of the statutory number of members of the Council after conducting a procedure with the participation of the person concerned, as specified in the act. The act of the President of the Republic of Poland shall not be subject to appeal.

Given that this provision allows the President to revoke a judge on the basis of a general clause not explicitly specified and without any possibility of appeal against that decision, it must be considered that this provision does not so much restrict as essentially abolish judicial independence. The provision

¹⁰ As examples of such changes one may cite the amendments to the Law on the Prosecution or amendment to the Rules on the functioning of courts aimed at imposing a greater workload on judges and prosecutors with functional positions, although it seems that the new provisions fail to take into account sufficiently the size of the units they represent or head, or whether the additional tasks given will not be detrimental to the efficient performance of their managerial duties.

of the draft Constitution of the Law and Justice party is reminiscent of the provision of Article 61 § 1 of the law on the system of common courts binding in the Polish People's Republic according to which the Council of State, at the request of the Minister of Justice, could dismiss a judge if he or she did not 'guarantee the proper performance of the duties of a judge'. The question that arises is whether, at the beginning of the twenty-first century, in a country at the heart of Europe, it is appropriate to take seriously the return to an institution with deep roots in the Communist era, so openly abusing the principles of a democratic state governed by the rule of law.

At the extraordinary Congress of Polish judges on 3 September 2016, one of the most prominent legal authorities in Poland, the former president of the Constitutional Tribunal and the public defender of civil rights, Professor Andrzej Zoll, when analysing the actions of the party currently ruling in Poland described them as 'a creeping attack on the Constitution' and stated that 'we are beginning to move very quickly towards an authoritarian system'. One thing is certain: no matter how far the present parliamentary majority is capable of progressing on the way to destroying the foundations of the rule of law in Poland, and in particular destroying the principles of the tripartite division of powers, the independence of courts and the independence of the judges, for Polish lawyers to whom these principles are dear the curse 'may you live in interesting times' has become a reality.

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THE JUDICIARY IN POLAND AT THE THRESHOLD OF 2017: CHALLENGES AND THREATS

Summary

The paper examines the first year of the Law and Justice Party's (Prawo i Sprawiedliwość) government which has implemented many changes in the system of justice in Poland by means of ordinary acts of parliament. Some of the measures taken by the government were aimed at increasing the competences of the executive powers over the judiciary by reference to a preferential interpretation of the existing regulations, whereas others focused on the implementation of changes in the legislation. While there is no doubt that the system of justice needs modifications to increase the efficiency of courts, most changes currently implemented or whose implementation is planned raise serious concerns among the judges. In 2016, the ruling party aimed first at subordinating or paralysing the work of the Constitutional Tribunal; later it went on to implement changes in the Prosecutor's Office with a view to making it politically dependent, increasing at the same time the competences of the executive, by, among other things, new legislative solutions. In January 2017 a draft of an act of parliament to amend the National Chamber of the Judiciary was announced. If implemented it will bring about fundamental and unconstitutional changes to the political system of the Republic of Poland and will politicise the Council, depriving self-governing judicial bodies of a real say in the process of identifying candidates for judicial appointments.