**28 January 2019**

**Summary of actions undertaken by Poland in order to address European Commission's recommendations concerning the reform of the Polish judiciary**

In 2015 the Polish competent authorities (President of the Republic, Parliament and Government) initiated actions aimed at increasing efficiency of the judiciary and restoring public trust in its functioning. An independent and effective judiciary system is a crucial and indispensable element of every democratic state. The organization of judicial proceedings should create appropriate conditions for resolving legal disputes brought before the courts. At the same time, the system of nominating judges and regulating their professional responsibility should be a cornerstone of the entire judicial branch that ensures its proper functioning, safeguards its independence and preserves it from any undue, external influence.

All actions undertaken by the Polish authorities in the process of the reform were driven by the abovementioned principles. We bear in mind that due to the complexity of the discussed issues, our EU partners may still raise questions with regard to some of the introduced changes. That is why we reiterate our full readiness for dialogue and to provide further clarifications. Nevertheless, it is hard for us to accept allegations that the reform creates a risk of a serious breach of the rule of law as they have not been borne out in reality. We decided to amend some parts of the reform or return to previous solutions in order to address concerns of our EU counterparts and provide time for additional reflection. We reckon that our concrete actions and positive attitude towards the dialogue have not been met with a symmetric reaction from some of our partners.

Therefore we would like to once more present the main areas of the reform with the recommendations of the European Commission and actions undertaken by Poland in order to address them. It is worth mentioning that in April and May 2018 Poland introduced many substantial amendments indicated by the European Commission. All these amendments are presented in the table below. They were introduced, inter alia, as a result of numerous meetings at the highest level between the representatives of the Commission and Poland. Information presented below not only explains all the introduced changes to the Polish judiciary laws but also tries to respond to questions which are most frequently raised during hearings in the Council.

| 1. | The law on Ordinary Courts Organisation |
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| The Commission has indicated that the law on Ordinary Courts Organisation and on the National School of Judiciary should be withdrawn or amended in order to ensure its compliance with the Constitution and European standards;<br><br>concretely, the Commission recommended in particular to:<br><br>– remove the new retirement regime for judges of ordinary courts, including the discretionary power of the Minister of Justice to prolong their mandate.<br><br>– remove the discretionary power of the Minister of Justice to appoint and dismiss presidents of courts and remedy decisions already taken. | **The retirement age of the judges of the common courts has been equalized at 65 for men and women**. Women retain their privilege for an earlier retirement at the age of 60 (just as it is for all other professions in the Polish social security system). It is worth mentioning that in 2017 the retirement age was re-established at 65 – not just for judges, but also for the entire population.<br><br>It should also be indicated that until 2013 the retirement age for judges was set at 65. It was briefly raised to the age of 67, and restored to 65 in 2017. While the Commission repeatedly underscores that judges should be allowed to serve until reaching the retirement age *"as originally established"*, it fails to recognize that this **age was indeed originally established exactly as under current regulation (at 65 years)**.<br><br>After the judges reach their retirement age, their judicial mandate may be prolonged (for a maximum of 5 years). This competence is no longer in the hands of the Minister of Justice. **Polish Parliament went even further than the Commission's recommendation (the EC indicated that the President of the Republic should decide on it) and established that the National Council of the Judiciary will decide on prolongation of judicial mandates.**<br><br>The NCJ has to abide by pre-established criteria and when deciding on the prolongation has to take into account the interest of the judiciary, public interest, judicial personnel needs and the caseload in the common courts. These criteria are very broad on purpose – if even one of them is fulfilled, the NCJ (a body composed in 2/3 of judges) is authorized to allow a prolongation.<br><br>In response to the Commission's recommendation Poland changed the regime for dismissal of the presidents of the common courts. The Minister of Justice, who oversees the courts in the administrative aspect of their functioning, retained this competence. However, the Minister 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.<br><br>There are also pre-established criteria that must always be taken into account: presidents of the courts may only be dismissed in |

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| | 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.<br><br>Another group of amendments concern appointment of the judges on probation. The power to nominate them is transferred from the Minister of Justice to the President, and they are appointed on the basis of the judicial exam ranking list. The National Council of the Judiciary makes its recommendation and passes it on to the President in a procedure very much alike to the one for the judges appointed for life.<br><br>The judges on probation will be appointed for a 4-year fixed term, during which they cannot be revoked by anybody (save for disciplinary reasons). In order to apply for a judicial post for life, they will be assessed only by the judiciary – by a visiting judge, college of the court, general assembly of district judges and the National Council of the Judiciary. |

| 2. | **The extraordinary appeal** |
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| The European Commission has also recommended amendments to the law on the Supreme Court so as to:<br><br>- remove the extraordinary appeal procedure, or<br>- narrow the criteria for its admissibility | When it comes to the extraordinary appeal, an **additional prerequisite was established**. In order for the extraordinary appeal to be used, it is **necessary to ensure conformity with the rule of law** (with the principle of "democratic state ruled by law and implementing the principles of social justice" that is enshrined in the Article 2 of the Polish Constitution, to be exact).<br><br>This principle has been thoroughly explained in the verdicts of the Polish courts, including the Supreme Court and the Constitutional Tribunal and its interpretation indicates a very limited range of situations, thus making the new remedy indeed extraordinary. In addition, **one of three additional requirements** – (i) infringement of principles, liberties or human rights protected by the Constitution, (ii) flagrant breach of law through its misinterpretation or misapplication, or (iii) an obvious contradiction between significant findings and material evidence **must be fulfilled.** |

It should be noted that as a result of the adopted amendments, the grounds for lodging an extraordinary appeal were narrowed down and made more precise. Accordingly, **any assessment of the changes introduced in the extraordinary appeal procedure – until they are fully implemented in the case-law practice – would now be premature.**

In relation 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.

**It is worth noting that if a verdict in the extraordinary appeal would undermine Poland's international commitments**, the Supreme Court shall limit itself to declaring that the original verdict being challenged was issued in breach of law – but **not repeal it.** The definition of "international commitments" is quite wide, and for a good reason. It applies not only to intergovernmental relations, but also to private entities, thus strengthening the protection of foreign investment in Poland. **As a result of the narrowing down of the admissibility criteria, only three such appeals were lodged in 2018 – and it still is solely up to the Supreme Court whether to rule in favour of the applicants.**

## 3. The National Council of the Judiciary

The Commission has indicated that the law on the National Council of the Judiciary should be amended so that the mandate of previous judges-members of the National Council of the Judiciary is not terminated and the new appointment regime is removed in order to ensure election of judges-members by their peers.

The regulations in force concerning the Council are consistent with the provisions of the Polish Constitution, which stipulates that the organizational structure, the scope of activity and functioning of the National Council of the Judiciary, as well as the manner of choosing its members, shall be specified by statute.

While it is true that in certain Member States there are bodies deciding on judicial appointments composed *"at least in half of judges elected by their peers"*, there is no universally applied mechanism. There are countries that do not have such bodies at all (and judges are being appointed by parliamentary or governmental politicians), in some others the judges form only a minority in such bodies.

The claim of such regulation being a *"well established European*

*standard"* is then unwarranted – even though it might be praised in legal theory, it was never considered a requirement from the perspective of the value of the rule of law (or any other, for that matter) referred to in Article 2 TEU.

**The National Council of the Judiciary in Poland is composed of a vast majority of judges** (17 out of 25 members, more than 2/3). 2 of these judges are ex-officio members, and 15 are elected by the Parliament – with a very wide democratic mandate (3/5 majority in the Sejm – lower chamber of the Parliament). **After they are elected, there are no mechanisms for 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 the 17 judicial members, there are also two members of the opposition parliamentary groups in the Council. Moreover, any potential undue influence can be easily exposed, since all the sessions are available online. No other institution in Poland – beside the Parliament – is transparent in such a way.

Additionally, **it was the Parliament's obligation to amend the law in order to implement the judgement of the Constitutional Tribunal** concerning the composition of the National Council of Judiciary. **Failing to do so would paralyze the council**, leaving only two judicial posts filled until 2020.

It should be noted that among the 15 elected members-judges of the previous National Council of the Judiciary, individual terms of 11 judges expired by March 2018, and two other – in May and June 2018. As a result, the Council would only have had two judges elected in February and March 2016 whose terms would have run until early 2020. Thus, there were only two options: either wait for the expiration of all individual terms of all Council members (which would have created 13 vacant seats over the following two years) or terminate the terms of all its members and proceed with electing the entire NCJ. As the former option would have left the Council paralysed (with more than 50% of its seats vacant), a transitional provision had to be enacted, with all individual terms terminated.

Furthermore, all the safeguards of the NCJ independence remain in place, and the election of the National Council of the Judiciary

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| | members by the Sejm has not led to the politicization of the Council. **Neither the Government nor the Parliament have any say in decisions taken by the Council**. The amendment to the Act on the National Council of the Judiciary does not contain any solutions that would restrict the Council's existing powers or change its composition. Under the introduced changes, judges continue to form the majority of the National Council of the Judiciary.<br><br>It is currently in the best interest of the judiciary to allow the NCJ to work in peace and observe how it carries out its competences. New members will be elected to the Council in 2022 – and it will be up to the next term of the Parliament to do it (so there is no incentive for the Council members to act in favour of – or against – any political group). |
| **4. Public statements** | |
| The Commission has indicated that the state authorities should refrain from actions and public statements which could undermine further the legitimacy of the Supreme Court, the ordinary courts, the judges, individually or collectively, or the judiciary as a whole. | Polish authorities can fully agree with this kind of recommendation. In this context it has to be mentioned that the attempt to reorganize the judiciary, taken up by the current parliamentary majority, **addresses high public expectations in this regard**, expectations that have been growing over recent years.<br><br>Deep public distrust in the system of justice is a situation unprecedented in mature democracies. Efficient, fair and truly independent system of justice is in the interest of all Polish citizens. It should be free from political pressure and particular interests of the legal corporation. That would be a real guarantee of the rule of law, public respect for the law, and efficiency of the state.<br><br>**Polish authorities have never undermined the legitimacy of the Supreme Court, ordinary courts or judges – individually or collectively.** Any statements in this regard concerned only the functioning of the judiciary in Poland - in order to identify the judiciary weaknesses and propose effective solutions to these problems. Such statements should not be regarded as illegitimate criticism of the judiciary. While there must not be any undue influence or pressure on the judiciary it should also be stressed |

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| | that the judiciary is a crucial branch of power that, just as the other branches, is also subject to assessment and justified criticism. |

| 5. | **The Constitutional Tribunal** |
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| The Commission has recommended to *"restore the independence and legitimacy of the Constitutional Tribunal by ensuring that its judges, its President and its Vice-President are lawfully elected and appointed and by implementing fully the judgments of the Constitutional Tribunal of 3 and 9 December 2015 which require that the three judges that were lawfully nominated in October 2015 by the previous legislature can take up their function, and that the three judges nominated by the new legislature without a valid legal basis no longer adjudicate without being validly elected".* | **The composition of the Tribunal is correct and in line with the law**. The dispute over this issue should be considered as terminated. It started with incorrect and ineffective resolutions of the previous term of the Sejm that was seeking to elect 1/3 of the Constitutional Tribunal judges without having competence to do so as it was uncertain at that point when the Parliament's term of office would come to an end. It was nevertheless undisputable that all tenures of CT judges were about to come to an end after the parliamentary elections, so the previous Sejm acted beyond its democratic mandate by trying to elect new CT judges well in advance. Today, the Tribunal continues to ensure a proper review of constitutionality. Despite allegations of politicisation, the Tribunal benches are to a great extent composed of judges elected by the previous Sejm.<br><br>**It should be noted that, contrary to the Commission's claims, Constitutional Tribunal judgements cannot be executed because their nature is not individual and specific**. This means that they do not obligate anyone to take any specific actions. The judgements of December 2015 dealt with the constitutionality of specific provisions of the Law on the Constitutional Tribunal and, as such, were not delivered in an individual and specific case. It should be noted that Constitutional Tribunal judgements cannot replace the performance of an act relating to the election or appointment of a judge of the Constitutional Tribunal.<br><br>To present this issue in a more detailed manner it should be reminded that in its judgment of 3 December 2015, the Constitutional Tribunal found the legal basis for the election of two judges during the previous Sejm to be unconstitutional – as their mandates expired during a new term of Parliament. At the same time, the Tribunal deemed the legal basis for the election of the three remaining judges constitutional, based on the assumption that their mandates expired on 6 November, i.e. |

during the previous term of the Sejm. In this judgment the Tribunal failed to take into account the fact that the election of the Tribunal judges was made "in the dark"- as the Sejm could not have known when its term would end and the new would begin.

The terms of office of judges of the Constitutional Tribunal expiring on 6 November could have ended both during the term of office of the 7th and the 8th Sejm, depending on when the latter would start. Its actual commencement date is not relevant from the point of view of the constitutionality of provisions in force in 2015 and the correctness of the election of judges carried out on its basis. The **constitutionality of a provision cannot be determined *post factum* by factual events that would or would not occur** after the time the provision was enacted or applied. This would lead to a kind of "conditional compliance with the Constitution" depending on future events (such as when the President would call the first sitting of the Sejm), which is unknown in the Polish legal system.

Currently, the Tribunal is working pluralistically, and generally cases are allocated in alphabetical order. 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 the majority in adjudicating panels (in over 40% of cases under current CT President) – which has not occurred in a single instance before the reform.

All the judges enjoy wide guarantees of independence: they are appointed for a one, fixed 9-year term and cannot be revoked; they are immune from any criminal prosecution and receive very high remuneration (which extends to a life-time pension once they retire). For these reasons they are immune from any undue influence – as there are no tools that could be used to exert any pressure on their decisions.

As a result, the Constitutional Tribunal has ruled on many occasions contrary to the position of the Government, Parliament or the Attorney General – including cases on key issues such as police search regulations or pension system reform (highly important from the Government's perspective).

| 6. | Unpublished judgments of the Constitutional Tribunal |
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| The Commission has indicated that all the judgments of the Constitutional Tribunal should be published – and that the Government should have no say in the process, thus being unable to block such publication. | **All the judgements of the Constitutional Tribunal were published in the Official Journal of Laws**. The Judgements of 9 March 2016, 11 August 2016 and 7 November 2016 were issued in breach of law and referred to provisions that lost their binding force. However, the Polish Parliament decided that the clarity of the legal system required the promulgation of these judgements.<br><br>Moreover, **the Government will have no power to decide on publication** of any verdicts of the Tribunal – this competence lies solely at the hands of President of the Tribunal (for the future as well). |

| 7. | Standards |
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| The Commission has indicated that any justice reform should comply with EU law, the rule of law and the European standards on judicial independence and should be prepared in close cooperation with the judiciary and all interested parties. | Poland shares the Commission's recommendation that lawmakers should cooperate with the judiciary and all interested parties when drafting the judiciary reform. However, the democratic mandate belongs to the Parliament and the President of the Republic, bodies responsible for addressing social expectations. Undoubtedly, the European standards on some aspects of functioning of the judiciary are common for all member states. Nevertheless, we should acknowledge the fact that there are also some differences in the way the judiciary is organized in different Member States. These differences in no way affect the effectiveness of the protection of the rule of law in Poland. |

In its recommendation of 20 December 2017 the Commission suggested that the Polish authorities amend the law on the Supreme Court to ensure its compliance with the rule of law.

On 24 September 2018, the Commission decided to refer Poland to the Court of Justice of the EU due to the alleged violations of the principle of judicial independence created by the new Polish Law on the Supreme Court. The Commission also asked the Court of Justice to order interim measures until it has issued a judgment on the case.

Since the interim measure was issued by the European Court of Justice on 19 October 2018, Poland indicated that in order to comply with its requirements, it is necessary to amend the Act on the Supreme Court. The Polish authorities have hence introduced the following amendments to the Law on the Supreme Court:

| 8. | **The Supreme Court** |
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| The European Commission has recommended amendments to the law on the Supreme Court so as to:<br>– not apply a lowered retirement age to the current Supreme Court judges (even though the new, lowered retirement age was adopted for all professions in Poland);<br>– remove the discretionary power of the President of the Republic to prolong the active judicial mandate of the Supreme Court judges; | **While Poland disagrees with Commission's assessment** and continues to maintain that the law on the Supreme Court was fully in line with the Treaties, Charter and all the fundamental principles of the Union, **in order to resolve the dispute the Polish Parliament adopted amendments to the questioned regulations**.<br>The new law amending the law on the Supreme Court adopted by the Sejm on 21 November 2018 and published on 31 December 2018 addresses all the Commission's concerns:<br>• **Retirement age for the Supreme Court judges that were in office before 3 April 2018 is again set at the age of 70.**<br>• For the judges appointed at a later date the age is set at 65 (female judges are able to retire at the age of 60 if they wish to do so).<br>• The **possibility to extend a judicial tenure** by a decision of the President of the Republic of Poland or of any other body **ceases to exist**.<br>• **All judges that retired as a result of the law of 8 December 2017 returned to the Supreme Court** on 1 January 2019 in accordance with the amendment to the law on the Supreme Court (unless they already reached 70 years of age).<br>• Those that wished to remain in retirement were able to do so – simply by declaring such a will (within 7 days).<br>• Mrs. Małgorzata Gersdorf remains the First President of the Supreme Court until the end of her 6-year term of office, i.e. 30 April 2020 (unless she decides to retire earlier).<br>• **Terms of office** of the First President and of all the judges |

of the Supreme Court **are considered uninterrupted** (unless they decide to remain retired).

It must also be underlined that the abovementioned changes were introduced in relation to an interim measure issued by the Court of Justice on 19 October 2018. Poland has always abided by the rulings of the Court, and is committed to do so in the future, with full respect of the Treaties and the European values.

**It must also be mentioned that even though Poland implemented the CJEU decision and the Commission's recommendations, the Commission still did not withdraw its complaint brought before the Court.**

There is an additional element in the Commission's statements that requires particular attention. The Commission claims that individual parts of the judiciary reform do not necessarily pose a threat to the rule of law, but when they are considered together, they create a so-called "cumulative effect" with negative impact on the rule of law. This kind of concept is difficult to defend as it is hardly possible that individual, positive (or even neutral) amendments can be harmful when they are introduced together. On the other hand, if the Commission maintains its opinion on the "cumulative effect", it should also notice the cumulative effect of numerous amendments adopted by Poland since April 2018.

Taking into account the aforementioned facts we strongly believe that the procedure based on article 7 of the Treaty of the European Union no longer contributes to achieving proper understanding of the content of the reform. Quite the contrary – it started to serve as a tool of exerting political pressure **instead of aiming at achieving a constructive and tangible solution.**

We are aware that some of our partners may wish to receive additional explanations with regard to the problems presented herein. Once more we reiterate our full readiness to answer all your questions. We prefer having a detailed discussion on the substance of the reform instead of addressing general, political statements. We will also be more than happy to listen to your best practices and ideas that could be used in the process of reforming our judiciary system.

We remain at your disposal for any further information that you might require.

*NON-PAPER*

# JUDICIAL INDEPENDENCE GUARANTEES IN POLAND – NATIONAL COUNCIL OF THE JUDICIARY

The National Council of the Judiciary is a body that safeguards the independence of courts and judges (Article 186 (1) of the Constitution of the Republic of Poland). It is composed of 25 members – nominated as follows (Article 187 (1)):

a) **2 judges** *ex officio* (the First President of the Supreme Court and the President of the Supreme Administrative Court);
b) **15 judges** – chosen **from amongst** the judges of the Supreme Court, common courts, administrative courts and military courts;
c) 4 members chosen by the Sejm from amongst its Deputies;
d) 2 members chosen by the Senate from amongst its Senators;
e) the Minister of Justice;
f) 1 member appointed by the President of the Republic;

The Constitution **does not provide *who* should elect the 15 judges** referred to in letter b) above. To the contrary – it specifically leaves the decision in this scope for a statute adopted by the parliament.

**Article 187 (4) of the Polish Constitution**

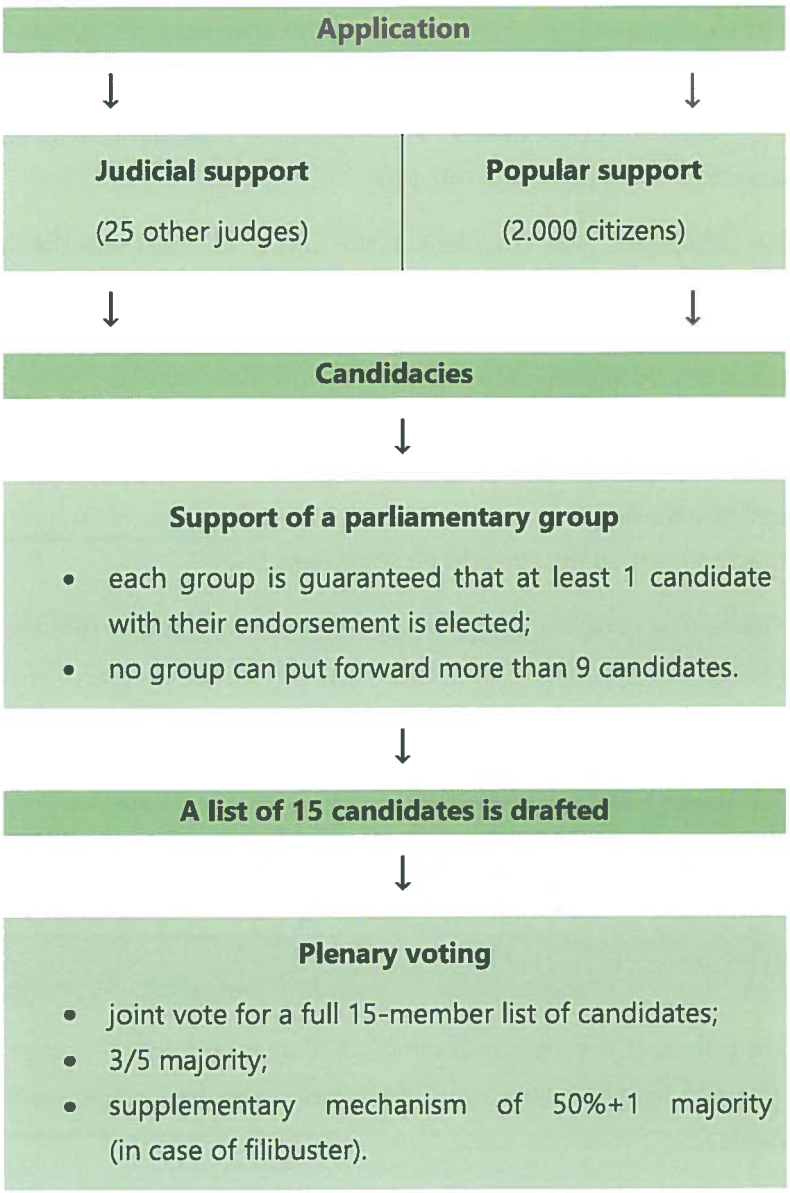
The organizational structure, the scope of activity and procedures for work of the National Council of the Judiciary, as well as **the manner of choosing its members, shall be specified by a statute**.

The composition of the court provides that over 2/3 of its members (17 out of 25) are judges – **enjoying full judicial independence and free from any influence** – either political or exerted by their peers.

This independence – aside from **wide guarantees provided for all Polish judges** – stems mainly from irrevocability. Judges are elected to the NCJ for a joint, 4-year term – and **may not be dismissed by anybody**. Their term may only end prematurely in case of death, resignation, appointment to another judicial office (judge's consent is required) or a dissolution of judicial appointment (e.g. as a result of a ruling of an independent disciplinary court).

It should also be noticed that the 4-year term of office of the judicial members of the NCJ ends halfway through the 4-year term of parliament (NCJ was elected in March 2018, the next term of Sejm will commence between October and December 2019). It guarantees that the judges do not have an incentive to act at will of the parliament that elected them – possible re-election shall be decided by a differently composed legislature.

The procedure of election provides that only the candidates backed by their peers (at least 25 other judges) or with a popular support (no less than 2.000 citizens) may present their candidacies. The mechanism also guarantees pluralism.




The procedure assures that **every parliamentary group is included in the selection process**. Current parliamentary majority is allowed to put forth only 9 candidates. The remaining 40% are elected out of judges endorsed by the opposition.

And that is exactly what happened on 6 March, when the Parliament elected 15 members of the NCJ. **9 candidates were endorsed by the parliamentary majority – 6 by the opposition**. It is also true that three parliamentary groups decided to abstain from taking part in the selection process – but should they have chosen otherwise, their candidates would also have been elected and form part of the National Council of the Judiciary.

It is worth mentioning in this context that the members of the Polish National Council of the Judiciary **enjoy even wider guarantees than the Polish Ombudsman**. Mr. Adam Bodnar, who

is currently serving at this post, is an outspoken critic of the Polish government, and **nobody would accuse him of being dependent on the parliamentary majority** – even that the law provides several options for the *Sejm* to dismiss him before the end of his term of office. These provisions are in force since 1991 and were never deemed a threat to the rule of law.

| | THE OMBUDSMAN (COMMISSIONER FOR HUMAN RIGHTS) | JUDICIAL MEMBERS OF THE NATIONAL JUDICIARY COUNCIL |
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| **APPOINTMENT** | The Parliament with a 50%+1 majority[1]. | The Parliament with a 3/5 majority[2]. |
| **DISMISSAL** | The Ombudsman may be dismissed in case of resignation, permanent incapacity to fulfil its duties (if declared as such by a medical certificate), failure to disclose involvement with the secret state police, or **if the parliament would deem that he breached his oath**[3]. | There is **no possibility for the parliament (or any other body whatsoever) to dismiss members of the NCJ.** The term of office of its members may end prematurely in case of death, resignation, appointment to another judicial office (judge's consent is required) or a dissolution of judicial appointment (e.g. as a result of a ruling of an independent disciplinary court)[4]. |

As a result of the ruling of the Constitutional Tribunal that deemed the previous practice of individual terms for each member of the NCJ unconstitutional[5], the parliament decided to rescind these individual terms their ends. The Tribunal ruled on many occasions that in certain cases such rescission may be justified by a protection of public interest (rulings of 31 March 1998 – K 24 / 97, of 26 May 1998 – K 17/98, of 23 June 1999 – K 30/98, of 13 July 2004 – K 20/03, and of 20 June 2017 – K 5/17).

In the context of the reform it must be underlined that the **previous individual terms of the judicial members of the NCJ would have ended until the end of March** (in case of 11 members), May (in case of one member) or June 2018 (in case of another member). Only 2 of 15 judges would remain in the Council for a longer period (that is, until February and March 2020, respectively). A decision not to rescind all these terms unilaterally **would leave the NCJ**

[1] Article 3 (1) of the law of 15 July 1987 on the Commissioner for Human Rights.
[2] Article 11d (4) of the law of 12 May 2011 on the National Council of the Judiciary.
[3] Article 7 (1) and (2) of the law of 15 July 1987 on the Commissioner for Human Rights.
[4] Article 14 (1) of the law of 12 May 2011 on the National Council of the Judiciary.
[5] Judgment of 20 June 2017, case file No, K 5/17.

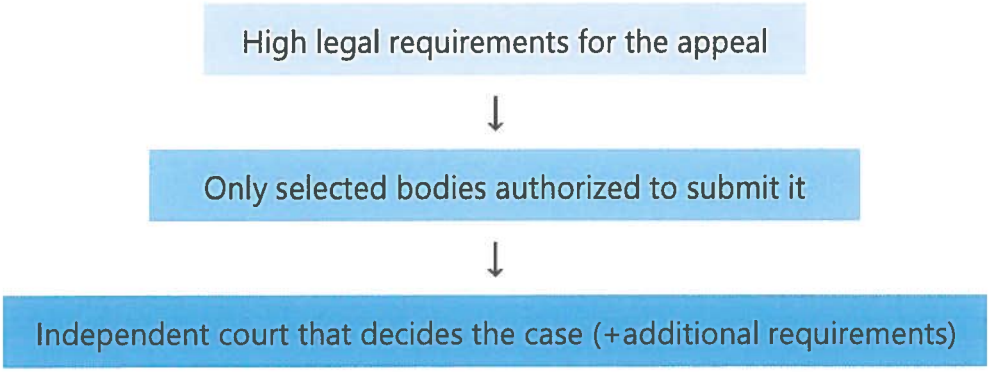
**effectively paralyzed for the next 2 years** (as it would leave over half of its posts – 13 out of 25 – vacant).

Since most of the individual terms would have ended very shortly anyway, the decision to rescind them all did not affect either the actual functioning of the Council – or the judiciary as a whole.

*NON-PAPER*

## WHY IS EXTRAORDINARY APPEAL INDEED EXTRAORDINARY?

There are three groups of "filters" providing that the extraordinary appeal is going to be used only in exceptional cases – and even in this group only a small portion of verdicts might be subject to a repeal or modification.




1. First of these groups is composed of the prerequisites to lodge an appeal, listed in the article 89 (1) of the law on the Supreme Court. The appeal must be **necessary to ensure the rule of law and social justice**, and it may be used if:

   - the verdict infringes principles or human rights, or civil liberties **provided in the Constitution**; or
   - it **flagrantly** breaches the law through its misinterpretation or misapplication; or
   - it was issued with an **obvious** contradiction between **significant** findings of the court and the evidence collected in the case.

   All these requirements are hard to meet in practice. Not every breach of law justifies the extraordinary appeal – the breach that is flagrant (i.e. clear, evident and important, e.g. the breach of the Constitutional freedoms). The same goes for the contradiction between evidence and findings – only very serious discrepancies, of high gravity to the case might constitute grounds for such appeal.

2. And it is not at the hands of citizens to decide for themselves whether these grounds exist. Article 89 (2) authorizes only the Ombudsman or the Attorney General to lodge extraordinary appeals in general (it also authorizes some other bodies, as Commissioner for Children's Rights or the Commissioner for Patients' Rights to do so with regards to cases that concern their duties).

The mechanism is similar to the one that already exists in the criminal proceedings code (Article 521 and 524) as a so-called "extraordinary" cassation. It also may be lodged only by the Ombudsman or the Attorney General. There are **millions of verdicts** each year – yet the "extraordinary" cassation is submitted in a very small portion of cases (in 2016, **the Attorney General lodged it 196 times, and the Ombudsman – 66 times**).

3. Finally, it is only the Supreme Court that decides whether the appeal is justified. The fact of submitting it does not affect the verdict at all – until the Supreme Court decides the case. The panels are composed either of two Supreme Court judges and one lay judge, or five Supreme Court judges and two lay judges, i.e. with a majority of professional judges, with involvement of the public in administering justice (as provided in the Polish Constitution).

   Moreover, if 5 years have passed since the verdict became final and it had already led to irreversible legal effects, the Supreme Curt may decide that the verdict remains in place, even if it breached the law. In that case the Supreme Court is authorized to issue a declaratory judgment – and state that the verdict in question was delivered with a breach of law (and therefore the interested party would have grounds for damages).

All these provisions constitute extensive "filters" that prevent the extraordinary appeal from being abused.

It must also be noted that there are remedies in other EU Member States that may be lodged without any time-frame to correct judicial errors or to assure homogeneity of verdicts. These remedies have been in force for many years and never led to instability of any of the legal systems in which they exist. For this reason, as well as for the reasons listed above, it is unwarranted to claim that the extraordinary appeal will have such an effect in Poland.

*NON-PAPER*

# CONSTITUTIONAL REVIEW

# – GUARANTEES OF INDEPENDENCE AND PLURALISM

Polish Constitutional Tribunal is a court appointed to assess the conformity of statutes and other sources of law with the Constitution of the Republic of Poland and ratified international agreements.

It is composed of 15 judges, elected individually by the Sejm for a 9-year term. They are fully independent and subject only to the Constitution. The law provides **extensive guarantees** in order to ensure that nobody is able to exert any pressure on their verdicts:

- Judges are nominated for a **single, 9-year term which may not be renewed** – thus they are **not implicated to adjudicate in a way desired by politicians** that elect them – they cannot be elected again;
- They enjoy **full immunity from criminal prosecution** for felonies, and may be held accountable for misdemeanours only via disciplinary procedure;
- Even when a judge of the Tribunal is caught red-handed, **the President of the Constitutional Tribunal may order that they are immediately released**;
- They are **well-remunerated**: every judge of the Constitutional Tribunal earns **no less than 5 times the average salary in Poland**, there are also bonuses and allowances for the judges living outside Warsaw and for those exercising functions of President and Deputy President of the Tribunal
- After their 9-year term ends, judges **retain their status (as "retired judges") for the rest of their lives**; they receive pensions in the amount of **75% of their last remuneration**.

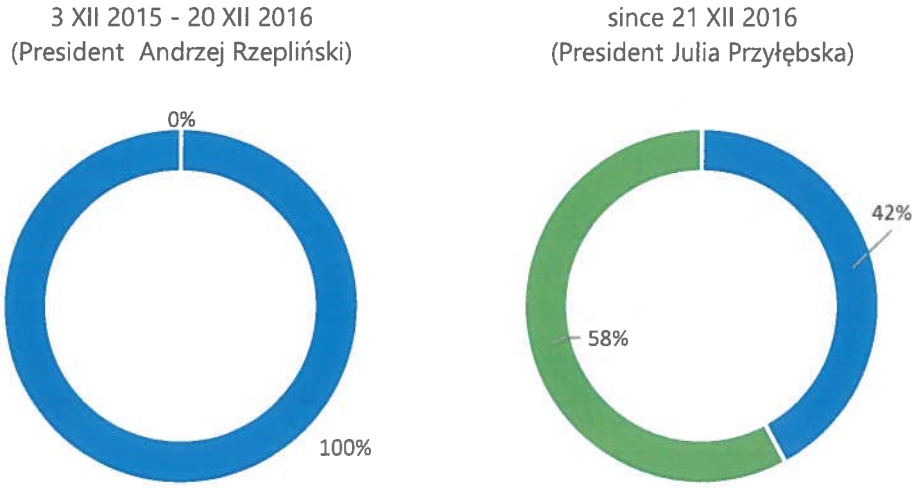
To sum it up: **after the judges are elected to the Tribunal, there are no incentives for them to concede to any external pressure**.

It is also obvious that the judges have different political views, and for many years it has not been strange for the Tribunal to be composed of former members of political parties. Some previous examples include:

- **Zdzisław Czeszejko-Sochacki**, previously a member of the communist Polish United Workers Party, Judge of the Constitutional Tribunal from 1993 to 2001, elected by the Sejm of 2nd term;
- **Janusz Trzciński**, previously a member of the communist Polish United Workers Party, Judge of the Constitutional Tribunal and its Deputy President from 1993 to 2001, elected by the Sejm of 2nd term;
- **Jerzy Ciemniewski**, previously a member of the Democratic Union, and then Freedom Union party, Judge of the Constitutional Tribunal from 1998 to 2007, elected by the Sejm of 3rd term;
- **Jerzy Stępień**, previously a member of Christian-Democratic Party, Judge of the Constitutional Tribunal from 1998 to 2007 and its President from 2006 to 2008; elected by the Sejm of 3rd term;
- **Janusz Niemcewicz**, previously a member of the Democratic Union, and then Freedom Union party, Judge of the Constitutional Tribunal from 2001 to 2010 and its Deputy President from 2006 to 2010, elected by the Sejm of 3rd term;
- **Marek Mazurkiewicz**, previously a member of the communist Polish United Workers Party and then Democratic Left Alliance, Judge of the Constitutional Tribunal from 2001 to 2010 and its Deputy President from March to December 2010, elected by the Sejm of 4th term;
- **Adam Jamróz**, previously a member of the communist Polish United Workers Party and then Democratic Left Alliance, Judge of the Constitutional Tribunal from 2003 to 2012, elected by the Sejm of 4th term;
- **Marek Kotlinowski**, previously a member of the League of Polish Families party, Judge of the Constitutional Tribunal from 2006 to 2015, elected by the Sejm of 5th term;
- **Teresa Liszcz**, previously a member of the "Solidarity" Electoral Action, Judge of the Constitutional Tribunal from 2006 to 2015, elected by the Sejm of 5th term;
- **Andrzej Rzepliński**, previously a member of the communist Polish United Workers Party, Judge of the Constitutional Tribunal from 2007 to 2016 and its President from 2010 to 2016, elected by the Sejm of 6th term.

Since it is the parliament that elects the judges, it has always been a *quasi*-political body to some extent. However, it must also be stressed that the previous political allegiance of certain judges does not affect the Tribunal as a whole – until it is composed according to the principle of pluralism.

Currently, there are 9 judges in the Tribunal that were elected during current 8th term of the Parliament – and six that were elected before (during 6th or 7th term). The cases are proportionally distributed among them: under the current President of the Tribunal, the latter six judges were granted majority in adjudicating panels in over 40% of resolved cases. It is a significant improvement in comparison with her predecessor.




- Cases resolved with a ruling issued by a panel with a majority of judges nominated **before 8th term of Sejm**
- Cases resolved with a ruling issued by a panel with a majority of judges nominated **during 8th term of Sejm**

*Source: http://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/ [available: 27.3.2018]*

Please take note that **all** judges of the Tribunal are fully independent of political pressure – the extensive guarantees listed above are effective in assuring their independence. As a result, judges elected during current term of Sejm often rule contrary the position of the parliamentary majority. A judgment of 14 December 2017 (case file No. K 17/14) may serve as a good example.

**Case K 17/14 – Police search regulations**

In an important verdict the Tribunal ruled that **certain provisions allowing Police officers to conduct search of persons and/or vehicles are unconstitutional**, as they do not set boundaries for these actions and do not foresee judicial control thereof. The case was considered "politically sensitive", as it pertained to law enforcement authorities that were often criticized by the opposition.

It is worth noting that the verdict was delivered **contrary to the position of the Parliament and the Government** – and it followed opinion of the Ombudsman (who is very critical of current ruling majority).

It is also worth indicating that the **unanimous verdict was delivered by a panel composed of 4 judges elected during current term of Sejm – and one elected before**. Among these 4 judges there was also judge Justyn Piskorski, who was vehemently attacked by the parliamentary opposition and branded an "illegal judge" and a political tool of the ruling party.

There are many other examples of rulings issued by the Tribunal under its current President that declared certain provisions unconstitutional – and did so contrary to the position of the Parliament, the Government or the Attorney General, e.g:

- judgment of 13 December 2017 (SK 48/15), on local fees and taxes;
- judgment of 14 December 2017 (K 36/15), on public fee for issuing driving licences;
- judgment of 14 December 2017 (K 17/14), on police search regulations (described above);
- judgment of 20 December 2017 (SK 37/15), on economic freedom and judicial review of supervision of entrepreneurs by public authorities;
- judgment of 7 February 2018 (K 39/15), on construction law restrictions;
- judgment of 27 February 2018 (SK 25/15), on legal advisory fees in certain court cases;
- judgment of 7 March 2018 (K 2/17), on environmental regulations;
- judgment of 14 March 2018 (P 7/16), on housing communities;

– and these are just from last three and half months.

The procedure is open and transparent, it also provides wide participation for institutions that are critical of current government (as the Ombudsman) – and the Tribunal often rules that provisions which Sejm or the government claim to be constitutional are in fact not in line with the Constitution.

This document is only a brief summary of how the Tribunal is currently functioning – thus, it is not possible to describe in detail all the cases that are (or were) resolved therein. However, we invite you to examine each and every case separately, if need be – as well as our Constitution and statutes. There have been many unjustified claims that the Tribunal is under political control – the facts prove that **such control not only does not exist, but there are substantial guarantees for judicial independence and protection of the Tribunal from any external pressure**, either political or of any other nature.

The reforms introduced by the Polish parliament also provide that **it is solely the President of the Constitutional Tribunal that is in charge of publication of its verdicts** in the Journal of Laws. It further separates the executive and judicial branch of government, strengthening the rule of law in Poland.