

Dariusz Mazur

Waldemar Żurek

**So called “Good change”
in the Polish system of the administration of justice**

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I. Introduction

On 25 October 2015, a parliamentary election was held in Poland from which the then opposition party Law and Justice (in Polish: *Prawo i Sprawiedliwość*, or *PiS*; further referred as “L&J”), led by Jarosław Kaczyński, emerged as the winner. The party had campaigned intensely using the slogan of “Good Change”, which it said it was going to bring to Poland. The “Good Change” policy was to involve reforms and improvement in a number of areas of public life which had until then been neglected, and to make it possible for Poland “to rise from its knees” in international relations, including with the European Union. According to Jarosław Kaczyński, the parties that had ruled in Poland until then had been elements of an alleged post-communist pact which had prevented that kind of thorough reform. He is also an author of a theory known in Poland as “impossibilism” according to which no serious reform of Polish society and institutions is possible due to the system of checks and balances and due to “the vested interests of liberal elites and foreigners intent on exploiting the country”. The type and number of legislative actions taken so far certainly suggest that the justice system is one of the key targets for the present government. Considering that it has been almost two years since L&J took power, that seems long enough to try to assess the effects that the “Good Change” policy has had on the justice system, and predict the direction of further changes in this respect.

In the Polish voting system a large portion of the votes for the political groups that do not reach the parliamentary threshold in effect accrues to the party which wins most votes, and thus the approximately 38% of the vote which L&J won gave the party an absolute majority in Parliament. Although L&J only has a small majority of seats, the efficiency of the party’s whips has turned the lower house of the Sejm (the Polish Parliament) into a highly efficient voting machine held firmly in the hands of the ruling party. Keeping in mind the fact that the party that won the election has created a single-party government, and the fact that the office of President of Poland was taken in August 2015 by Andrzej Duda, the Law-and-Justice-backed candidate, it is easy to realise that the ruling party is actually wielding complete legislative and executive power.¹ We note at this point that the political situation in Poland differs from that in Hungary under Viktor Orbán in one important respect: with only a slim majority in Parliament (234 of the total number of 460 seats in the lower house) and being unable to form a coalition, Law and Justice is far from holding the qualified majority that would allow it to change the Constitution.² The present Constitution states that Poland is a democratic state ruled by law, and its political system is strictly based on the tripartite separation of powers, with an independent judiciary and an extensive catalogue of civil rights and freedoms. Lacking the majority needed to change the Constitution, Law and Justice decided to further changes to the system by way of adopting legislative acts, caring not at all for their compliance with the Constitution. Consequently, the Constitutional Tribunal thus has

¹ During his first year in office, the President of Poland neither vetoed nor referred for constitutional review any of the bills proposed by L&J.

² According to Article 235.4 of the Polish Constitution, “A bill to amend the Constitution shall be adopted by the Sejm by a majority of at least two-thirds of votes in the presence of at least half of the statutory number of Deputies...”

to become the first natural chief enemy, so to say, of the ruling party, as it stands in the party's way to unbridled autocracy. To use military terminology, the Constitutional Tribunal has become a besieged fortress the taking of which will pave the way to making effective changes to the political system even if such are in breach of the Constitution.

II. The Constitutional Tribunal

1. The 'original sin' of the Civic Platform.

Admittedly, the 'original sin' of political attempts to tamper with the Constitutional Tribunal was committed by the coalition of the Civic Platform (in Polish: *Platforma Obywatelska*, PO) and the Polish Peasants' Party (in Polish: *Polskie Stronnictwo Ludowe*, PSL) that at the time governed Poland. On 8 October 2015, towards the end of the term of the previous Sejm, when three new Constitutional Tribunal judges were selected to replace those judges whose mandates expired in November 2015, the Sejm – on the basis of Act of 25 June 2015³ - appointed two additional judges ahead of time in order to replace two justices whose mandates did not actually end until December and whose successors, in light of applicable law, should have been selected during the next term of Parliament, which started on 12 November 2015. While this action of the former coalition should be clearly condemned, it is important to note that during the term of the current Sejm the Civic Platform itself appealed the act of 25 June 2015, which it had itself proposed, as a result of which on 3 and 9 December 2015 the Constitutional Tribunal found some of the provisions of that act to be unconstitutional, thus invalidating the election of the two additional judges. At the same time, the Tribunal ruled that the selection of the other three judges by the previous Sejm had been constitutional and the Polish President was required to swear them in, which is a pre-condition for judges to start their service on the Tribunal. Although these constitutional review proceedings reversed the negative effects of the misconduct of the previous governing coalition, the fact that such action had to be taken at all gave L&J a convenient pretext to commence "remedial action" regarding the legal status of the Constitutional Tribunal. The reasons for that action and the methods adopted to carry it out, as well as the fact that it was obviously intended to hamper effective constitutional review of the legislation passed by the current Sejm, make the "remedial action" look like efforts to extinguish a fire by adding barrels of fuel to it.

2. The first stage – how to paralyse the Constitutional Tribunal.

a) Admitted and not admitted judges.

The steps taken against the Constitutional Tribunal involved, in particular, the Sejm adopting resolutions on 25 November 2015 passed with the votes of L&J deputies to invalidate the election of judges of the Constitutional Tribunal by the previous Sejm on 8

³ The Act was published in the Official Journal of Laws (*Dziennik Ustaw*) of 2015, position no. 1064.

October 2015. Next, President Andrzej Duda, a former member of Law and Justice, refused to swear in the three judges of the Constitutional Tribunal who had been duly selected on 8 October 2015. Instead, on 2 December 2015, Parliament proceeded with the selection of five new judges for the Constitutional Tribunal,⁴ and, although legal basis was lacking, the Polish President swore in all five of them, despite the fact, that in the light of the Constitutional Tribunal's judgments of 3 and 9 December 2015, only two of the five had been validly selected. The oath-taking ceremony took place at night, in breach of tradition and settled custom. A majority of the public perceived that as the hasty and unconditional execution of political instructions from the ruling party by the President.

Next, the President of the Constitutional Tribunal Andrzej Rzepliński admitted to the bench two of the five judges elected during the new term of Parliament, i.e. those who were duly selected to replace the judges whose tenure expired in November 2015. From that moment on, the Tribunal had twelve sitting judges instead of the fifteen required by the law, because the Polish President refused to execute the rulings of the Tribunal of 3 and 9 December 2015 by swearing in the three judges that had been lawfully selected during Parliament's previous term,⁵ while the President of the Constitutional Tribunal refused to admit to the bench Lech Morawski, Henryk Cioch and Mariusz Muszyński - the three judges selected by the present Parliament in breach of applicable law, so called "judges-doubles"⁶.

We soon discovered that the actions described so far were only a prelude to the battle for the Constitutional Tribunal. When the ruling party realised it was not able to take control of the Tribunal quickly by filling most positions on it with the party's candidates, legislative and *de facto* steps were taken to obstruct its activity, in addition to a range of propaganda measures to undermine the reputation of the Tribunal, especially its President, Mr. Rzepliński.

b) The first so-called "remedial statute".

Some of the steps taken by L&J to hobble the Tribunal's work are referred to as "remedial statutes" which were intended to "cure" the situation with regard to the

⁴ The selection of the five judges of the Constitutional Tribunal was made based on an amendment of 19 November 2015 to the Act of the Constitutional Tribunal, which was adopted by Law and Justice deputies in record-breaking time. The bill was submitted to the Sejm on 17 November and was adopted on 19 November; on 20 November it was affirmed by the upper house of Parliament (in Polish: Senat) with no changes and signed by the President of Poland on the same day. In addition to its other provisions, the amendment terminated the tenures of the present President and Vice-President of the Constitutional Tribunal within three months from the date it came into force. That provision was another one which the Tribunal found to be unconstitutional in its verdict of 9 December 2015.

⁵ In its Recommendation of 27 July 2016 (C(2016)5703), the European Commission observed that the failure to implement the Constitutional Tribunal's judgments of 3 and 9 December 2016 "*raises serious concerns with regard to the rule of law, as compliance with final court judgments is an essential requirement inherent in the rule of law*" (pt. 12 of the Recommendation). The same opinion was expressed by the Venice Committee in its Opinion of 11 March 2016, No 833.2015 (pt. 136 of the aforementioned Opinion), issued, one should note, following a request from Witold Waszczykowski - the Polish Minister of Foreign Affairs, from the L&J cabinet.

⁶ Comment of the First Vice-President of the European Commission Mr. Franz Timmermans, from the opening speech 29 July 2017: "*Some judges lawfully elected are not appointed, some judges appointed are not lawfully elected. The legitimacy of the Tribunal is now seriously undermined*" [http://europa.eu/rapid/press-release_SPEECH-17-2084_en.htm]

Constitutional Tribunal. The first of those laws, adopted by L&J deputies on 22 December 2015, referred to the ruling procedure and the independence of the Tribunal judges. The act made vast changes to the method in which the Tribunal would vote, so that all judgments relating to abstract compliance with the Constitution, which represent the majority of cases, would have to be handed down by the full panel of judges (until then full-bench rulings had applied only to key matters of the rule of law); the composition of the full-bench panel was increased to thirteen of the total fifteen Tribunal judges (until then full bench had meant nine judges). In addition, that category of matters would require a two-thirds majority in order to be resolved on, instead of the simple majority which used to be the case for the Tribunal. Another change brought in by the “remedial statute” was that, regardless of the significance of the matters on the table, the Tribunal was to consider motions in the order in which they were filed (the “sequence rule”), unlike before, when the President of the Tribunal had had the authority to order the early consideration of more fundamental matters. Finally, the 22 December 2015 amendment to the Act on the Constitutional Tribunal required that a motion could not be heard by the Tribunal sooner than three months from the date that notice regarding the sitting date was served on the parties, and for cases to be heard by a full bench (in fact the majority of matters) service of notice of the sitting date would have to precede the actual hearing date by no less than six months (compared to the previous general fourteen-day notice period). We need to emphasise that this statute entered into force on the date of its adoption with no *vacatio legis*, which was a gross violation of good law-making practice. The European Commission⁷ and the Venice Commission⁸ were of one mind, noting that the implementation of the changes would hamper the Tribunal’s decision-making process, cause a risk of the Tribunal becoming unable to rule, at least temporarily, and slow down the proceedings in breach of Article 6 of the ECHR, on top of the fact that the requirement for a two-thirds majority violates Article 190.5 of the Polish Constitution.⁹ It is cautiously estimated that as a result of adopting these changes the average case consideration time would increase from the current one to two years (when matters which the President of the Tribunal finds urgent can be put on a faster track) to five years or more, which would raise a question mark over the point of constitutional review, especially given that the term of a Parliament is four years.

c) The second so-called “remedial statute”.

On 22 July 2016, Parliament passed another “remedial statute” with the votes of L&J deputies, concerning the functioning of the Constitutional Tribunal. On the face of it, this looked like a softer option compared to the amendments of 22 December 2015; on closer inspection, however, it vested with the executive branch of government a number of useful instruments with which to hamstring the Tribunal. In particular, this it stated that the full

⁷ Pts. 30, 32, 34 and 36 of the Recommendation of 27 July 2016 referenced in footnote 5.

⁸ Pts. 62, 63, 65, 71, 82 and 83 of the Opinion of 11 March 2016 referenced in footnote 5.

⁹ When reviewing the bill, the National Council of the Judiciary also pointed out that the absence of even three judges from a panel will prevent any resolutions from being adopted (Reasons for the Council’s resolution No 99/2016 of 15 January 2016).

bench of the Tribunal would require eleven judges (instead of the thirteen in the 22 December 2015 amendments). Matters would be decided by the full bench if at least three judges of the Tribunal so moved, even if they were not part of the bench assigned to decide a given matter, and their motion for a full-bench procedure would not even have to be justified. Under the new amendment, decisions would be adopted by a simple majority, which was an improvement compared to the 22 December 2015 amendments, where full-bench resolutions required a qualified majority of two-thirds of the votes. The 22 July 2016 statute reintroduced the “sequence rule”, according to which the Constitutional Tribunal was required to hear cases in the order in which they were registered, with a reservation, however, that the President of the Tribunal was authorised to set a date out of turn if such derogation was motivated by the protection of civil rights or freedoms, the security of the state or the constitutional order. Another improvement over the 22 December 2015 amendments was the minimum thirty-day period between the date the parties receive notices regarding a hearing and the date the case can be heard; for matters of special significance the President of the Tribunal may order the shortening the period by one half (in the 22 December 2015 amendments the notice period was three or even six months). Can we say, then, that the second draft of the “remedial statute” guarantees conditions for the Tribunal to render constitutional justice effectively? Unfortunately, we need to reply in the negative manner for a few main reasons. There is one additional provision in the law: the presence of the Prosecutor General is obligatory to consider matters that require a full bench. This reservation, inspires concern that the Prosecutor General, who is the Minister of Justice and a L&J MP (i.e. an active politician) at the same time, may hold up certain proceedings by absenteeism. The second provision of the 22 July 2015 law that raises concern as to its impact on the efficiency of proceedings is the one that says that when a case is heard by the full bench, a group of at least four judges may, during a meeting in chambers, make an objection to the decision made by the majority, which automatically defers the case by three months; if another objection is later made, another obligatory deferment of three months will take place. Also, with the new wording of the Constitutional Tribunal law (Article 89) the government would have significant powers to decide which judgments of the Tribunal are lawful and which are publishable. Also worrying were the transitional provisions of the act, whereby all cases started before its enforcement, no matter how advanced they are, have to be proceeded with under the new law, and the proceedings suspended mandatorily for six months. It is not hard to notice that while the law of 22 July 2016 appears to be a compromise in comparison to that of 22 December 2015 (reducing the number of judges in the full bench, introducing numerous exceptions from the sequencing rule and the shorter period for hearing notice), it was in fact formulated so as to potentially enable the executive to hamper the Tribunal’s work under the current political circumstances.

d) Refusal of publication of judgements by Polish government.

A constitutional complaint against the 22 December 2015 amendment to the Act on the Constitutional Tribunal (the first remedial statute) was lodged by the National Council of the Judiciary, a group of opposition MPs, the Ombudsman and the Chief Justice of the Supreme Court. On 9 March 2016, the Constitutional Tribunal ruled that the new law in its

entirety and a number of its individual provisions were unconstitutional, and held that the law in general crippled the Tribunal's efficient and reliable work and violated the rule of law as regards constitutional justice rendered by the Tribunal. The Tribunal acting in a panel of 12 judges did not proceed based on the amendment of 22 December 2015 because it ruled that an act of law that is presumed to jeopardize the control of the constitutionality of law has to be reviewed for compliance with the Constitution before it can be applied by the Tribunal. The government reacted to the verdict of the Constitutional Tribunal by refusing to publish it in the *Official Journal of Law* (in Polish: *Dziennik Ustaw*), although according to Article 190.2 of the Constitution doing so is an obligation of the government. Importantly, this was the first case of a government refusing to publish a ruling of the Constitutional Tribunal since the Constitutional Tribunal was set up in 1986. Before the ruling was announced, Prime Minister Beata Szydło said when speaking to the media, "*Tomorrow's communication which some judges of the Constitutional Tribunal are going to release will not be a verdict as defined in the law. Therefore I cannot violate the Constitution and publish such a document*". The Deputy Minister of Justice compared the sitting of the Constitutional Tribunal to a "*friendly meeting over a coffee and biscuits*". A wave of demonstrations swept through Poland, organised by the civic movement *Komitet Obrony Demokracji* (in English: the Committee for the Defence of Democracy), in which the protesters expressed their support for the Constitutional Tribunal and urged the government to publish the Tribunal's judgments, while the officials of one of the opposition parties projected the text of the Tribunal's verdict onto the wall of the Chancellery of the Prime Minister. Many university law faculties and non-governmental organisations made appeals to the Prime Ministers to publish the judgments of the Constitutional Tribunal.¹⁰

The law of 22 July 2016 (the second "remedial" status) was also appealed to the Constitutional Tribunal with respect to its constitutionality by a group of opposition MPs, the Ombudsman and the Chief Justice of the Supreme Court. On 10 August 2016, the day before a sitting of the Tribunal was scheduled to consider those complaints, Jarosław Kaczyński, the leader of the L&J party, announced in the media that the government would not publish the resulting judgment of the Constitutional Tribunal.¹¹ On 11 August 2016, the Constitutional Tribunal, which sat as a bench of twelve, handed down a verdict stating that nine of the ten appealed provisions of the law were unconstitutional.¹² This time the government also refused publication of this ruling.

¹⁰ Resolutions in support of the Constitutional Tribunal were adopted by councils of the law departments of the universities of Poznań, Kraków, Wrocław, Łódź and Warsaw.

¹¹ The Modern (in Polish: *Nowoczesna*) opposition party filed a complaint with the prosecutor's office asserting that the statement by Jarosław Kaczyński was an act of incitement; the complaint was dismissed last October.

¹² The tribunal found to be unconstitutional provisions such as the requirement of a full bench to sit at the demand of three judges; the requirement to consider cases in the order in which they are received, with absolute priority given to certain categories of matters of not the highest rank; the fact that cases are suspended in the event that the Prosecutor General is not present; the obligation to defer the consideration of cases that require a full-bench sitting at the motion of four judges; the obligation to close the files of suspended cases within one year, when combined with the requirement to defer a hearing date that has already been set and to collect a full bench; the government's authority to decide which verdicts are publishable as lawful; and the provision under which the three judges elected in breach of the law by the present Parliament would take positions in the Tribunal.

On 7-th of November 2016 the Constitutional Tribunal ruled that the law of 22 July 2016 is unconstitutional also in terms of the new way of designating candidates to a post of President of Tribunal and his deputy.

NGO Helsinki Foundation for Human Rights filed the public prosecution office with the complaint about the government's failure to publish the Constitutional Tribunal's judgment of 9 March 2016. Efficiently "reformed", the prosecution service¹³ dismissed the motion to prosecute on 27 April 2016, stating that the refusal to publish a ruling is not misconduct in public office because the prosecution had failed to identify "the element of acting against public or private interest". "Incidentally", before that decision was handed down, a prosecutor who argued for opening an investigation was reassigned to a new office. The prosecutors of his department stepped forward in his defence and penned a protest letter. The dismissal was appealed against by the Helsinki Foundation for Human Rights, and on 13 October 2016 it was reversed by the court in Warsaw. The assumption that the refusal to publish the Tribunal's verdicts is not "acting against the public interest" must leave one flabbergasted given that a range of expert bodies, both international (the Venice Commission and the European Commission) and domestic (legal academia, a variety of legal associations organisations), assert straightforwardly that failing to publish the judgments of the Constitutional Tribunal is an outright breach of the democratic rule of law in Poland.

In the meantime, between 9 March 2016 and 11 August 2016, the Constitutional Tribunal had handed down twenty-three judgments but the government had refused to publish them forthwith, in breach of Article 190.2 of the Constitution. Those were judgments concerning matters important for the protection of human rights, such as access to public information or deprivation of liberty of wards of legal guardians. Unexpectedly, on 15 August 2016, the government published twenty-one of the twenty-three verdicts, i.e. all except for those of 9 March 2016 and 11 August 2016, which referred to the "remedial laws" concerning Constitutional Tribunal.

e) The Act on legal status of Judges of Constitutional Tribunal.

On 4 November 2016, the Sejm adopted another revision of the law on the Constitutional Tribunal, this time regulating the status of the Tribunal's judges. One of the changes it introduced was the obligation for the judges to make financial disclosures, restricting the active and retired judges' potential additional academic or teaching positions to one employer only (there had been no such restriction until then). Also, the law revised the grounds for disciplinary sanctions for the judges of the Constitutional Tribunal: until then they could be held liable in case of breach of law or other unethical conduct that might potentially reduce trust in their independence or impartiality. The new law provided for disciplinary measures if judges failed to comply with the "Code of Conduct of Constitutional Tribunal Judges" but the text of this document has not as yet been made known. Additionally, the catalogue of disciplinary sanctions was extended: in addition to the existing admonition, reprimand and resignation, it envisaged reduction of remuneration by ten to twenty percent

¹³ The way the prosecution service was reformed is discussed in Chapter III of this report

over a period of up to two years. Moreover, Tribunal judges were to take the office the moment the judges were sworn in by the President of Poland. This solution would work for the benefit of the ruling party as the President of Poland had, as mentioned earlier, sworn in the three judges the selection of whom was found to be unconstitutional by the Tribunal in December 2015 but the present President of the Constitutional Tribunal Andrzej Rzepliński has not permitted them to sit, on the grounds of improper selection.

Criticism and scepticism were heaped on a set of regulations concerning former Tribunal judges, to whom practically the same restrictions on participation in public life are to apply as to the judges currently sitting on the Tribunal. In particular, former judges couldn't be members of political parties, trade unions or be publically active in a way that is incompatible with the rule of judicial independence and pressure-free working environment for the judiciary. According to the draft law, a violation of these rules would carry disciplinary liability with the same catalogue of sanctions as for the active judges, up to deprivation of the status of retired judges (and thus making them ineligible for their pensions). A lot of commentators point out that this number of restrictions against retired judges may have a lot to do with the fact that former Presidents of the Tribunal, such as Andrzej Zoll, Jerzy Stępień and Marek Safjan, have on many occasions spoken critically about the actions taken by the L&J government with reference to the Constitutional Tribunal. The regulations described above were, above all, intended to gag them so as to prevent public criticism. Eventually, the part of regulations imposing restrictions on retired judges of the Tribunal for public activity was withdrawn from the definite version of the act.

f) Criminal proceedings in respect of President of the Tribunal.

The Law and Justice party took action that can hardly be interpreted as anything other than an attempt to browbeat the justices of the Constitutional Tribunal. In particular, on 5 April 2016, Zbigniew Ziobro, the Minister of Justice and Public Prosecutor General, sent an official letter to the President of the Constitutional Tribunal in which he noted, "The Prosecutor General will not authorise, or participate in, any attempts by the Constitutional Tribunal to act outside of the constitutional and statutory regime. They can only be subject to his scrutiny for legal compliance."¹⁴ From today's perspective, those words presaged further, criminal actions launched against Andrzej Rzepliński, the President of the Constitutional Tribunal. We will describe in detail first of them handled by the Regional Prosecutor's Office in Warsaw, which was investigating whether the Tribunal's President acted in breach of applicable law when he admitted twelve judges to the bench on 9 March 2016. Characteristically, the Regional Prosecutor's Office in Warsaw initially dismissed a motion to launch a pre-trial process, but after the Law on the Prosecution Service was amended (described in chapter III of the report), the Prosecutor General nominated a new head of the

¹⁴ The National Council of the Judiciary objected to the statement and its content, and in its resolution of 7 April 2016 it observed that, being a representative of the executive power, the Minister of Justice and Public Prosecutor General is not authorised to verify the judgments of the Constitutional Tribunal, so his statement violates the principle of tripartite separation of powers and [is an attempt to] muscle in on the independence of the judges.

Regional Prosecutor's Office in Warsaw¹⁵ and the proceedings were restarted. Despite clear and unchallengeable facts of the case, the proceedings were still pending and its period of conduct was extended many times which seemed to be aimed solely at putting pressure on the President of the Tribunal. The idea that the case proceedings were intended to intimidate the President of the Tribunal finds its confirmation in the fact that on 17 January 2017, a month after professor Rzepliński ceased to be the President of the Tribunal, the prosecutor issued a decision refusing to start investigation in the view that the act "does not contain the elements of the offense".

Furthermore, the second investigation was instigated in respect of President of Constitutional Tribunal Andrzej Rzepliński. The Regional Prosecutor's Office in Katowice is probably still investigating this so-called "misconduct in public office" (Article 231 of the Criminal Code) consisting in refusing to admit to the Tribunal the three judges whose selection was found to be unconstitutional by the Tribunal on 3 and 9 December 2015.

3. The second stage – how to take control over the Constitutional Tribunal.

At the time when the term of office of President of Constitutional Tribunal Mr. Andrzej Rzepliński (who firmly protested against numerous actions by political forces to influence the Tribunal's activity) was going to an end it was becoming more and more obvious that the governing party would treat end of his tenure as an opportunity to take full control over the Tribunal.

On 26 October 2016, another major revision of the law on the Tribunal was made, aimed at installing the three judges selected by the present Parliament in positions already lawfully filled by assigning a decisive role to the act of swearing in by the President of Poland. This revision also seeks to nominate a person elected by the new Parliament for the position of the temporary President of the Tribunal (*interrex*) after the mandate of the incumbent President, Andrzej Rzepliński, expired in December 2016. The bill states that when the incumbent President steps down, the judge with the longest seniority would act in that capacity until a new President of the Tribunal is elected, including periods of service in institutions other than the Tribunal selected, as it seems, according to a non-random key. Particularly specified in the draft of the Act seniority entitling to take position of *interrex* of Tribunal, which included e.g. any employment in the Common Court of Law (as a trainee, assessor and judge) as well as on the "central level of administration", excluding positions of the Supreme Court Judge, the judges in the administrative and military courts. In fact, among the judges at that time sitting on the Tribunal the one with the longest seniority estimated in such a peculiar manner was Justice Julia Przyłębska¹⁶, who was selected by the deputies of L&J during the current Parliament. Regardless of the above, it should be emphasised that the

¹⁵ Former head of Regional Prosecutor's Office was replaced in the position of the District Prosecutor in Warsaw by a former assistant of the current Minister of Justice and Public Prosecutor General.

¹⁶In the period of time in which judge Julia Przyłębska acted as the Communal Court Judge in Poznań, she was negatively evaluated by the College of the Court, which brought to attention the fact that the judge in the line of duty received a reproof for 26 justifications past due and two comments for gross breach of law and her jurisprudence was characterized as exceptionally unstable. In this situation we can have substantial doubts whether judge Przyłębska meets criteria for the one of the most important judicial function in Poland.

Constitution sufficiently regulates function of *interrex* of the Tribunal by appointing the position of Vice-President of the Tribunal. For that reason this proves to be another amendment that was intended to allow the ruling party to take control of the Constitutional Tribunal at any cost, by placing their own candidate as a temporarily Tribunal director. The later bill of implementing regulations introduced an additional, and unfounded in the Constitution, right of the President to “confer the duties of the President of the Tribunal” and the right for the present judges of the Tribunal to retire within 1 month from the entry into force the Act of the status of Constitutional Tribunal Judges. It is not hard to notice that the last mentioned provision is blatantly corrupt as its goal is to induce Judges of the Tribunal to step down in order to allow judges – nominees of L&J - entry into office. The draft was assessed critically by National Council of the Judiciary in its Opinion of 13 December 2016.

On 30 November 2016 The General Assembly has been convened in order to select candidates for the new President of the Tribunal¹⁷, in connection with approaching end of term of the current President Andrzej Rzepliński. The session was attended by nine out of ten judges required for quorum due to absence of judges – Law and Justice candidates: Julia Przyłębska, Piotr Pszczółkowski and Zbigniew Jędrzejewski - who took sick-leave¹⁸. Due to closing date on 4th December for submission of list of candidates to the President, the judges present at the General Assembly selected as candidates Marek Zubik, Stanisław Rymar and Piotra Tuleja. However, none of them were nominated as the President of Constitutional Tribunal by the President.

Acts mentioned above: on organization and procedure before the Constitutional Tribunal and on the status of Constitutional Tribunal judges were passed by Sejm on 30 November 2016, and on 13 December 2016 the Act on regulations implementing those Acts was passed. From that moment the events unfolded rapidly. Those three “recovery” Acts were published in the Official Journal of Law (Dziennik Ustaw) in the late evening of the December 19, 2016, which was the day of Andrzej Rzepliński termination of office, without any *vacatio legis*. Therefore on 20 December 2016 the President under the new Act appointed Julia Przyłębska as the acting President of the Constitutional Tribunal (*interrex*). On the same day the first decision of Julia Przyłębska was to allow to rule previously elected by deputies of PiS, with violation of regulations, judges Henryk Cioch, Lech Morawski and Mariusz Muszyński, whom previous President did not allow to rule. Also on the same day the General Assembly of Constitutional Tribunal judges was convened to choose candidates for the position of President. As an act of objection for refusal to postpone the Assembly to 21 December (which would allow one of the absent judges to participate) eight judges refused to participate in the meeting. As a result, only six judges were present – nominees of L&J, who then selected among themselves Julia Przyłębska and Mariusz Muszyński as a candidates for the President position. This time smaller representation of judges on assembly, than on assembly on 30 of November, did not prevent President Andrzej Duda from electing Julia

¹⁷ According to the statutory obligation the meeting should be held no later than 4th December.

¹⁸ It should be noted that it was yet another absence of PiS nominee from the Constitutional Tribunal meeting, in which particularly Justice Julia Przyłębska excelled, which caused the press ironic comments about the mysterious “epidemic” in Tribunal.

Przyłębska as a President of the Constitutional Tribunal on 21 December 2016¹⁹. The first decision of the new President was to remove the Vice-President Stanisław Biernat from his current office room to another, forbid him meetings with the press in the Tribunal building, send him on forced holiday and put a ban on photographing and filming of the pending cases in the Tribunal.

The constitutional crisis has also caused the legislature and executive to retaliate against those state authorities that stood up for compliance with the rule of the Constitution. For example, funding has been cut for the previously budgeted expenses of the Constitutional Tribunal, the Ombudsman and the National Council of the Judiciary, leading to an unprecedented situation in which funds are too short to pay the retired judges of the Tribunal.

4. The third stage – how to dismantle the rule of law using the “reformed” Constitutional Tribunal.

Currently the Constitutional Tribunal is totally subordinated to the governing party. In fact the Tribunal almost does not work²⁰. In the meantime terms of offices of some old judges expired and the new judges were selected by L&J majority in Parliament. As a result at the moment there are 8 governing party nominees out of total number of 15 judges. Three judges of the present Tribunal were appointed in breach of Constitution (see subchapter 2.a), and the nomination of Julia Przyłębska for a President is also questioned by constitutional authorities²¹. What is more, properly elected old members of the Tribunal are excluded from the Court sittings by Julia Przyłębska, who also sent ex vice-President Stanisław Biernat, against his will, on a compulsory vacation. Nevertheless, the L&J party has figured out that even such a ruined institution, if “properly” used (or rather misused), can become an effective tool to oppress those authorities and institutions which are still independent from the influence of the governing party.

So far three requests of this kind have been filled with Constitutional Tribunal:

- 1) the request submitted on 11 January 2017 by the General Prosecutor Zbigniew Ziobro to examine the constitutionality of the Sejm Resolution from 2010 (before L&J came into power) on the selection of the Constitutional Tribunal judges Stanisław Rymar, Piotr Tuleja and Marek Zubik. In opinion of the applicant the doubts rise regarding the selection of three judges with one resolution. This application, which undermines the mandate of the three Constitutional Tribunal judges, is groundless for two reasons. Firstly, in the light of previous jurisprudence the Constitutional Tribunal has no power to examine the validity of Sejm resolutions which are not the normative acts but the

¹⁹ The Act – implementing regulation of 13 December 2016 abolished the requirement of 10-person quorum for the Assembly resolution to be binding, however, taking into account the general rules regarding minimum quorum for the collegial bodies, as well as mode of its adaptation and entry into force (without any *vacatio legis*) it is hard to consider its provisions to be in accordance with the Constitution.

²⁰ The first session of the Tribunal with new President Ms. Julia Przyłębska took part on 15 February 2017 (almost two months after her appointment).

²¹ As it was mentioned she was elected by only six judges of the Tribunal which – as a minority of the total number of judges – can’t be treated as a General Assembly of Judges and adopt an effective resolution about choosing the candidate for the President of the Tribunal,

acts of application of the law²². Secondly, the selection of each judge was held by separate votes in the presence of the Sejm quorum and each of them received more than half of the votes from members presented in the room. In this situation, it is obvious that the request was based on artificially created problem to achieve a specific political objective by ruling party. Afterwards, on the basis of this ungrounded request President Julia Przyłębska excluded three judges from ruling. One thing becomes clear – that the Tribunal under the leadership of the L&J nominee Julia Przyłębska will issue a decision consistent with the interests of the party²³.

- 2) the request submitted on 1-st of March 2017 by a group of fifty L&J Members of Parliament to examine the legality of election on the post of First President of the Supreme Court Ms. Małgorzata Gersdorf in April 2014 (before L&J came into power)²⁴,
- 3) the request submitted on 12 April 2017 by the General Prosecutor Zbigniew Ziobro to examine the constitutionality of the Act on National Council of Judiciary from 2011 (enacted before L&J came into power) in its part concerning the selection of the 15 judges – members of the Council and their terms of office²⁵.

In all above mentioned cases, it seems obvious that the requests directed to the “new” Constitutional Tribunal were based on artificially created problems to achieve a specific political objectives by ruling party which are to terminate the mandate of the term of office of three judges of Constitutional Tribunal, current First President of Supreme Court and fifteen judges-members of National Council of the Judiciary. “Accidentally” all requested persons do not accept breaching the rule of law by the governing party. Sadly, 18 months of so called “good change” occurred to be enough to turn Polish Constitutional Tribunal from the effective guardian of the Constitution into one of the main instruments of destruction of the rule of law in Poland in the hands of governing party.

In May 2017 three judgements of the “old” Tribunal miraculously disappeared from the official electronic database of judgements accessible via Internet. Accidentally, this were the verdicts of 9 March, 11 August and 7 November 2016 on the so called “remedial statutes” of 22 of December 2015 and 22 of July 2016, which found the requested laws unconstitutional. The new Vice-President of the Tribunal Mr. Mariusz Muszyński, asked by the journalist on “disappearing verdicts” commented “*Because the judgements, as not published in the Official Journal of Law, haven’t entered into force, there is no reason for them to be present in the official database and to complicate the legal reality*”²⁶.

²²When the Tribunal was examining the admissibility for the Constitutional Tribunal to study the validity of the Sejm resolutions the applicant Minister of Justice Zbigniew Ziobro presented his standpoint in which he excluded jurisdiction of the Constitutional Tribunal in this regard. If we take under the consideration that this standpoint was fully supported in the Tribunal decision of 7 January 2016, it is difficult to understand the source of the General Prosecutor current concerns.

²³ Perhaps the President of the Tribunal not coincidentally appointed her own, Mariusz Muszyński and Michał Warciński to head this case, who are exclusively the judges elected by the current Parliament,

²⁴ This request is described in details in part. VI.2 of this report,

²⁵ This case was already adjudicated by the “new” Tribunal which is described in details in subchapter V.3.,

²⁶ The situation remains the plot of “Animal Farm” by George Orwell in which the parts of the animal anthem not convenient for the ruling pigs gradually disappear from the text,

In spite of possessing the majority of judges in the Tribunal, including the President and Vice-President, the presence of the “old” judges in the Tribunal caused some problems for the governing party. For example, in April 2017 Stanisław Rymar, one of the old judges, issued a dissenting vote (*votum separatum*) to the Tribunal’s judgement in which he expressed the opinion that the verdict is invalid due to the fact that one of the five members of the bench was not properly elected²⁷. As a solution for such kind of problems the new Internal Rules on Functioning of the Tribunal²⁸ were adopted at the end of July 2017, which seriously limited the independence of judges of the Tribunal in favor of President of Tribunal. For example the bench sitting in a particular case can ask other institutions (like Supreme Court, Supreme Administrative Court, or international institutions) for legal information or legal opinion only if the President of the Tribunal accepts such a motion²⁹. What is more the competence to decide about the possibility of the recognition of especially complicated cases in a full composition of the Tribunal was switched from the bench adjudicating in particular case to the President of the Tribunal³⁰. Last but not least the new Internal Regulation excluded possibility of issuing *votum separatum* from the initial part of the Tribunal’s judgement. In this way the “old” judges of the Tribunal are deprived of the possibility to contest the presence of unlawfully admitted judges in the bench. According to law authorities described provisions of the Internal Rules, by seriously limiting independence of the judges, violate both the Constitution and The Act on Organization and the Procedure before the Constitutional Tribunal (which is superior in the hierarchy of legal acts than Rules on Functioning of the Tribunal)³¹.

5. Reaction of Polish and international institutions on constitutional crisis.

As a final note, this discussion of the current situation of the Constitutional Tribunal in Poland would not be complete without briefly presenting the reactions of some key Polish and international institutions.

On 13 January 2016, the European Commission began the procedure of probing governance in Poland, one of the reasons therefore being the political and legal tussle over the Constitutional Tribunal. On 1 June 2016, the Commission adopted a negative opinion on governance and democracy in Poland, setting a deadline of two weeks for the Polish government to reply and present its position on the objections raised. On 27 July 2016, the European Commission formulated Recommendations³² in which it found that there was a “systemic threat to the rule of law” in Poland, and set a deadline of three months for carrying out its recommendations by publishing and implementing the judgments of the Constitutional

²⁷ The dissenting opinion concerned participation in the bench Mr. Henryk Cioch, one of the three judges selected by the present Parliament in positions already lawfully filled, which was described in part. II.2.a),

²⁸ Published in Official Journal (Monitor Polski) of 2017, position no 767,

²⁹ Par. 35 of the Internal Regulation,

³⁰ Par. 51.6 of the Internal Regulation,

³¹ Such opinion was expressed, among others, by one of the “old” judges of the Tribunal Piotr Tuleja in “Monitor Konstytucyjny”,

³² Accessible on the Commission’s website: www.ec.europa.eu.

Tribunal of 3 and 9 December 2015 and 9 March 2016, ensuring that the Constitutional Tribunal can review the constitutionality of the law on the Constitutional Tribunal of 22 July 2016, and by publishing and implementing the judgment the Tribunal will hand down in that respect.³³ These recommendations of the European Commission were also pooh-poohed by L&J politicians in their media statements; one MEP said that the opinion is so “*out of touch with reality*” that “*breath alcohol testers should be installed at the door to the Commission’s offices*”, and one of the L&J senators referred to it as “*purely political*” and “*with no grounding in international treaties*”. As a result, the Polish government did not execute the European Commission’s recommendations within the prescribed period (i.e. by 27 October 2016), replying instead with a ten-page paper which stated that “*The Polish authority finds it legally impossible to implement the recommendations presented*” claiming that “*by implementing them Polish authorities would violate the Constitution and the law*”. The “legal argumentation” set out in the letter is absurd and implies, for instance, that while the Constitutional Tribunal does render constitutional justice, at the same time “the Tribunal’s interpretations of legal acts are not binding” and its judgments are irrelevant for the way the Sejm or the President act in specific situations.

On 11 March 2016, an opinion on the Constitutional Tribunal issue in Poland was adopted by the European Commission agency known as the Venice Commission (after the place it has its seat).³⁴ The Commission stated that the 22 December 2015 amendment to the Act on the Constitutional Tribunal is a threat to the rule of law and to the functioning of the democratic system, and the legal changes made to it are likely to slow down the proceedings and cripple the Tribunal’s work. The Commission further urged the government to publish the Tribunal’s judgment of 9 March 2016 and confirmed that the Tribunal was authorised to make a constitutional review of an amendment to the Constitutional Tribunal law under the Constitution itself without having regard to the law the constitutionality of which is the subject of its scrutiny. Paradoxically, while the Venice Commission issued this opinion following a request from the Minister of Foreign Affairs, a member of the present Cabinet and of Law and Justice, Witold Waszczykowski, as soon as the opinion proved to be unfavourable for the ruling party, its officials commented in the media that “it is orchestrated by the EU’s leading powers that want to frustrate certain processes in our country”, and, last but by no means least, that the opinion “is something we may or may not use”.

On 26 April 2016, the Polish Supreme Court adopted a resolution declaring the compliance with the verdicts of the Constitutional Tribunal on the constitutionality of laws from the moment they were announced, whether or not the Polish government published them in the Official Journal of Law. On the same day, the spokeswoman for L&J commented on the resolution in the following way, “The message of today’s position of the Supreme Court is clear to me: this is producing further anarchy in our country. In fact, a crew of cronies got together to defend the former status quo.”

³³ Based on the discussion above, the Constitutional Tribunal completed a constitutional review of the law of 22 July 2016 by its judgment of 11 August 2016. However, the judgment has not been published by the government.

³⁴ Its full official name is the European Commission For Democracy Through Law.

Furthermore, on 14 October 2016, the Venice Commission issued an opinion on the “remedial statute” regarding the Constitutional Tribunal of 22 July 2016,³⁵ in which it states, for example, that the law does not take into account the key principle of checks and balances, i.e. the independence of the judiciary and the position of the Tribunal as the ultimate arbitrator in matters of constitutionality.

When discussing the reactions of international institutions to the constitutional crisis in Poland we should also take note of a letter dated 19 October 2016 from ninety-one Polish and international NGOs that monitor human rights and democratic standards addressed to the President of Poland and the Prime Minister, urging them to swear in the duly selected judges of the Constitutional Tribunal and to publish all of its judgments.³⁶

At this point we should also quote point 8 of the Concluding Observations of the UN Human Rights Committee of 31 October 2016 on the seventh periodic report of Poland: “*The State party should ensure respect for and protection of the integrity and independence of the Constitutional Tribunal and its judges and ensure the implementation of all its judgments. The Committee urges the State party to immediately publish officially all the judgments of the Tribunal; refrain from introducing measures that obstruct its effective functioning and ensure a transparent and impartial process for the appointment of its members and security of tenure, which meets all requirements of legality under domestic and international law.*”³⁷ Commenting on the document in the media, L&J Member of the European Parliament Ryszard Legutko referred to the UN Human Rights Committee as “*a UN agenda that does not really know where Poland is*”.

To tackle with the crisis in Constitutional Tribunal, under the supervision of the National Council of the Judiciary and together with societies of judges and Silesian University, the extraordinary Conference of Polish Lawyers in Katowice on 3 March 2017 was organized. The event entitled “The crisis of constitutional judiciary and decentralized control of constitutionality” was attended by more than 800 lawyers, mainly judges. There was a common agreement among the participants that after the changes Constitutional Tribunal has lost its independence and authority and therefore the judges of ordinary courts are obliged to undertake the decentralized control of constitutionality in every pending case they would find it necessary, to preserve the rule of law. The participants have also found that every judgement issued by current Constitutional Tribunal adjudicating with participation of judges appointed in breach of Constitution (at the moment there are three of them), can be estimated as *sententia non existens* from the legal point of view.

When discussing the current situation of Polish Constitutional Tribunal it is difficult not to mention how negatively the actions described above affected the authority of the Tribunal. When we compare the numbers of legal questions directed to the Tribunal by ordinary courts in recent years we can see a dramatic decrease. While in 2015 common courts formulated 135 legal questions, in 2016 there were only 21 of them, and in the first part of

³⁵ Opinion of the European Commission For Democracy Through Law No 860/2016 is accessible at www.venice.coe.int

³⁶ A Polish-English version of this letter is available at www.polityka.pl/tygodnikpolityka/kraj/_resource/multimedia/20100677,

³⁷ This document is available in English at www.tbinternet.ohchr.org

2017 – only 11. These numbers clearly show that the “new” Tribunal is not perceived by judges of common courts as reliable and independent legal authority.

Another sign of depreciation of the Tribunal’s authority is the fact that National Council of the Judiciary in March 2017 has withdrawn four motions directed to the Tribunal concerning important constitutional issues. The Council stated that presence of unlawfully elected judges (so called “judges-doubles”) in the composition of the Tribunal causes that judgements rendered have to be assessed as *sententia non existens*.

III. The Public Prosecutor’s Office

1. Introduction.

In Poland in October 2009 significant amendments were made to the Act on the Public Prosecutor’s Office,³⁸ resulting from the taking into consideration of, among others, recommendations of the Committee of Ministers of the Council of Europe.³⁹ In particular, these involved the separation of the previously joined positions of Public Prosecutor General and the Minister of Justice, as a result of which the Public Prosecutor General has been recognised as the supreme body of the Public Prosecutor’s Office, and the Public Prosecutors Office as the body of legal protection. According to the regulations introduced at that time, the Public Prosecutor General was appointed for a six-year term and the post could be filled only by a person that had been an active judge or a prosecutor for at least ten years. Dismissal from the position of the Public Prosecutor General could be executed only by a majority of two thirds of the votes of the statutory number of deputies in Parliament in a situation in which his annual report was not accepted by the Prime Minister. Introducing tenure of official positions at various levels of the Prosecutor’s Office was also a way of strengthening its independence. The changes made in 2009 increased the independence of the front-line prosecutors conducting preparatory proceedings by limiting the range of superior prosecutors’ commands by excluding the possibility of giving that type of command concerning the content of the specific procedural steps. In summary, the changes made in 2009 helped to strengthen the independence of the Public Prosecutor’s Office as an institution, and individual prosecutors as its officers.

³⁸ These were introduced by the Act of 9 October 2009 amending the Act on the Public Prosecutor’s Office and other laws, Official Journal of Laws (Dziennik Ustaw) of 2009, position no. 1375.

³⁹ In this context one can mention, before others, Recommendation Rec (2000) 19 of the Committee of the Council of Europe on the Role of Public Prosecution in the Criminal Justice System, the Bordeaux Declaration of the Consultative Council of European Judges (CCJE) and the Consultative Council of European Prosecutors (CCPE) on “Judges and Prosecutors in a Democratic Society”.

2. Law on the Public Prosecutor's Office from 28 January 2016.

The Public Prosecutor's Office, alongside the Constitutional Tribunal, was an institution that could be classified to a broadly understood bodies or agencies of legal protection which have become the subject of changes shortly after the L&J became the ruling party. Taking rapid⁴⁰ actions that made deep changes in the way the Public Prosecutor's Office is functioning was possible mainly thanks to the fact that – unlike the Constitutional Tribunal or judiciary – it is regulated by legal provisions which are not at the constitutional level, as a result of which making changes is possible by passing laws in Parliament with a simple majority, and where the potential scope of checking their constitutionality is narrow. Fundamental changes in this area were made by the “Act on the Public Prosecutor's Office” of 28 January 2016,⁴¹ which in a significant way restricted the independence of the Public Prosecutor's Office from the executive power, as well as the front-line prosecutors conducting preparatory proceedings.

3. Unification of posts of the Public Prosecutor General and the Minister of Justice.

Under the law in question the first action was to combine functions of the Minister of Justice and Public Prosecutor General,⁴² by going back to the model which had been in force before 2009 (dating back to the time of the communist regime) and undoing the effects of previously introduced reforms. The combining of the two posts has been accompanied by a significant reduction in the requirements for candidates for the position of Public Prosecutor General, which enables active politicians to be assigned to this dual role.⁴³ It is significant that the embedding of the position of Public Prosecutor General in the political mainstream was accompanied at the same time by significant increase of his powers, also in comparison to the law before 2009, when the positions of the Public Prosecutor General and the Minister of Justice were one and the same. Currently, the Public Prosecutor General has, in particular, the ability to request, in a specific case, the carrying out of inquiry procedures directly related to

⁴⁰ It should be noted that when adopting the new Act on the Public Prosecutor's Office the L&J party made use of the ‘parliamentary path’ to propose a bill, which is a much shorter and simplified way of proceeding in Parliament.

⁴¹ Published in the Official Journal of Laws (Dziennik Ustaw) of 2016, position no. 177, dated 15 February 2016.

⁴² The role of Minister of Justice and Public Prosecutor General was combined when the Act on the Public Prosecutor's Office came into force, i.e. on 4 March 2016. By itself, the combining of these two positions, while granting very broad supervisory and investigatory powers to the Public Prosecutor General, means that the same person on one hand, through subordinate prosecutors, becomes an actual participant in every criminal procedure and, on the other hand, becomes an entity that supervises courts, which has become the basis for the complaint of the National Council of the Judiciary to the Constitutional Tribunal on the “administrative supervision”. This explains one of demands of the extraordinary congress of judges from 3 September 2016, pursuant to which administrative supervision of common courts should be entrusted to the First President of the Supreme Court.

⁴³ In particular, under the Act of 2016 the requirement that a candidate for the post of Public Prosecutor General needs to have at least ten years' work experience as a prosecutor or a judge adjudicating in criminal cases has been removed. As a result, the requirements regarding the qualifications of the Public Prosecutor General are now lower than these for prosecutors of the lowest level of the Prosecutor's Office, and even those for assessors of the Prosecutor's Office.

the on-going investigation (in terms of surveillance of the content of correspondence or mail or use of telephone tapping) and also become acquainted with the materials gathered during such activities; however, the Act on the Public Prosecutor's Office does not provide any permissibility requirements for the taking of this kind of action by the Public Prosecutor General, which raises the risk of abuse.⁴⁴ The Public Prosecutor General has also the right to issue binding commands, including with regard to the content of particular procedural steps in each individual case (Article 7 § 2 and 3 of the Act), to overrule or change a decision of a subordinate prosecutor (Article 8 of the Act)⁴⁵ and the right to take over the cases conducted by subordinate prosecutors (Article 9 § 2 of the Act).

It has been legitimately pointed out in source literature that equipping the Public Prosecutor General with such wide capabilities to directly influence the course of pending proceedings causes him/her to become a "superprosecutor" equipped with broad investigatory powers, as a result of which the position of the current Minister of Justice and the Public Prosecutor General, Zbigniew Ziobro, who is also a deputy in the Polish Parliament, violates Article 103 § 2 of the Polish Constitution, which states that a public prosecutor cannot have at the same time a seat in the Parliament.

4. Strengthening the power of the Public Prosecutor General and superior prosecutors.

Every prosecutor, superior or subordinate, has the above-mentioned set of rights, which significantly reduces the independence of prosecutors conducting individual proceedings. The 2016 Act on the Public Prosecutor's Office also strengthens the power of the General Public Prosecutor in matters of the staff policy, at the expense of weakening the positions of the heads of other levels of the Public Prosecutor's Office. Specifically, the Public Prosecutor General, at the request of the National Public Prosecutor, appoints and dismisses chief prosecutors of high regional, regional and district prosecutor's offices (Article 15 § 1 of the Act on the Public Prosecutor's Office), which is tantamount to withdrawing the requirement for tenure of the official positions of the Prosecutor's Office, which allows the Prosecutor General to introduce any arbitrary changes in official positions in the Prosecutor's Office, and thus exposes official prosecutors to the risk of availability⁴⁶. What is more, although as a general rule under the new law candidates for vacant positions in a district prosecutor's office are appointed after winning a competition for an opening, Article 80 of the

⁴⁴ Article 57(3) of the 2016 Act on the Public Prosecutor's Office enables him/her to do that.

⁴⁵ It has been legitimately pointed out in source literature that equipping the Public Prosecutor General with such wide capabilities to directly influence the course of pending proceedings causes him/her to become a "superprosecutor" equipped with broad investigatory powers, as a result of which the position of the current Minister of Justice and the Public Prosecutor General, Zbigniew Ziobro, who is also a deputy in the Polish Parliament, violates Article 103 § 2 of the Polish Constitution, which states that a public prosecutor cannot have at the same time a seat in the Parliament.

⁴⁶ On the basis of the 2009 Act on the Public Prosecutor's Office the heads of the Appellate and Regional Public Procurator's Office were appointed for six-year terms, and the heads of District Public Procurator's Office for four-year terms, while their dismissal before the expiry of their term could take place only in the cases exhaustively listed in the Act (e.g. in the event of permanent incapacity to perform duties due to illness).

Act on the Public Prosecutor's Office gives the Public Prosecutor General the right to appoint "in justified cases" to those positions a candidate without conducting a competition⁴⁷. When discussing the newly introduced possibilities for almost uncontrolled and arbitrary changes in the development of the personnel policy in the Public Prosecutor's Office by the Prosecutor General it is impossible not to mention additional law accompanying the Act on the Public Prosecutor's Office titled "Regulations implementing the Act on the Public Prosecutor's Office".⁴⁸ The provisions of this law seemingly introduce a reorganisation of the Public Prosecutor's Office, in fact – apart from elimination of the military Public Prosecutor's Office – the structure of the Public Prosecutor's Office is almost unchanged, with the exception of changes in terminology. Specifically, going from the top of the hierarchy of the Public Prosecutor's Office, the Public Prosecutor General's Office has been replaced (or rather only renamed) by the National Public Prosecutor's Office and the Appellate Public Prosecutor's Office by the Regional Public Prosecutor's Office. When carried out, in fact the apparent reorganisation of the Public Prosecutor's Office units has been treated as a pretext for the re-appointment of prosecutors to particular units and exchanging many superior prosecutors and a justification for the transferring of "unwelcome" prosecutors to different official positions. In this way more than 100 prosecutors at managerial positions, e.g. in the Appeal and Regional Prosecutor's Offices, were transferred by the Public Prosecutor General to ordinary posts in the lower Public Prosecutor's Offices (the district level). In order to avoid humiliation and politicisation, about 400 prosecutors, who were expecting demotion, decided to take advantage of early pension entitlements. In response to the implemented changes another group of 50 prosecutors, who have been demoted, established an association called *Lex Super Omnia* (Law Above All). Its aim is, inter alia, defending prosecutors against harassment and pressure, and ensuring that the independence of the Public Prosecutor's Office is written into the Constitution.⁴⁹ Members of the forming association have submitted or will submit a complaint to the European Court of Human Rights in Strasbourg regarding their transfers to lower positions in connection with this year's reform of the Public Prosecutor's Office. These prosecutors are complaining that they have been demoted, inter alia, without any justification and without any opportunity to appeal against those decisions, which were arbitrary⁵⁰.

⁴⁷ In September 2016 the Public Prosecutor General took advantage of this opportunity by appointing to the post of the Regional Public Prosecutor in Krosno without an open competition the daughter of Stanislaw Piotrowicz, who is currently the deputy of the L&J party and during the communist era was a prosecutor who prosecuted the anti-communist opposition. Mr Piotrowicz recently became famous by stating that he was the main architect of the "repairing" law concerning the Constitutional Tribunal while representing in the Parliament during speeches a group of deputies from L&J which prepared the bill.

⁴⁸ Published in the Official Journal of Laws (Dziennik Ustaw) of 2016, position no 178.

⁴⁹ The first application for the registration of the association was rejected on formal grounds by the court in Warsaw. It is significant that the Public Prosecutor's Office in Warsaw joined the procedure for registration of the association, and a representative of that office asked to become acquainted with the case files and for a photocopy of the memorandum of association and the list of members. Although such activities are permitted under applicable law, this draws attention to the fact that during the registration of the other prosecutors' associations (during the previous government) the Public Prosecutor's Office never used those powers.

⁵⁰ The Ombudsman instigated the proceedings in this respect before the Constitutional Tribunal. In his claim the Ombudsman asserted that the Act in question, inter alia, was inconsistent with the principle of the citizens' trust in the country and applicable law (Article 2 of the Constitution), damages the reputations of the

The new law authorised the Public Procurator General to pass on to the media, without any requirement to obtain the consent of the investigating prosecutor, and without any legal limitations, information from on-going preparatory proceedings, with the exception of classified information (Article 12 § 2 of the act). This type of procedure does not guard against abuse,⁵¹ in particular with regard to breach the presumption of innocence by giving information to the media.⁵²

5. Limiting cognition of courts in favour of public prosecutor's office.

It should be noted that the extension of the Public Prosecutor General's competence and the subordination of the prosecutors to political factors are accompanied by the transitional provision of Article 5 of the Act of 10 June 2016 Amending the Code of Criminal Procedure and other laws,⁵³ introduced on the basis of criminal procedure, which significantly limits the cognition of the court in criminal cases in favour of the Public Prosecutor's Office. This legal rule gives the Public Prosecutor's Office the right, with respect to cases which were submitted to the court before the entry into force of the act, to demand the return of any case to the Public Prosecutor's Office in order to complete the investigation or probe, if there is a need to supplement the evidentiary proceedings. According to the amended version of the provision of law⁵⁴ this type of application it is to be binding for the Court and the parties are unable to appeal against the Court's decision to return the case to the Public Prosecutor's Office. According to an accurately written opinion of the management of the Polish Judges' Association "Iustitia", this new law can be used by a politicised (that last word has been added by the authors of the article) Public Prosecutor's Office in an instrumental way, e.g. in order to deprive a defendant of the right to obtain an acquittal judgment or, on the contrary to discontinue a case against an individual, after its returning, so as to prevent his conviction.

Unfortunately there is no statistical data about the scope of application of art. 5 in practice. However, it was used in quite a significant way in a case concerning the activist of National Radical Camp Justyna Helcyk. In 2016 she was accused of hate speech⁵⁵ in respect

prosecutors through their unjustified demotion (Article 47 of the Constitution in conjunction with Article 31 § 3), and violated the right to trial via the lack of any possibility to appeal against the decisions on demotion (Article 45 § 1 of the Constitution).

⁵¹ See the opinion on the bill of the Helsinki Foundation of Human Rights, No. 116/2016/MPL dated 19 January 2016.

⁵² Fear of abuse of the media policy is very likely due to the fact that the current Public Prosecutor General, the Minister of Justice, Zbigniew Ziobro, during his previous holding of this post in the years 2005 to 2007 became famous for giving a statement during a press conference in 2007, with regard to a criminal case (then at an early stage of the pre-trial proceedings) in which the doctor was suspected of, inter alia, medical malpractice, Mr Ziobro suggested that the doctor was responsible for the loss of a patient's life ("*... no one more would be killed by this doctor...*"), which the European Court of Human Rights held to be a violation of the presumption of innocence (the case of Garlicki against Poland, judgment of 14 June 2011, No 36921/07).

⁵³ Published in the Official Journal of Laws (Dziennik Ustaw) of 2016, position no. 1070.

⁵⁴ The government's draft of the Amendment to the provision in question was referred for consideration at a meeting of the Council of Ministers on 5 Sept. 2016, then directed to further proceeding as "print No 851".

⁵⁵ Among others she called Muslims as "Islamic scum", suggested that Muslims can come to Poland, and rape Polish woman,

of Muslims during nationalists' demonstration in Wrocław. Subsequently the indictment act was directed to Wrocław court. Soon later, after the interpellation of the right-wing deputy and the intervention of the Ministry of Justice, the prosecution office, on the basis of art. 5, withdrew the case from the court and issued its own decision on discontinuation of the proceedings. The motives of the decision weren't revealed to the media as confidential⁵⁶. Such level of secrecy raises the question if the decision was politically motivated.

Another change introduced recently, limiting the extent of the cognition of the courts in favour of expanding the powers of the Public Prosecutor's Office, relates to the introduction to the Code of Criminal Procedure of Article 168 b thereof and changes to Article 237 a.⁵⁷ Under those legal rules, the expression "subsequent consent"⁵⁸ to use in criminal proceedings the materials in the form of the recording (tapping) of phone calls, which until now has been within the competence of the courts, is now granted to the Public Prosecutor's Office. Moreover, insofar as the term "initial consent" with regard to a person the recording of telephone conversations is permitted only for the catalogue of very serious criminal and tax offenses which are fully and precisely defined in the act, the phrase "subsequent consent", with regard to the interlocutor of the person towards whom the "initial consent" was given is possible for any type of crime, furthermore, the decision to use that evidence in criminal proceedings is not subject to any time limitation. In this situation, it is not surprising that the Ombudsman has reported the aforementioned amendment to the Code of Criminal Procedure to the Constitutional Tribunal, asserting that it violates the right to privacy guaranteed by the Constitution (Article 47 of the Constitution) and the right to freedom and protection of the secrecy of communication (Article 49 of the Constitution) as well as the ban on obtaining and collecting information on citizens that is not necessary in a democratic country ruled by law (Article 51 § 2 of the Constitution).

Another bizarre, from the point of view of protection of human rights, change in the field of admissibility of evidence was introduced by art. 168 "a" of the Code of Criminal

⁵⁶ It wasn't the only one case in which the "reformed" public prosecutors' office decided, in very controversial way, in favor of nationalist activists. Another similar case concerned the group of nationalists from Białystok who, during their meeting, used the symbol of swastika and the slogans characteristic for Nazis (like "triumph of Aryan child", "preserving purity of blood and race") and afterwards put the film from this ceremony on a website. This time the decision of 29 of November 2016 on discontinuation of the proceedings was motivated by the fact that the suspects explained that the swastika wasn't used as the symbol of Nazis, but the symbol of Slavonic pagan god. The problem is that the film show something different. Quite recently the public prosecutors' office appealed the judgement of Wrocław court in favor of nationalist Piotr Rybak accused for firing the puppet of Jew on Wrocław main market. In another case the public prosecutors' office asked the Wrocław court for returning files to preparatory proceedings for supplementation the files of the case in respect for Jacek Międlar – an ex priest accused for hate speech. Probably again one can expect the discontinuation of the proceedings. On the basis of mentioned cases one may think that not the judges (like the Government claims), but the nationalists are "the privileged caste" in Poland ruled by L&J.

⁵⁷ These were introduced on the basis of Article 1(35 and 42) of the Act of 11 March 2016 on the Amendment of the Code of Criminal Procedure and others acts [Official Journal of Laws (Dziennik Ustaw) of 2016, position no 437),

⁵⁸ What is referred to as "subsequent consent" allows the use in criminal proceedings of telephone records against other persons that talked to the people with regard to whom the Court, at the request of the Public Prosecutor, has previously authorised the operational control in form of recording telephone conversations.

Proceedings⁵⁹. The provision almost mentioned removes the rule of *fruits of poisonous tree* from Polish criminal procedure. According to mentioned regulation the evidence gathered in illegal way (even as a result of an offence) is admissible in criminal proceedings except for cases in which “*it was collected by the public official on duty as a result of murder, intentional bodily harm or deprivation of liberty*”. We can imagine wide scope of behaviours which could be classified as tortures according to ECtHR jurisdiction, but which don’t fall under narrow scope of application of exclusionary rule stipulated in art. 168 “a” (for example not excessive use of physical violence not causing bodily harm, or use of “moderate” electric shock). Both academics and judges assess this controversial regulation as deeply unconstitutional.

6. Reformed public prosecutor’s office as an instrument of pressure on judiciary.

Quite recently, in 2017, a few situations have happened in which criminal proceedings were instigated in respect of judges who issued procedural decisions in pending cases not in favour of public prosecutor’s office.

In the first one the judge haven’t accepted motion of the public prosecutor to apply the preliminary custody, applying non-custodial preventive measures instead (bail combined with ban on leaving the country). We must admit that, taking into account the circumstances of the case, the decision of the judge was really controversial. Afterwards the suspect disappeared and was apprehended again after some time.

In the second situation, adjudicated before Kraków district court, the judge Agnieszka Pilarczyk haven’t accepted the evidentiary motion of General Public Prosecutor Zbigniew Ziobro, this time acting as a party in criminal proceedings concerning death of his father as a result of alleged medical maltreatment. The formal ground for instigating the criminal proceedings in respect of the judge was the fact that Agnieszka Pilarczyk, a few months earlier, issued decision accepting the costs of sworn medical experts’ opinion which were high. “Accidentally” the criminal proceedings in respect of the judge was instigated a few days before the judge was going to take closing speeches and close the trial. What is more the fact of instigating the proceedings became the ground for an immediate motion of public prosecutor for exception of a judge from the case. We must add that the motion was dismissed and the judgement which was rendered on 10 February 2017 was not in favour of Zbigniew Ziobro (the accused doctors were acquitted).

In the third situation the district court in Szczecin rejected the public prosecutor’s office motion to apply preliminary custody in respect of ex-managers of the big chemical factory in Police, suspected for large-scale embezzlement. The court released the suspects due to the lack of sufficient evidence. What is important the case has a political context, due to the fact that the offence notification was done by the new management board, appointed under the auspices of L&J, in respect of the previous managing board. In spite of criticism towards the 1-st instance court decision expressed by Minister of Justice – General Public Prosecutor Mr. Ziobro, the Regional Court in Szczecin sustained the decision of the first instance in force.

⁵⁹ Art. 168 “a” entered into force on 14 April 2016 [Official Journal of Laws (Dziennik Polski) of 2016, position no. 437].

This time the public prosecution office (the same unit which prepared the motion for preliminary custody!) instigated a criminal proceedings in respect of ... the presiding judges of the first and second instance court who were responsible for assigning a case. The idea of the alleged offence is that presiding judges assigned the case ignoring the order based on alphabetical panel of judges. The paradox is that, according to the statutory regulation, the presiding judge, due to the important reasons, can skip alphabetical order when assigning cases. Taking into consideration that ascertaining what are “the important reasons” is left to the discretionary power of the presiding judge the idea of trying to accuse anybody for any kind offence in such circumstances looks like complete absurd.

In all mentioned cases the criminal proceedings were instigated in respect of judges who issued decisions which can be subjected to appeal examination, which is unprecedented. In all three cases, from the formal point of view, the proceedings were instigated not against the concrete persons (not “*in personam*”), but the descriptions of alleged offences were precise enough to ascertain clearly that the judges are *de facto* suspected. What is characteristic in all mentioned cases instigating a criminal proceedings was immediate, without any kind of checking of facts of the case. What is more, contrary to the statutory regulations, the public prosecutor’s office didn’t care for waiving judge’s immunity before describing subject of the proceedings in a way which – in fact – identified the judges as suspects. Among the judges all described situations are perceived as a way of putting pressure on independent judiciary. Such an assessment was supported by the statement of National Council of the Judiciary.

7. Summary.

In summary, it can be stated that under the 2016 Act on the Public Prosecutor’s Office the personal union of the positions of the Minister of Justice and the Public Prosecutor General was introduced, simultaneously with the extension of the Public Prosecutor General’s power, among others including within his competence the ability to directly interfere in typical investigation activities. Taking in the account that the independence of the prosecutors conducting various proceedings was limited, as a result a model of the Public Prosecutor’s actions was achieved in which political factors (in form of the ruling party) can influence the actions of the Public Prosecutor’s Office. In this way the Public Prosecutor’s Office can become a tool for political battles. If one adds to that the exchange of personnel at the level of heads of the higher level of the Public Prosecutor’s Office made on the pretext of reorganisation the result is an image of the Public Prosecutor’s Office as potentially entirely disposed towards the ruling camp. These circumstances, in conjunction with the ability of the Public Prosecutor’s Office to “pull” criminal cases from the cognition of court (even though invalid), as well as with a significant amount of freedom in collecting and using operational materials which result from the tapping of telephone conversations, and with the admissibility of evidence collected in illegal way, must arouse deep concern from the point of view of protecting freedom and civil rights.

IV. Ordinary Courts

1. The scope and the shape of the planned reform.

The changes to the ordinary courts in Poland which could cause constitutional questions to arise are, from the formal point of view, much more difficult to introduce than the changes concerning the Public Prosecutor's Office. That is due to the fact that constitutional rights guarantee the independence of the judicature from executive authority and the independence of the judiciary, thus realising the triple division of authority. Those rights ensured that, until the Constitutional Tribunal remained independent from executive authority and its actions were not totally paralysed, the activities of ordinary courts were constitutionally protected. The current Minister of Justice and the Public Prosecutor General, Zbigniew Ziobro, gave an interview on a right-wing TV channel in September of 2016 in which he clearly stated that changes in the administration of justice will be introduced after "the dispute concerning Constitutional Tribunal has been settled". Judges generally treated that as a signal that the planned changes may be against valid constitutional order, in particular violating the triple division of authority, the independence of the judicature and the independence of the judiciary. According to the information coming from governmental circles the plan of the reform of ordinary courts was almost ready at the time of mentioned interview; however, no drafts were sent for opinions to relevant bodies, in particular the National Council of the Judiciary. In the same interview, the Minister of Justice and the Public Prosecutor General introduced only some general aspects concerning the planned changes. In particular, he mentioned that the rules of disciplinary proceedings would be changed in such a way as to exclude the competence of the corporation of judges; and he presented two possibilities being discussed. The first is the introduction of 'people's courts' in which a "social lay participant" would state "whether breach of rules has occurred, and not colleagues from the corporation". The second is the idea to set up a disciplinary chamber in the Supreme Court (likely with a "social lay participant") to settle disciplinary matters. Also, Jarosław Kaczyński indicated that "Corporation judicature of judges has not fulfilled its promises. Verdicts concerning guilt are very rare." It's interesting to note that according to a study made by the National Council of the Judiciary, since 2007 only 12.8% of all disciplinary cases have resulted in verdicts of acquittal, while 87.2 % have resulted in verdicts of guilty. Another change would concern the "rules of introducing judges into their profession and promoting them". One of the basic changes would concern the organisation of the administration of justice itself. The currently existing three-level structure of ordinary courts (which includes district courts, regional courts and courts of appeal) is to be replaced by a two-level structure. However, it's not clear which level would be liquidated; the lowest one (i.e. district courts) or the highest one (the appeal courts). Another plan is to create a "universal" position of "a judge of ordinary court" which will enable verification of all appointments of judges. Another idea is to connect all district courts into one large regional court where the district courts would become only non-resident departments, which would allow judges to be transferred from one to another without any problems. If such a solution is introduced, the constitutional rule stating that judges must not be transferred will become an illusion. There is a common belief among judges that this possible future re-organisation is only a pretext – the same situation was found with the re-organisation of the Public

Prosecutor's Office – and that the real aim is to employ as court presidents only the judges who are trusted by the minister and demote those who are treated by the “good change” as not trustworthy and “too individual”.

2. Direct interventions of the executive power into judiciary.

At the time of writing, the government formed by the L&J party has still not conducted basic reform of ordinary courts system yet, as they have announced, except for granting Minister of Justice exclusive power to appoint and dismiss presidents of all levels of ordinary courts (described in subchapters IV.7 and VII.6). However, that does not mean that the government and Parliament have not taken numerous actions which influence the functioning of ordinary courts. These actions can be divided into two categories. The first one includes different actions taken by the President and the Minister of Justice which are aimed at widening the competence of executive authority over the judiciary. These activities cause serious legal questions to arise and are undoubtedly in contradiction with present legal customs, which results in a change of the balance of power which has been worked out over years. The most important examples of such action were the granting of a pardon by the President to the former director of the Central Anti-corruption Bureau, the President's refusal to nominate ten judges of common courts and the withdrawal of delegations to judges of the Regional Court in Warsaw. The second category of actions taken so far includes legislative changes, both those already introduced and those prepared in official bills or other legal acts.

a) Granting of a pardon to the former director of the Central Anti-corruption Bureau.

Moving on to a more precise description of the actions concerning the first aforementioned category, the first one, chronologically, was the granting of a pardon by the President to the former director of the Central Anti-corruption Bureau, Mariusz Kamiński, and three of his employees. They were convicted by the District Court in Warsaw of abuse of powers and illegal operational actions, for which Mariusz Kamiński was sentenced to three years in prison and banned from taking any position in state administration for ten years.⁶⁰ However, in November 2015, before the appeals had been examined, the President granted a pardon to Mariusz Kamiński and three others who were invalidly sentenced in this case. The President's decision caused a significant amount of controversy; not only concerning its justification (or rather lack of it) but also legal permissibility of such action. Although no one has denied the President's right to grant pardons to convicted criminals, this was the first case in the post-war history of Poland of a pardon being granted to somebody when the judgment of the court of the first instance had not become final and valid, and so the criminal

⁶⁰ In fact, in 2007, when the L&J party ruled for the first time, the Central Anti-corruption Bureau, led by Mariusz Kamiński, carried out a sting operation against the leader of a coalition party, Samoobrona (in English: Self-defence), which was supposed to lead to a controlled bribery. In the justification for the verdict concerning this case the court stated that the Central Anti-corruption Bureau had incited corruption while there was no legal and factual basis to start such an anti-corruption operation (such action is described as “entrapment” according to ECtHR jurisdiction which classifies such evidence as inadmissible [for example see cases *Ramanauskas v. Lithuania* or *Bannikova v. Russia*]).

responsibility of the given person had not been definitely settled.⁶¹ What's more, this decision was passed without following the mode of proceedings described in the code of criminal procedure; moreover, neither the President nor the employees of his chancellery read the relevant files of the case, so the decision was quite arbitrary. What seems to be rather tricky is the fact that President commented on his decision in media as follows, "*I have decided, in a special way, to release the administration of justice from this case, in which one could always say that courts had political supervisors, and to end the problem once and for ever*". The problem is that it is much easier to suspect the President, being a nominee of the ruling party, of having political motivation for his acts than the courts, which are still independent. Also, one should add that just after Mariusz Kamiński was granted a pardon, without a final and valid verdict, he was appointed as the Minister co-ordinating the Secret Service. Appointing such a person for a position that is very closely connected with operational techniques, has caused objections concerning protection of human and civil rights.

We must add that the case is still not validly finished. On the basis of the President's decision the Regional Court in Warsaw (the 2-nd instance court) terminated the proceedings in the case in March 2016. However, on 31-st of May 2017, after examination of the cassation of the auxiliary prosecutors, Supreme Court stated that President's act of pardon was not legally effective due to the fact that Polish legal system does not provide for pardon in respect of the person who was not validly sentenced (in the meaning: definitely found guilty). At the moment the proceedings in the case before Supreme Court are suspended⁶².

b) Refusal of nomination of ten judges of common courts.

Another controversial decision of President Duda was a refusal to nominate ten judges of common courts introduced by the National Council of the Judiciary on 22 June 2016. According to common practice the President of the Polish Republic has had only an honorary right to hand judges' nominations to those who took part in competitive selection in given courts and, then, were appointed by the National Council of the Judiciary. The only similar situation in the post-war history of Poland took place in 2007, during the previous reign of L&J, when the President Lech Kaczyński refused to nominate nine judges. The President's right to refuse to nominate these judges causes serious legal doubts to arise, as it is not directly stated in the Constitution. One should note that the judges whom Lech Kaczyński refused to nominate in 2007 used all of the legal measures to change that decision; however,

⁶¹ One should point out now that a very general regulation, Article 139 of Constitution, does not settle when granting a pardon can be introduced; however, the only implementing rules of statutory rank are included in the code of criminal procedure, in Chapter XII, entitled "Procedure after the verdict is valid and final".

⁶² The proceedings are suspended on the basis of the decision of Supreme Court from 1-st of August 2017, on the motion of Minister of Justice – General Public Prosecutor Zbigniew Ziobro. Mr. Ziobro previously asked Constitutional Tribunal to resolve the alleged conflict of competences in terms of right to pardon between the President and the Supreme Court, and afterwards asked for suspension of the proceedings before the Supreme Court until the decision of Constitutional Tribunal. Not many people believe that the "new" Constitutional Tribunal is able to solve the conflict of competences in favor of the Supreme Court. Almost all legal experts consider that there is no real conflict of competences and the whole proceedings in this respect is based on problem artificially created to prevent Mr. Kamiński of being validly sentenced.

both the verdicts of the Constitutional Tribunal⁶³ and the Supreme Administrative Court were negative for them. One way or another, only those Polish Presidents who are supported by the “Law and Justice” party have usurped the right to reject a judge’s nominations so far. Coming back to President Andrzej Duda’s decision, one should note that it was entirely arbitrary, due to the fact that it had no justification whatsoever. This very type of decision led to media speculation from which one could learn that at least some of the judges who had not been nominated in June 2016 may have been involved in legal procedures where the verdicts were adverse for members of the L&J party. Real reasons for the President’s refusal to hand in a nomination to one of the candidates were disclosed by the document obtained by the journalists of TVN television programme in November 2016. And, indeed, they were quite gloomy. It turned out that Andrzej Piaseczny, one of the candidates, is an ex-public prosecutor who had led the investigation against a present deputy General Public Prosecutor-Bogdan Świączkowski and had made an application to set aside his prosecutor’s immunity. When the President’s Chancellery approached Ministry of Justice to make an opinion concerning Andrzej Piaseczny as a judge they received a negative opinion in writing explaining that *”Analysis of the material(...) proved that applications concerning setting aside prosecutor Bogdan Świączkowski’s immunity were groundless”*. The opinion which made the nomination impossible was signed by... Bogdan Świączkowski himself. As we can clearly see a personal revenge for people of “good change” may be a justified and sufficient reason for the refusal of judge nomination.

c) Withdrawal of delegations to judges of the District Court in Warsaw.

The potential motivation of revenge on judges who gave adverse verdicts for members of the ruling party is even more obvious concerning an individual decision of the Minister of Justice and the Public Prosecutor General, Zbigniew Ziobro. It followed a withdrawal of delegation to Justyna Kostka-Janusz - a judge of the District Court in Warsaw - to adjudicate in a court of higher instance (Warsaw Regional Court) in October 2016. This decision was quite astonishing as there was no slightest objection to the performance of work by this judge, there were no legal procedures instigated against her and her work was highly appraised by her superiors. What is more withdrawal of delegation caused necessity to start from the very beginning several serious criminal cases instigated by Justyna Koska-Janusz before the Regional Court. However, journalists established that some years ago she had conducted proceedings in which the Minister of Justice and the Public Prosecutor General Zbigniew Ziobro was one of the parties. He lost the case and was fined for an absence without a good cause, and, on top of that, the judge decided to charge him with costs. It is significant that the decision concerning the withdrawal of delegation was signed personally by Zbigniew Ziobro (not one of his deputies), which is rare in such cases. The Ministry of Justice commented on

⁶³ Three judges of the Constitutional Tribunal submitted a dissenting opinion at that time, emphasising the fact that having a complex, multistage procedure for selecting the judges would be pointless in case the selection could be cancelled with one arbitrary decision made by the President. Moreover, entrusting the President with this kind of authority would undermine the competences of another constitutional organ, i.e. the National Council of the Judiciary.

these press articles and gave an official statement on its website in which they claimed the delegation was withdrawn due to the fact the judge had “showed her extraordinary incompetence” in conducting proceedings in a simple case which made the headlines. It turned out later that the judge had had only a brief contact with the case; specifically, it involved a road accident and she had refused to deal with it via a speeded-up procedure due to the fact that she doubted the soundness of mind of the accused. It is worth mentioning that a later medical examination of the person who had caused the accident proved her limited soundness of mind, so claims about the judge’s incompetence are completely groundless.

In November 2016 judge Justyna Koska-Janusz filed a civil claim for protection of her personal rights breached by publication on a Ministry of Justice website. She demands for withdrawal a defamatory statement about her alleged “extraordinary incompetence” from the Ministry of Justice website, publication of official apologies in three newspapers and two web portals and payment of 10.000 zł for social objective. At the first term of the trial in May 2017 the counsel of Ministry of Justice made a request for disqualification of all judges of Regional Court in Warsaw from the case due to their alleged close relations with a plaintiff. Such kind of request is obviously groundless, however, it caused a 4 months long suspension of the proceedings due to the necessity of taking written statements from all judges of Regional Court in Warsaw. Application of such kind of procedural trick causing obstruction of the proceedings fits to barrator rather than to the Minister who presents himself as a great reformer of system of administration of justice who wants to fight against excessive length of the courts proceedings.

Another withdrawal of delegation to a judge of the District Court in Warsaw - to adjudicate in a court of higher instance (Warsaw Regional Court) happened in June 2017 and concerned judge Katarzyna Kruk. However, this time Ministry of Justice did not reveal any reasons of the withdrawal, it seems groundless again. There wasn’t any objection to the performance of work by this judge. Withdrawal of delegation caused necessity to restart 11 serious criminal cases instigated by Katarzyna Kruk before the Regional Court. What is more, in Warsaw Regional Court there are almost 100 vacancies at judges’ positions. It seems that the only reason for withdrawal was the activity of requested judge in judicial self-governmental bodies which fight for preserving independence of the judiciary. Katarzyna Kruk took part in Congress of Judges on 3-rd of September 2016⁶⁴. She was also elected, by her domestic district court, as a member of Forum of Cooperation of Judges⁶⁵. Once again the action of Ministry of Justice seems like a kind of politically motivated revenge

3. Legislative changes devoted to create “freezing effect” on judges of ordinary courts.

Moving on to the second category of actions taken so far by the government of L&J, concerning legislative changes, both those already introduced and prepared in official planned bills or other legal acts, one should point out that, while each of these legislative initiatives

⁶⁴ Mentioned in subchapter IV.8,

⁶⁵ Creation of Forum is described in subchapter V.4,

could seem quite natural in itself, the number of them in such a short time must cause anxiety. Moreover, one can observe a general tendency to increase influence on courts' activities together with clearly greater repressive nature of the said activities with regard to judges (in comparison to other categories of public servants), which is a worrying factor. No one questions the necessity for changes in the system of the administration of justice leading to greater efficiency, but it is hard to justify the under-mentioned changes.

a) Creation of the Department of Internal Affairs.

One of new solutions introduced by a new act concerning the Public Prosecutor's Office is the creation, at the level of the General Prosecutor's Office, of a Department of Internal Affairs, whose task is "*to conduct and supervise the preparatory proceedings in cases concerning intentional crimes committed by judges, public prosecutors or apprentice judges*" (so called in Polish: asesor). The staff of the Department of Internal Affairs is employed by the Minister of Justice and Public Prosecutor General. The fact that this new unit has been placed at on the very top of the prosecutor administration may suggest that corruption among judges and public prosecutors is a serious problem in Poland which needs purposive action. However, the statistics show that there is definitely no such need. It turns out that after more than six months of functioning, including the cases started before the Department of Internal Affairs was created, there were only 24 proceedings, 19 of which concerning public prosecutors and only 5 concerning judges⁶⁶. Taking into account that in Poland there are about 10,000 judges and more than 6,000 public prosecutors, the number of cases mentioned above should be treated as tiny and insignificant⁶⁷. Therefore, the fact that such a unit has been created cannot be treated as other than an attempt to depreciate or even to threaten judges and public prosecutors. This solution, according to the National Council of the Judiciary, violates Article 32 of the Constitution, which guarantees every citizen equal treatment.⁶⁸ That is why the National Council of the Judiciary has reported it to the Constitutional Tribunal.

b) Aggravated bribery – exclusively for judges and public prosecutors.

According to the new amendment of the criminal code taking of a material or personal profit by a judge, a lay judge or a public prosecutor in connection with on-going proceedings will be a crime (so the category of the most serious criminal offences in the Polish criminal code) for which the punishment can be a sentence of between three and fifteen years of

⁶⁶ Data form November 2016.

⁶⁷ One should point out that the creation of the Department of Internal Affairs is not the only example of a new structure of the Public Prosecutor's Office which has no proper justification given the factual structure of a crime. Equally unusual is the creation, at the level of Regional Public Prosecutor's Offices (i.e. a high level), of units whose main aim is dealing with matters involving medical mistakes, while those units are often also created at the level of Regional Public Prosecutor's Offices.

⁶⁸ This article states "Everybody is equal before the law. Everybody has the right to be treated equally by the state authorities."

imprisonment.⁶⁹ On the one hand, we should agree that a judge accepting a bribe is a serious offence, but, on the other hand, since 1989 such situations have been so rare that criminal actions in this respect give no justification for tightening the rules. At the moment there is only one serious pending case concerning bribery by a judge in respect of ex-President of Kraków Appeals Court. However, in mentioned case taking a bribe was connected with administrative activity of ex-President, not the judicial one. It is significant that a GRECO report states that Poland is a post-communist country which has no problem with corruption in the administration of justice. In addition to that, it is difficult to find any justification for clear “distinction” of judges, public prosecutors and lay judges as compared to other categories of public servants (for example MPs) who can, potentially, also be given a bribe.

c) Publication of assets declarations of judges.

On 5 September 2016, the government accepted a draft of an act requiring that judges’ statements concerning their property would be publicly available and making an intentionally untruthful statement would be treated as a criminal offence. This new law entered into force in January 2017. Before judges made statements about their property; however, those were sent to the appropriate tax office – not to the public knowledge – and if a statement contained untrue facts, only disciplinary action was taken. Critics of the draft assert, quite correctly, that publication of judges’ statements concerning their private properties may be a threat to their safety, especially in relation to judges who deal with organised crime. The same Act introduced a general increase in the disciplinary responsibility of judges, by lengthening the period during which a disciplinary procedure may be started, from three to five years. It also introduced a disciplinary penalty, which previously had not existed, which results in a decrease in a judge’s earnings of between 5 percent and 15 percent for a period of between 6 months to 2 years.

4. The law on apprentice judges.

The Ministry of Justice has also introduced a new law changing the regulation concerning the choice of apprentice judges (in Polish: asesor). They would be chosen by the Minister of Justice for a 5 years long apprenticeship. Such a solution has on one occasion already been claimed as unconstitutional by the Tribunal, as European Court of Human Rights in Strasburg stated that such a way of choosing and appointing an assistant judge is not in accordance with “independence of the court of law”⁷⁰. One must point out that the Minister of Justice may, at present, appoint and withdraw the Manager of National School of Judiciary and Prosecution and may decide about its tutors. At the same time L&J parliamentary

⁶⁹ Following the ordinary type, this crime results in a sentence of between six months to eight years of deprivation of liberty.

⁷⁰ See the case of Miroslaw Garlicki v. Poland on the website of ECtHR, appl. No 3692/07, judgment of 14/06/2011 (<http://hudoc.echr.coe.int/eng?!=001-121945>)

majority introduced changes which allow Minister of Justice to employ and dismiss presidents of courts without any problems⁷¹.

5. Subordination of directors of courts to the Minister of Justice.

Another legislative change which has increased the impact of the Minister of Justice on the work of courts involves their directors, who take responsibility for the courts' finances. So far directors were supervised by the courts' presidents and were chosen in special competitions. According to a new act which entered into force at the end of April 2017 they are directly supervised by the Minister of Justice and are appointed without any competition procedure. This act does not present any grounds for removing director, such an arbitral decision could be made by Minister of Justice. This way he obtained decisive and uncontrolled influence on courts' finances and is able to paralyse the work of any court that has been deemed to not work in his way.

6. Silencing court spokesmen.

Another characteristic legislative change made recently was a change to the Regulations on Courts' Working Activities that has increased the strictly judicial workload of the court spokesmen. A large number of spokesmen certainly stated that the triple division of authority and the independence of judges must be unchanged. The change mentioned above has led to many spokesmen, especially in big courts, where their workload is enormous, being unable to fulfil their duties properly, so the courts are becoming "silent". In addition to that, another change has been made recently to the code of penal procedure (specifically Article 360 § 2) according to which during judicial proceedings it is the Public Prosecutor who *de facto* has a full control over making decisions concerning the openness of trials, even though a given court is the formal host. Many people think of this as a sign that the Public Prosecutor's Office would like to conduct 'show trials' and in such cases control over the openness of a trial is essential.

It is worth mentioning that public opinion has been amazed lately by the news that High School of Social Communication from Toruń, whose director is Rev. Tadeusz Rydzyk, has won the tender for the media training of judges and court spokespeople, although there were many other subjects applying. This school, without estimating its teaching standards, represents - as it is commonly said - unequivocal system of worldview and religious values which may, unfortunately, be reflected in the social opinion of the judges trained there.

7. Taking control of appointments of presidents of courts.

The last efficient legislative initiative aiming at subordinating judiciary to executive power is the Law on Ordinary Courts which was prepared by the group of 50 Members of Parliament of L&J and subsequently published on the website of Polish Parliament on 12 of

⁷¹ Described in details in part IV.7 and VII.5 of this report.

April 2017⁷² to introduce, among other amendments, the new rules of appointment of Presidents of the all level of ordinary courts strengthening the position of Minister of Justice – General Public Prosecutor in this respect. So far the Minister of Justice has been responsible for appointment of Presidents of regional and appeals courts, but it has been obligatory for him to ask general assembly of judges of the proper court for the opinion on the candidate. In case of negative opinion of general assembly Minister of Justice has not been able to push his candidate for without the positive opinion of National Council of the Judiciary. Differently, the Presidents of the district courts (the lowest level of Polish courts) have been appointed by the Presidents of appeals courts after examination of the opinion of both the general assembly of judges of proper district court and the President of the superior regional court. According to the draft law the Minister of Justice is going to be responsible for the appointment of the Presidents of all levels of ordinary courts and he wouldn't have to ask for opinion neither of proper general assembly of judges nor National Council of the Judiciary. In this way any form of influence of judicial self-governmental bodies on the process of appointment of Presidents of ordinary courts would be eliminated. Additionally the draft law extends the grounds for revoking Presidents of courts by Minister of Justice by adding the blurred and uncertain ground of “persistent not fulfilling of professional duties and obligations”. Last but not least the intertemporal regulation included in the draft law empowers the Minister of Justice to revoke Presidents of the ordinary courts of all levels appointed on the basis of previous regulation, within 6 months from entering into force of the new regulation, entirely on the basis of his discretionary power (the Minister doesn't have to point out any reasons of such a decision). It is more than obvious that the main reason of this changes it is not only “to strengthen the administrative control of the Minister of Justice over the courts” (like it is stipulated in the written motives of the draft law) but also – or even mainly – to reduce the independence of the judiciary from the executive power by appointment of subordinated Presidents of courts.

8. Reaction of the judiciary and other legal professions to the growing pressure.

All of the above-mentioned legislative actions of the current Parliament, together with the factual actions of the executive authorities, not to mention the increasing crisis concerning the Constitutional Tribunal, have led to a great and still growing concern and anxiety among judges and other groups of legal professionals. They fear that their status, which enables them to carry out their duties concerning the administration of justice with independence, is endangered to a great extent.

That is why, under the supervision of the National Council of the Judiciary and together with societies of judges, there was an Extraordinary Congress of Polish Judges in Warsaw as early as on 3 September 2016 which was attended by about 1000 judges of the 10 000 judges working in common courts.⁷³ After long discussions the congress passed three resolutions which contained, among others, requests to transfer the administrative supervision

⁷² Consequences of entering into force Law on Ordinary Courts are described in subchapter VII.5 of the report,

⁷³ The number of judges who were interested in taking part in the congress was much bigger, but limited accommodation possibilities made it impossible to organise a congress with more participants.

over courts to the First President of the Supreme Court (at present they are supervised by Minister of Justice), to introduce a rule of creating and dissolving the courts only by legal statute, to limit the influence of political factors on the choice of judges, to increase the rights of judges' self-government bodies and to respect the right to protect the rights previously acquired by judges. In another resolution the Congress appealed to the executive authority to respect and publish the verdicts of the Constitutional Tribunal and objected to the arbitrary decision of the President not only refuse to appoint the judges who had been selected by the National Council of the Judiciary and also refuse to swear in the judges who had been legally chosen to be members of Constitutional Tribunal. After the resolutions of the Congress were published, several dozen assemblies of judges from Regional Courts and Courts of Appeal also passed resolutions in which they gave their full support to the position taken by the Congress. However, at the same time, some of mass media connected with the present parliamentary majority started attacking judges' circles. The politicians from the ruling party have been using 'war rhetoric' such as "We won't move even one step back" (Joachim Brudziński, the Deputy Speaker of the Parliament) and "We are in a state of war with juridical elites" (Patrik Jaki, the Deputy Minister of Justice). All those activities of politicians have provoked mass attacks on judges on the Internet and by some mass media. This situation has led a non-governmental institution, the Institute of Law and Society (INPRIS), agreeing together with Amnesty International to monitor and record cases of hatred against Polish judges.

It is worth mentioning that in Kraków on 26 November 2016 took place XII National Congress of Advocacy during which the following resolution was adopted: (...) *Limiting the independence of the judiciary, the independence of judges, including the Constitutional Tribunal judges, undermines the principles of modern democracy. The Constitution does not give any legislative or executive authority the right to intervene in the issue and publication of the Constitutional Tribunal decisions, nor to assess the correctness of selection of Constitutional Tribunal judges (...) Any legislative changes require consultation and active participation of representatives of society and to respect the principles separation and balance of power. (...) From the constitutional norms the principles emerge, thanks to which individuals are protected against the "democratic dictatorship" of majority. The boundaries of constitutional democracy are determined by law which is autonomous and have equal value. Any violation of these boundaries, regardless of their legitimacy, should be treated as an attack on basic constitutional values. Their protection in all cases and at all times is our primary duty, from which no one – neither the institution of Advocacy nor the lawyers – can be released.*

V. The National Council of the Judiciary.

1. Introduction.

The National Council of the Judiciary established in 1990 is a collective body created in accordance with the Constitution which has an essential significance with regard to

protecting the independence of judges and courts in Poland. It consists of 15 judges elected by the judges' self-government bodies from among the judges, 4 Parliament and 2 Senate members chosen by the Parliament and the Senate, the President of the Supreme Court, the President of the Supreme Administrative Court, the Minister of Justice and a representative of the President. So the total number of members is 25. The Council has rights guaranteed by the Constitution, which include, among others, the right to choose candidates for judges and present them to the President for approval, the right to set out the rules of professional ethics for judges and the right to express its opinion with regard to legal acts concerning judiciary. The council also prepares opinions about the candidates for the positions of presidents of the courts and their deputies, and elects disciplinary spokesman for judges. In addition to that, the Council has the right to ask the Constitutional Tribunal to investigate whether acts concerning the independence of judges and courts are in accordance with the Constitution. We can say that present structure and scope of competences of Polish National Council of Judiciary is in accordance with European requirements and standards. Taking into consideration the Council's rights mentioned above and its function, all changes concerning its rights or the status of its members might easily change the balance between different forms of power. Therefore, one must become more and more concerned about the type of changes prepared for the introduction by the Parliament.

2. Draft of a new law.

On 26 January 2017 a project of the change of law concerning the National Council of Judiciary was sent to this very Council to form the opinion. This project changes the matter of Polish state in a fundamental way and against the Constitution at the same time. It is significant that vice-minister-Marcin Warchoł, made a deadline for the Council's opinion on 31 January 2017. It meant that the Council had only four days to form the opinion in such an important matter, including Saturday and Sunday. The Council is a collective agency including also judges otherwise engaged in cases in their own courts of law. Minister is well aware of that and he knows the schedule of monthly Council's meetings. Therefore, it clearly means that Ministry only wanted to fulfil a formal obligation of sending a request for opinion, without giving a real opportunity to form the opinion in such a fundamental matter. On 7-th of April 2017 the first reading of this draft law took place in the Parliament. L&J majority in the Parliament effectively objected both motion of the opposition parties to reject the draft law and the concurring draft law prepared by association of judges "Justitia".

The announced project stipulates that also judges-members of the Council should be elected by Parliament ordinary majority which, in turn, will make the Council a political body and deprive the organs of judicial self-government of the impact upon the process of choosing candidates for judge positions. The candidates are to be presented by Parliament's presiding board or 50 parliament members, however the final decision concerning which judges to present would be made by Parliament Speaker. It must be pointed out that Council members, described by art.187 part 1 point 2 of Polish Constitution, perform their duties as Council members and judges doing their everyday jobs in courts of law. According to the project they would have to get the support of Parliament members, namely politicians, which will undermine the confidence of citizens in the independence of judiciary system. Once the

changes are introduced politicians will start to trample paths down to judges, or, even worse, judges to politicians. Apart from that, this suggestion is not in accordance with the recommendations of European Network of Councils for the Judiciary (ENCJ). These recommendations clearly state that Council judges should be elected by judges. What is more, they should constitute a majority in the Council.

A draft act changes the principles for choosing judges who are to become members of the Council, which is connected with the termination of the mandates of the present members⁷⁴. This change affects only members who are judges, not any other members of the National Council of the Judiciary. The opinion of the National Council of the Judiciary is that all of the above-mentioned changes conflict with the Constitution. In particular, the termination of the mandates of present members violates Article 187 part 3 of the Constitution, which states that the term of those chosen as members of the Council lasts for four years. Termination of the term of present Council members is also a very dangerous precedent. The reason for that is the fact that every next government will be able to quote this solution and claim that they can change easily what is guaranteed by Constitution as a 4-year term. Therefore, every time the government do not like the Council members, they could change them in this way. This also means that the “institutional memory” of the Council will be passed on only by politicians.

What is more, the project includes changes concerning the structure of the Council transforming it into two “Assemblies” (“Chambers”). The First Assembly of National Council of Judiciary would consist of ten members (the First President of Supreme Court, President of Primal Administrative Court, Ministry of Justice, Polish President’s representative, four MPs and two senators), and the Second Assembly of National Council of Judiciary would consist of 15 members chosen from the judges of Supreme Court, common courts of law, administrative courts and military courts. The project states that in order to pass the law by the Council these two assemblies would have to vote for it in separate sittings. The mentioned above project violates in an obvious and drastic way art.187 part 1 of Polish Constitution. According to it members of the Council will not have equal position, while, the Constitution describes National Council of the Judiciary as a homogenous organ with clearly defined membership and does not differentiate the status of its members. This suggestion may be treated as an attempt to circumvent the regulations which guarantee the equality of votes for Council members. It states that the vote of the ten members The First Assembly of National Council of Judiciary will have more power than the vote of each member of the Second Assembly of National Council of the Judiciary which violates the right of material equality between members of National Council of Judiciary. However, what is met with the greatest objection is the fact that minister’s proposal means that in order to pass any law the Council will have to have the support of the First Assembly of National Council of the Judiciary in which the politicians will always have the clear majority (designated by Minister of Justice, President, four MPs and two senators). Such an inner structure of the Council will make it unable to perform its basic duties, namely, to safeguard and protect the independence of

⁷⁴ Initially the project stated that term of office of all ordinary court judges – members of the Council will be terminated within three months after the new regulation is binding, but in the new version shortened this period to one month.

courts of law and judges. At the same time this situation may lead to a case when the performance of two assemblies could block the Council's activities if, for example, the judges elected by politicians want to be too independent.

In case of entering into force of the changes mentioned above the Poland would have the most politicized Council of the Judiciary in entire Europe. 23 out of 25 members would be either politicians or judges chosen by Parliament by ordinary majority of votes (in the present Polish Parliament governing party L&J has ordinary majority of votes). Even being extremely optimistic about independence of 15 judges chosen by the Parliament the requirement of unanimity of both chambers of the Council for undertaking any kind of resolution would enable effective blocking of any decisions by the "political" part of the Council. In this way the executive and the legislative (representing the same single political party) would take very serious control over processes of appointment, nomination of judges, their promotion, and even the possibility to influence the disciplinary proceedings concerning judges. This solution would break both Polish Constitution and the rules elaborated by European bodies, like CCJE or ENCJ. What is exceptional even the Legislative Office of Parliament issued written opinion expressing fierce criticism towards the draft law stating that it is a clear breach of the Constitution. If we take into consideration all factors mentioned above we would easily understand that judicial independence in Poland is under the very serious threat at the moment.

3. Legal action against the National Council of the Judiciary before the Constitutional Tribunal.

Another part of a struggle between L&J and the National Council of the Judiciary is the request submitted on 12 April 2017 by the General Prosecutor Zbigniew Ziobro to examine the constitutionality of the Act on National Council of Judiciary from 2011 (enacted before L&J came into power) in its part concerning the selection of the judges – members of the Council and their terms of office. In the opinion of the applicant the doubts rise the procedure of selection the judges which favours judges from superior courts in this way breaching the rule of equality. Additionally, Mr. Ziobro claimed that system of indirect election of judges-members of the Council is not proper, the same as the fact that terms of offices of all judges-members of the council don't expire at the same time (they have always 4-years long tenure), in contrast to the Members of the Parliament whose terms of offices always expire at the end of the mandate of Parliament. This application, is groundless for two main reasons. Firstly, quite recently, on 7-th of April 2017, L&J parliamentary majority rejected in its entirety draft of law prepared by judges association "Justitia" which assumed introduction of direct election of judges-members of the council and reinforced rule of equality within the election process⁷⁵. This draft of law was rejected by the Parliament in spite

⁷⁵ According to this legislative proposal the Council of the Judiciary would consist of 16 judges-members elected by their peers which are: 1 judge of the Supreme Court, 1 judge of the Administrative Supreme Court, 1 judge of the Regional Administrative Court, 1 judge of the Martial Court, 2 judges of the Appeals Courts, 2 judges of the Regional Courts, and 8 judges of District Courts. In this way judges of district courts, which is the lower level of courts in Poland would constitute 50% of the judges-members of the council elected by their peers.

of the fact that it fulfilled main requirements of the General Prosecutor's request. Secondly, there is nothing strange or unconstitutional in the fact that terms of offices of the members of the collective body don't expire simultaneously; it is even preferable to sustain institutional memory of such a body. In this situation, it is obvious that the request was based on artificially created problems to achieve a specific political objective by ruling party which is to terminate the mandate of the 15 present judges-members of the Council.

This case was already adjudicated by the "reformed" Tribunal. However, the manner of the proceedings before the Tribunal was peculiar, to say the least. Perhaps the President of the Tribunal not coincidentally appointed herself, Mariusz Muszyński, Lech Morawski, Grzegorz Jędrejek and Michał Warciński to head this case, who are exclusively the judges elected by the current Parliament⁷⁶. Another peculiarity of the proceedings in this case was that, before rendering a verdict the Tribunal asked the Parliament for the opinion on the Act in question, but did not ask the National Council of the Judiciary, which was a sign of a clearly biased approach. What is even more surprising the decision in such a fundamental case was rendered without a public trial, but after the in camera hearing. Only the pronouncement of the judgement was public, however more in theory than in practice if we take under the consideration that it took place in the small room of the Tribunal, and the media were forbidden from their own live transmissions. There was only one, official on-line transmission of a very poor quality instead. The journalists present in a courtroom were ordered to switch off cellular phones. Exceptionally, there was no press conference after the pronouncement. The judgement in this case was rendered on 20 of June and the "new" Tribunal found that the Act on National Council of Judiciary is unconstitutional, as breaching the judges' independence and equal status of judges by favoring judges of high rank courts over judges of basic level of courts as candidates to the National Council of the Judiciary. The Tribunal also stated that the judges-members of the National Council of the Judiciary do not have individual, always 4-years long terms of office, but their tenures expire at the same time as tenures of the deputies-members of the Council. The last mentioned statement, completely contrary with numerous opinions of legal experts, obviously supports the Governmental idea of termination the terms of offices of the present members of the Council (as described in part. V.2 of the report).

4. Reaction of the judiciary.

On 20 March 2017 the general meeting of the judges – representatives of general assemblies of regional and appeals courts took place in Warsaw. The general meeting adopted some resolutions, among others the resolution creating the common forum of judges of courts of all levels which is going to replace National Council of the Judiciary with regard to protecting the independence of judges and courts in Poland. The common perception of reality among the judges is that the future National Council of the Judiciary, totally dependent

⁷⁶ According to the art. 38 of the Act on Organization and the Procedure before Constitutional Tribunal (Official Journal of Laws /"Dziennik Ustaw"/ of 2016, position no. 2072) the members of the bench, the presiding judge and the judge-rapporteur shall be appointed according to alphabetical order of judges. This shows that the composition of the formation of the court in this case was determined not in the accordance with the rules, one can suppose that it was done due to the political reasons.

on the legislative and executive power, would not have any mandate to fulfil its duties properly and have to be replaced by independent body. On 20 April 2017 assemblies of judges of district, regional and appeals courts have elected their representatives – members of the newly created forum (1 from each district court, 2 from each regional court and 3 from every appeals court) and spokesmen. As a result, on 10-th of June 2017 in Warsaw about 200 representatives of judges from entire country constituted Forum of Cooperation of Judges (in Polish: Forum Współpracy Sędziów) – an informal organization which is going to replace the National Council of the Judiciary in terms of protecting judicial independence. During the meeting on 10th of July judges elected the Presidium of Forum of Cooperation of Judges (15 judges) and also the Intervention Group (11 judges). The aim of the Intervention Group is collecting, monitoring and publicizing information about violations of independence of judiciary and independence of particular judges.

VI. The Supreme Court.

1. Legislative plans concerning Supreme Court.

The role of the National Council of the Judiciary is even more essential, as it also appoints the persons who fill vacant positions in the Supreme Court, which, in turn, controls and supervises, for example, annual financial reports of political parties as well as the validity of general and presidential elections as well as European Parliament elections. In an interview for the Onet.pl internet site Jarosław Kaczyński stated that, *“After the flattening of the structure [of the courts – authors’ comment] the function of Supreme Court will have changed. It will have become a second appeal instance for some cases. Therefore it will have to include more members because as it is now it will not be able to deal with so many new matters.”* The Courts of Appeal, which are now the second instance for more serious matters, deal with more than 100 000 cases a year, which means that after introducing the suggested “flattening of the legal structure” the Supreme Court may receive ten times more cases than it currently does. Such a solution will either paralyse the work of the Supreme Court or result in the necessity to increase its personnel, so the present judges will become a meaningless minority. The possibility of “taking control” of the Supreme Court quickly becomes more and more probable due to the fact that the leader of the L&J party, speaking at a press conference in mid-September this year, said, *“The Supreme Court played a very negative role during the years 1990 to 2016, the role of a defender of the old order, and it is responsible for the decisions that one cannot punish criminals in judges’ togas, one cannot sue them, and many of them should deserve the strictest punishment. Today we do not have capital punishment, however they surely deserve a life sentence as they are common murderers.”* It is worth mentioning that Jarosław Kaczyński did not present any example which could justify his statement, not to mention the more shocking fact that the Supreme Court is probably the most verified public institution in Poland. This is proven by the fact that the Supreme Court includes only one judge who had been adjudicating in that court before 1990 and who was positively verified after the regime change.

2. Personal attack on the First President of the Supreme Court.

Not long time ago, more precisely just after taking control of Constitutional Tribunal the First President of the Supreme Court Mrs. Małgorzata Gersdorf became one of the main enemies of the “good change”. She gained this position after some public statements concerning her deep concern about the current state of preserving the rule of law in Poland ⁷⁷. Traditionally the attack started from defamatory statements in public media, subordinated to L&J party. Afterwards the legal action against Mrs. Gersdorf was instigated by group of fifty Law and Justice Members of Parliament. On 1-st of March 2017 they submitted a request to Constitutional Tribunal to examine the legality of her election on the post of First President of the Supreme Court in April 2014 (before Law and Justice came into power). In the opinion of the applicants the doubts rise the procedure of selection of the First President of the Supreme Court which is based not on the Act of Parliament, but on the internal act of the Supreme Court, namely on the Regulations adopted by General Assembly of the Supreme Court Judges. This application, is obviously groundless due to the fact that the Act on Supreme Court from 2002 in its art. 3 introduces legal delegation for the General Assembly of the Supreme Court Judges to enact a Regulation on “rules of internal organization and the course of conduct before the Supreme Court”. There is nothing unconstitutional with such kind of delegation of competence included in the Act of Parliament. In this case, it seems obvious that the request was based on artificially created problem to achieve a specific political objective by ruling party which is to terminate the mandate of the term of office of current First President of Supreme Court, who doesn't accept breaching the rule of law by the governing party.

3. Leak of information about the draft law on the Supreme Court.

According to the reliable article in the renowned newspaper from 19 April 2017 ⁷⁸ the Ministry of Justice In spring 2017 have prepared a new draft law on Supreme Court. The main changes provided by this draft included:

- termination of terms of offices of: the First President, Presidents of Chambers and Presiding Judges of the Divisions of Supreme Court and their deputies,
- termination of validity of all delegations to Supreme Court granted to judges of lower courts and granting Minister of Justice the competence to appoint judges for the future delegations,
- lowering of the retirement age for judges of Supreme Court to 60 years for women and 65 years for men (currently it is 70 years regardless of gender),
- creating a new Disciplinary Chamber in the Supreme Court dealing - as a first instance court - with cases in respect of judges and public prosecutors who committed intentional offences; members of this Chamber are going to be selected by the “reformed” (which means subordinated to politicians – see Chapter V.2) National Council of the Judiciary.

⁷⁷ Among others, during the congress of the delegates of the regional and appellate courts on 30 of January 2017 she stated: “ At this moment we judges are obliged to fight for every inch of justice. There is no fight without casualties”

⁷⁸ „Rzeczpospolita” from 19 April 2017, page C1

Changes mentioned above, if they enter into force, altogether with the aforementioned “reform” of National Council of the Judiciary would, to a large extent, effectively subordinate Supreme Court to the executive power (represented by Minister of Justice), which would take control over appointment of superior judges. Reduction of retirement age would enable “refreshment” of the staff by replacing “old” judges (it would concern about 40 % of judges) by the youngsters and presumably more submissive. In fact this would mean destruction of the independence of the next - after the Constitutional Tribunal and National Council of the Judiciary - basic organ of the broadly understood legal protection in Poland which would again undermine the rule of law. Neither the authenticity of draft law described in the newspaper was confirmed by the Ministry of Justice, nor another official draft law on Supreme Court was revealed at that time, or later, until 12 of July. One can suppose it was a controlled leak of information designed to check the reaction of the audience and the judiciary on the draft law.

VII. Attempt of alleged “great reform” of Polish judiciary from July 2017.

1. Acceleration of legislative works.

As it was mentioned before legislative works on the draft law on National Council of the Judiciary were instigated in January 2017⁷⁹. In April 2017 the draft Law on Ordinary Courts was published on the website of Polish Parliament⁸⁰. Just to recall basic facts: the first draft law if enacted would politicize the constitutional body (NCJ) that selects judges and is responsible for judges’ promotion, the second draft law would enable the Minister of Justice to dismiss in strictly arbitrary manner the presidents of ordinary courts and to replace them by politically dependent nominees. Afterwards the further legislative works on the mentioned draft laws were continued, however, they were substantially slowed down.

In the meantime, in state owned media (especially TV channels TVP 1 and TVP Info) the negative campaign in respect of judges and judiciary was continued. Again and again there were presented cases of the same disciplinary proceedings against a few judges. On the basis of one single case Polish judges were described as corrupted. The whole system of courts was presented as cumbersome. If we compare the statistical data on Polish system of administration of justice to the data of other EU counties’ systems we can assess effectiveness of Polish courts as the average. Nevertheless, if we take under the consideration, on the one hand the very wide scope of cognition of Polish courts (judges resolve 15 mln of cases of all categories a year) which causes a massive workload, and on the other hand rather modest governmental expenditures on law courts, the effectiveness of Polish judiciary is not on a bed side⁸¹. The government repeatedly highlighted the idea of a great reform of the system of administration of justice calling it vital in the fight against corruption and necessary to help

⁷⁹ See subchapter V.2.

⁸⁰ See subchapter IV.7,

⁸¹ See the 2017 EU Justice Scoreboard [ec.europa.eu],

the judicial system to become more efficient. The problem is that both of the draft laws include literally no solution designed to speed up the proceedings. They are designed exclusively to take political control over the judiciary.

What is characteristic, in summer 2017 the Minister of Justice has suspended new appointments of judges. It is estimated that there were 600 vacancies (out of total number of 10.000 judges) which caused the decrease of efficiency judiciary. It seems that the L&J plan is simple: first take over the National Council of the Judiciary and then appoint new politically palpable judges.

In June 2017 it was commented in independent media that further action in respect of judiciary was hampered by expected visit of President Donald Trump in Poland (designed for 6-th of July). The L&J wanted to avoid drafting attention of international journalists to the problem of suppression of independence of judiciary in Poland.

On 12-th of July 2017, less than a week after the Trump's visit the parliamentary L&J majority, in spite of the fierce criticism from the opposition, the faculties of law of Polish universities, academics and non-governmental organizations adopted the draft law on National Council of the Judiciary and the draft Law on Ordinary Courts. One must remember that the Speaker of the Parliament (Sejm) who is a L&J nominee introduced voting on both acts into the agenda of the session on the same day in the morning to prevent opposition from any kind of efficient counteraction.

2. Deus ex machina – the draft Law on the Supreme Court.

On 12 July 2017, just before midnight, the group of MPs directed to the Parliament the draft law amending the Act on the Supreme Court. It was presented without any previous notice, even the National Council of the Judiciary wasn't informed. The complexity of the draft, as well as immediate comments on its content made by the representatives of the Ministry of Justice, suggest that it was prepared under the auspices of the Government and presented by MPs to evade an obligation to perform a public consultation. Such practice has been a typical for two recent years in respect of almost all important and controversial drafts. The Parliament dominated by governing party MPs is working in a rush, ignoring opinions of NGOs, faculties of law of universities, academics, representatives of courts, judges and other legal professions. The draft introduces very serious changes in a way of functioning of the Supreme Court. In fact this changes are revolutionary and unconstitutional, if introduced they would subordinate the Supreme Court to the governing party obviously breaching (or maybe rather "breaking") the system of checks and balances. If we take under the consideration the fact that Polish Supreme Court is not only the highest instance for all civil and criminal cases, but is also charged with ruling on validity of elections as well as approving the annual financial reports of political parties and adjudicating as the 2-nd instance court upon disciplinary proceedings against judges, it becomes clear how dangerous for preserving the rule of law in Poland would be subordination of this institution to a single political party, even if it is called "Law and Justice".

The most controversial provision of the draft law states that all tenures of judges sitting currently in the Supreme Court will be terminated on a day following the day of the Act's coming into force. In the light of this provision, the Minister of Justice will decide

which judges will remain in the office for the transitional period⁸² and whose term of office will be terminated⁸³. This provision is clearly contrary to art. 180 of the Polish Constitution which guarantees irremovability of judges. After the transitional period the new judges of the Supreme Court will be selected by the National Council of the Judiciary. One must remember that on 12 of July the Parliament adopted changes in the Act on the National Council of the Judiciary which enable the Parliament to appoint the judges-members of the Council. Furthermore, in the light of these changes the appointment of a new judge will not be possible without the consent of the “political” chamber of the Council (including representatives of government, Parliament and President).

Furthermore, the draft Law states that the term of office of the First President of the Supreme Court expires when he/she turn 65. Judge Małgorzata Gersdorf, the current First President of the Supreme Court, will turn 65 in November this year. According to the art. 183 of the Polish Constitution the term of office of the First President of the Supreme Court lasts 6 years and cannot be shortened by ordinary law. The tenure of current First President expires in 2020.

Another controversial novelty of the draft Act is creation of the Disciplinary Chamber of the Supreme Court and the post of the President of this Chamber. However the idea of the new Chamber may look innocent some of its features show that it could be used as a tool of pressure on judges and representatives of other legal professions. According to the draft from organizational point of view the Chamber has a position of a separate court inside the Supreme Court and the President of the Disciplinary Chamber is not supervised by the First President of the Supreme Court (in fact their positions are equal). What draws attention is the strong position of Minister of Justice – General Public Prosecutor within the disciplinary proceedings in respect of judges. On the one hand he can invoke his disciplinary prosecutor to pursue the case in respect of a specific judge. On the other hand, the Minister can raise objection against the decision on the refusal of instigating disciplinary proceedings (due to the lack of factual grounds) and such objection is binding the Chamber. Both prerogatives breach the rule of separation of powers. The most “sophisticated” solution of the draft Law concerning the Disciplinary Chamber is awarding 40 % of extra salary to judges of this Chamber. Doesn't it look like a kind of bribe for those who would eagerly follow ministerial instructions?

Last but not least in the light of the draft Law on the Supreme Court, the Minister of Justice prepares the Statute of the Supreme Court which will regulate its works. Currently the Statute is created as an internal regulation of the Supreme Court.

⁸² According to the draft the transitional period would end when the “reformed” (in this case it means “politically dependant” as chosen by Parliament) National Council of the Judiciary choses the new judges of Supreme Court. What is peculiar the draft Law doesn't specify the maximal length of the transitional period,

⁸³ Helsinki Foundation for Human Rights statement from 13-th of July 2017: „*The termination of tenures of all the Court's judges and granting the Minister of Justice a competence to single-handedly decide which judges will remain in the office in this most important Polish court is tantamount to the revocation of the Supreme Court's independence. Such a solution is applied only by the governments of authoritarian states*” [http://www.hfhr.pl/wp-content/uploads/2017/07/joint_statement_july2017.pdf]

The draft Law on the Supreme Court has been directed to the first reading in the Parliament's plenary session which took place on 18-th of July. The second reading, after a great fuss in the Sejm, has started on the same day and was continued on 19th July 2017. During the third reading which took part on 20 of July the Parliament adopted the entire Act with 30 mainly technical amendments. Two of them, forced by a President, were of more serious nature and they transferred some competences from Minister of Justice to the President. According to the first one the President became responsible for preparing the Statute of the Supreme Court which would regulate its works. According to the second amendment the Minister of Justice was still responsible for appointing candidates from among judges of Supreme Court whose tenures wouldn't be terminated in the moment of entering the new law into force, but the President would have the right to reject them. Another amendment introduced during the same session and also forced by President Duda didn't concern the Act on the Supreme Court, but the Act on the National Council of the Judiciary. The amendment introduced 3/5 parliamentary majority in the presence of at least 50% of deputies in the process of election of judicial members of the Council, instead of original simple majority.

During the session of Parliamentary Commission of Justice and Human Rights which took part at night between 19 and 20 July the Rules of Procedure of the Sejm were repeatedly breached by parliamentary majority and the Speaker, both representing L&J. Among others all amendments reported by the opposition were rejected in one collective voting instead of separate ballots over particular amendments, there wasn't any debate on the opposition proposals and the amendment of Act on Council of Judiciary was voted in spite of the fact that it wasn't included in the agenda.

3. Domestic and international protests.

Parliamentary debates over the laws on Council of Judiciary, Ordinary Courts and Supreme Court triggered one of the biggest waves of public protests since the L&J came to power in late 2015. The demonstrations started on 12 of July and were continued until 25 of July substantially growing into force. Hundreds of thousands of Poles were gathering in front of local courts carrying candles and creating the chains of light around the buildings of the courts. People protested against a new law that subordinates judiciary to the governing party and allows Minister of Justice to appoint Supreme Court judges, defying a European Union warning that the move undermines democracy and the rule of law. The demonstrators raised such slogans as "free courts", "democracy", "constitution", "free Poland, European" and many others. In protests which took part after 19th of July people demanded from President Duda to veto all three new bills on judiciary. Tens of thousands demonstrated in big Polish cities like Warszawa, Kraków, Szczecin, Wrocław, Poznań, Gdańsk, Białystok, Kielce. What was rather exceptional the protests took place also in many small cities and big part of protesters were young people (20-25 years old) who had prevented themselves from any kind of public activities before. Every day more and more cities joined the protests. In total about 250 towns took part in the demonstrations.

Probably the biggest protests took part on 20th of July. That day, in front of the Parliament building and the Presidential Palace and in front of the Supreme Court, thousands of people gathered to protest against changes in the judiciary. Demonstrators demanded that

President Andrzej Duda veto the bills on the Supreme Court, the National Council of the Judiciary and on Ordinary Courts. Warsaw City Hall estimated the crowd at more than 50,000, while police put it at 14,000. Police stopped 270 people, asking them for their ID, fined 52 people and detained one.

On 21-st of July in an interview for TVP1, the Interior Minister Mariusz Błaszczak, commented about the previous day protests. He said that the demonstration in front of Presidential Palace was *“like a picnic”*. He admitted the demonstration was bigger than on previous Sunday, but *“let us bear in mind that this is summertime, the middle of the holiday season, with many strollers and casual passers-by taking advantage of beautiful warm weather”*. His deputy, Jarosław Zieliński showed less humanitarian approach by addressing the demonstrators on Twitter as *“communists, agents of SB (the Security Service from the Communism times), traitors”* and added *“down with the scoundrels”*. Polish prime minister Beata Szydło publicly suggested the demonstrations were financed from abroad.

The situation that constituted so serious threat to the independence of Polish judiciary also drew attention of many international authorities. The US State Department cautioned the L&J against adopting the measures that appeared to *“undermine judicial independence and weaken the rule of law in Poland”*. The State Department spokeswoman Heather Nauert added: *“We urge all sides to ensure that any judicial reform does not violate Poland's constitution or international legal obligations and respects the principles of judicial independence and separation of powers”*.

In an opening speech of the European Commission in Brussels on 19-th of July the first vice-president Franz Timmermans mentioned about the possibility of usage of Article 7⁸⁴ - a mechanism that would allow for sanctions against Poland and possible suspension of their voting rights in the bloc, which has never been used before. Mr. Timmermans commented: *“Each individual law, if adopted, would seriously erode the independence of the Polish judiciary (...). Collectively, they would abolish any remaining judicial independence and put the judiciary under full political control of the government.”*

Guy Verhofstadt, the President of the Alliance of Liberals and Democrats for Europe in the European Parliament, called on President Andrzej Duda to take action and said the European Commission should trigger the EU’s Article 7 if the issue is not resolved.

Donald Tusk the President of the European Council described the move as step backwards and said it went *“against European standards and values”*.

4. Presidential vetoes and his new draft laws.

President of Poland Andrzej Duda so far went along with the government’s earlier initiatives, like this asserting control over the Constitutional Tribunal, and another one which placed L&J in full control of state-owned media. He signed all proposed bills immediately, sometimes ta late night, and so eagerly that some malicious critics even called him *“notary public of the L&J government”*. To some extent it seems natural if we take under the

⁸⁴ He said: *“Finally, with regard to Article 7, the option of triggering Article 7 of the Treaty was part of the discussion and it should come as no surprise to anyone that, given the latest developments, we are coming very close to triggering Article 7”* [http://europa.eu/rapid/press-release_SPEECH-17-2084_en.htm]

consideration that he is a former member of L&J and a candidate of this party for the position of Polish President. However, his approach became really problematic when he signed bills which were obviously unconstitutional (like those concerning the Constitutional Tribunal).

Unexpectedly, on 18th of July 2017 Andrzej Duda, announced his ultimatum for the governing party and sent to the Sejm a draft of the amendment of draft Act on the National Council of the Judiciary of Poland submitted by L&J. The presidential draft included only one regulation connected with the majority of MPs who can elect judicial members of the Council proposing that this majority should be 3/5 in the presence of at least half of a statutory number of deputies. President stated in public speech that he was not going to sign discussed act on the Supreme Court until the Parliament would not vote for his proposal. In fact, the proposal did not change too much as the National Council of the Judiciary would still be politicized, as its judicial part would be chosen by Parliament. What is more, the President's draft should be recognized as unconstitutional since it breaches art. 10 (the separation of powers), art. 173 (independence and autonomy of courts) and art. 187 (structure of the Council) of the Polish Constitution. After a further consultation between the President and Marshals of the Parliament, which took place in the evening on 18th July 2017, MPs of governing party decided to present proposals for amendments to the draft of the act on the Supreme Court according to which some of the new competences of the Minister of Justice (including a final decision which judges of the Supreme Court will remain at their posts for the transitional period) will be transferred to the President of Poland. One must remember that such amendments would not change the fact that introduction of these proposals would politicize the Supreme Court. The only real effect would be transferring part of competences from the Minister of Justice to the President.

On 24th of July, President Duda vetoed two of three bills aimed at placing Polish courts firmly under political control. The vetoes concerned draft law on National Council of the Judiciary and draft law on Supreme Court. Initially, when he announced his veto on Monday morning, President Duda spoke only of "formal mistakes" in the laws and mentioned the fact that the drafts granted too much power to the Minister of Justice-Public Prosecutor General which brings back solutions from Communist times. On the same day, in his evening formal speech, he mentioned also constitutional issues: *"The acts on Supreme Court and National Council of the Judiciary had largely addressed public expectations, but I couldn't accept them because of the changes they require to assure their accordance with Constitution"*. Once again the President objected to the rising influence of the Minister of Justice and expressed his regret that he was not consulted before the bill was put to vote in the lower house of Parliament. Moreover, the President announced that his legal experts would prepare the new draft laws on the National Council of the Judiciary and on the Supreme Court within two months. He also promised to carry his drafts through wide consultations. At exactly the same time, prime minister Beata Szydło had her own formal speech in which she said that her government would not *"step down from a path to restore the state"*. *"The presidential veto slows down the necessary reforms ... but we cannot yield to the pressures of the street and foreign countries,"* she added. What is characteristic the public TV started from transmission of Beata Szydło while private independent broadcasters begun from presidential address.

It seems that at the moment there are two most probable scenarios regarding further legislative works over so called reform of the judiciary. Firstly, the L&J party can try to gather a qualified majority – three out of five of parliamentarians, with the presence of at least half of all MPs in the room – to reject the president's vetoes. That would be difficult because the party doesn't have such a majority, and the ability of L&J to create coalition in this respect seems limited. A second scenario is to proceed with a proposal prepared by the president.

The second scenario is considered as the most likely. On 8 September President Duda, for the first time in a long time, met Jarosław Kaczyński. They have talked for two and half hours, mainly about the reform of the judiciary. On 13th September President Duda conducted consultations with parliamentary parties L&J, Kukiz 15, Civic Platform and Polish Peasants' Party. After the consultations President's spokesman announced that presidential draft laws are going to be published on 25 September 2017.

The draft laws have been presented on 25 of September indeed and they look as a softer versions in comparison to those prepared by L&J in July, however, the closer analysis show the opposite.

On 6th of October 2017 Polish Supreme Court published detailed written opinion on the presidential draft laws on National Council of the Judiciary and on the Supreme Court. The opinion is fiercely critical and emphasizes that the only one positive aspect, from the point of view of preserving the rule of law, is the fact that the draft law on Supreme Court doesn't extinguish the "old" supreme court in just one moment, but rather introduces the step by step approach in this respect⁸⁵. The Supreme Court assessed that in many other aspects the presidential draft laws are more advanced in terms of subordination of the judiciary to the governing camp, than those which were vetoed. One of the main aspects of the politicisation of the judiciary is, according to the Supreme Court, the fact that all judges of the Supreme Court are going to be elected by the new, politicised National Council of the Judiciary. What is more strict obligation of resolving constitutional doubts by asking the Constitutional Tribunal seriously limits the autonomy of the Supreme Court.

The presidential draft laws contain, among others, introduction of qualified 3/5 majority in Parliament for election of judicial members of the National Council of the Judiciary, skipping the idea of dividing the National Council of the Judiciary in two separate chambers⁸⁶, the transfer of some personal competencies from Minister of Justice to the President, lowering of the retirement age for judges of Supreme Court from 70 to 65 instead of termination of their terms of offices, however, the President can agree for prolonging up to 71. It is estimated that such solution, if introduced, would concern 40 % of current judges, however it is not clear if it will also affect the current First President of the Supreme court whose term of office is constitutionally guaranteed. Another new solution is introduction of extraordinary claim from any kind of valid judgement if „*the party feels harmed by court's*

⁸⁵ However, one should remember that in case of Constitutional Tribunal subordination of 40 % of judges and the President of the Tribunal (which happened in December 2016 – see subchapter II.3) was enough to take control over the Tribunal by the governing camp.

⁸⁶ In case of not reaching the 3/5 majority the new mode of voting is going to be applicable which is going to grant L&J eight of fifteen judges-members of the Council. In this way the L&J would appoint 15 members of the Council (eight judges, six members of the Parliament & the Minister of Justice), which would be enough to have full political control over this body, even without splitting it into two chambers,

decision". Such kind of *actio popularis* can be filed with within 5 years from validity of the judgement⁸⁷. What is more, within three years from entering of a new law into force extraordinary claim is going to be applicable in respect of cases validly concluded after 17th October 1997 which is a date of entering into force of the Polish Constitution. It looks like a clear vote of no confidence in respect of 20 years of Polish judiciary especially if we take into the consideration that Polish court procedures (both civil and criminal) include relevant provisions allowing for extraordinary re-examination of the cases. This solution looks like a mixture of absurd and populism, and one can expect it is going to destabilize the legal system to a very serious extent, and would enable politically motivated interventions into cases validly concluded many years ago. It is hard to understand why entering into force of Polish Constitution, which guarantees a very high level of protection of fundamental rights and freedoms and fulfills requirements deriving from international treaties, was chosen as the borderline of this extraordinary claim. The idea of the extraordinary claim is connected with creating a new Chamber of Supreme Court called "Chamber of extraordinary control and public issues" dedicated to dealing with extraordinary claims, adjudicating with social lay participant⁸⁸. This special chamber is going to be exclusively competent also for examining the election protests, ruling on validity of elections and referendum, as well as cases concerning protection of competition, control of energetics and telecommunication⁸⁹. Lay judges are going to be introduced also in newly created Disciplinary Chamber for Judges. Many provisions concerning mode of the proceedings before Disciplinary Chamber in respect of judges obviously breach the rules of fair trial placing judges in much worse position than suspects in ordinary criminal proceedings⁹⁰. In other aspects President's proposals remain solutions of the vetoed bills.

⁸⁷ However it seems ridiculous, the extraordinary claim is applicable even in respect to judgements which weren't the subject of any appeal in the ordinary course of the proceedings. Why grant such a right to a party who accepted a judgement?

⁸⁸ Introduction of non-professional lay judges at the level of the Supreme Court which is a court of law dealing with complicated legal problems seems completely unique, comparing to the systems of other countries, and it is also difficult to understand its reasonableness. Not to mention the fact that the lay judges of Supreme Court are going to be elected by the Senat (upper house of the Polish Parliament) which is dominated by L&J deputies, which would deepen political dependence of the future Supreme Court.

⁸⁹ Taking into account complicated nature of such matters introduction of social lay participant seems completely unjustified from the substantial point of view. On the other hand, if we take under the consideration how important matters are going to be decided, introduction of legally unqualified lay judges can be perceived as a potential factor which is going to facilitate taking political control over the Chamber by the governing camp.

⁹⁰ For example the Minister of Justice – General Prosecutor Public would be entitled to make an objection in respect of the decision of disciplinary spokesman on discontinuation of the proceedings due to the lack of factual basis and such objection would be binding for disciplinary spokesman. What is more such objection can be repeated in respect of the same judge again and again. The Supreme Court emphasized that such solution can lead to the situations of the perpetual state of judges staying under the suspicion and – at the same time – excluding them from performing judicial duties. One may think it can be used as a perfect way of a direct influence of the executive power over the judiciary. Another peculiar solution introduced exclusively in the field of the disciplinary proceedings in respect of judges is the possibility of continuation of the proceedings even in case of justified non-appearance at the term of the trial. Such solution obviously breaches the rule of equality of arms.

According to the authors of this report at the moment it is obvious that President's vetoes were not motivated by the real care for preserving the rule of law and independence of the judiciary in Poland, but it was rather an act of political fight for domination between the President and the Minister of Justice. The proposed bills are still explicitly unconstitutional as granting politicians control over the judiciary.

5. Entering into force the new Law on Ordinary Courts.

Unfortunately, President Duda has not used his right to veto in respect of the draft Law on Ordinary Courts. Instead, on 24 of July he signed the bill. It was published into Official Journal of Law and entered into force on 12th of August 2017⁹¹. As it was mentioned before the new law gives the Minister of Justice – Prosecutor General Public the competence to dismiss, in an arbitrary manner, all presidents and vice-presidents of ordinary courts within 6 months from the moment of entering into force.

On 15th of August 2017 the Forum of Cooperation of Judges supported by the biggest Polish association of judges “Justitia” published an appeal to all Polish judges asking them to refuse accepting proposals of Ministry of Justice to take up positions of terminated presidents. The appeal was justified by statement that this extraordinary and arbitrary way of exchanging presidents of courts breaches the constitutional rules of partition of power and independence of courts.

At the beginning of September the first attempt was made to dismiss the president of regional court. It concerned the President of Regional Court in Łódź, Mr. Krzysztof Kacprzak who is currently in the middle of his 6-year-long term of office. It was done in such a manner that a few other judges of Łódź court were proposed by Ministry of Justice to take up his position. All of them refused. On 7th of September the General Assembly of Regional Court in Łódź adopted a resolution (68 out of 70 judges voted for the resolution) supporting current President. In the resolution the judges fiercely objected the intent of Minister of Justice, emphasized achievements and good statistical results of the court under the scrutiny of the current president and expressed opinion that attempts to remove him are politically motivated.

On 12th September 2017 three vice-presidents of Regional Court in Warsaw were removed from their positions before the end of their terms of offices by Ministry of Justice, on the basis of the new Act on Ordinary Courts. No official reasons for the dismissal were revealed by Ministry of Justice except for the statement that they were removed on a motion of new President of the court. However, the new President Joanna Bitner explicitly denied any kind of her activity in this respect. What shed some light on the motives of the Ministry of Justice is the fact that all removed vice-presidents in May 2017 signed an open letter to the Minister of Justice criticising his lack of activity in respect of defamatory statements addressed to judges of ordinary courts and members of their families by right-wing media. What is more one of reduced vice-Presidents a few years ago instigated disciplinary proceedings in respect of judge Łukasz Piebiak who is at the moment the deputy of Minister

⁹¹ Published in the Journal of Laws (Dziennik Ustaw) of 2017, position no. 1452

of Justice, and who is personally responsible for decision on revocation. General Assembly of judges of Warsaw Regional Court condemned the decision of the Ministry of Justice.

6. The negative billboard campaign.

On 8-th of September the great billboard/TV/press/Internet negative campaign addressed against Polish judges was instigated. The cost of the campaign is 19 mln zł (about 4,5 mln EURO), which is more than the cost of the winning presidential campaign of Andrzej Duda in 2015. It is conducted by Polish National Foundation. The Foundation was established by current Polish Parliament under the auspices of L&J and is financed by 17 biggest Polish state owned companies controlled by managers who are nominees of the governing party. In spite of the fact that the statutory objective of the Foundation is to promote Poland abroad, the main aim of the present media campaign is to depreciate authority of the judiciary inside Poland.

The government says it is designed to promote the great reform of the system of administration of justice, but in fact it represents mainly the black PR action run by political party L&J showing Polish judiciary in distorting mirror by describing, in a very tendentious way, situations of disciplinary proceedings in respect of some judges and real or alleged court mistakes. While some of described situations are true, the others are manipulated or even fake. One of the “true” examples concerns the judge who stole trousers from the shop. The situation as such has happened, however, the website doesn’t mention that the judge, at the moment of theft, had already been retired for many years and, what is more, he was mentally ill. For the purposes of the campaign judges are described as a “privileged caste”. In terms of colors the campaign is designed in black and white. The judges are situated on the black side and depicted as classic examples of lack of competence, corruption and indolence. One of the judges accurately commented: *Situation in which one of the branches of power arranges negative paid campaign against another branch of power of the same country is so peculiar that even George Orwell or Monty Python couldn’t have invented it”.*

What is rather surprising just after commencement of the campaign some L&J officials stated that it is run neither by government nor by L&J. Such statement seems completely unreliable if we take under the consideration that the Prime Minister Beata Szydło was present at the official inauguration of the campaign, the people in charge of the campaign are ex workers of Szydło’s office, the whole action is financed by state own companies and the campaign continues the long lasting governmental policy of defamation of judges. The opposing parties reported the public prosecutor’s office about the possibility that the campaign breaches the ban of financing political parties from public money different than derived from official subsidies provided for in the Act on Political Parties. Nevertheless, it seems questionable if public prosecutor’s office supervised by General Prosecutor Public is able to check, in unbiased and reliable manner, if the campaign which supports the reform introduced by Minister of Justice - General Prosecutor Public constitutes an offence.

Many commentators accurately emphasize that the cutting edge of the campaign was originally directed not only against the judges but also against the President Andrzej Duda, who – by using his veto power – for the first time stood up against L&J seriously undermining Jarosław Kaczyński’s omnipotence. It is significant that the Internet domains

used for the campaign were registered on 25 July – the next day after the vetoes. Unfortunately, at the moment, assessing the shape of presidential draft acts presented on 25th of September, it looks that the President Duda found the common ground with Jarosław Kaczyński in order to subordinate judiciary to the governing camp.

VIII. Conclusion

The aim of this work has not been a complex discussion concerning all the introduced changes and taken actions regarding the administration of justice by the government and Parliament which have exercised authority in Poland since October 2015. Such a discussion within one article, however large, would not be possible. It is also worth mentioning that there have been some other changes which should receive a positive evaluation, at least as having good intentions and being in the right direction ⁹².

The above ascertainment does not change the fact that a distinct majority of either the introduced or planned changes which have been presented above have caused anxiety in judges' circles to such an extent that the atmosphere in the Polish system of justice is going from bad to worse. The ruling "Law and Justice" party has been acting consistently through the year 2016 and the major part of 2017 not only to subordinate and paralyse the work of the Constitutional Tribunal but also to introduce changes in the Act concerning the Public Prosecutor's Office which will lead to its subordination to political factors. Finally, having taken into consideration factual actions aiming to increase the power of executive authorities over common courts and the Supreme Court, together with legislative acts which contain repressive elements concerning judges working in common courts, one may easily state that the reform of the judicial system will be directed towards very serious limitation of the independence of courts and judges, or rather even worse – towards subordination of judiciary the governing party. What's more, the work on the reform of the judicial system is being carried out in secrecy and without any social consultation, not to mention the National Council of the Judiciary. There is even more concern relating to the fact that solutions introduced in the future will seriously violate the current binding constitutional standards, which can be deduced from a statement of the Minister of Justice and the Public Prosecutor General, who said that "the right" reform of the judicial system will take place after "the crisis concerning Constitutional Tribunal has been settled". According to his nomenclature, that means either the ruling party taking control or paralysing the activities of courts; whatever the case may be, there will be no effective control regarding the accordance of newly passed Acts with the Constitution. These concerns were fully confirmed after 19 December 2016 when the term of the current President of Constitutional Tribunal Andrzej Rzepliński came to an end. It

⁹² Examples of such changes include, among others, the change in the Act concerning the Public Prosecutor's Office and the Regulations of performing official duties by judges, which aim at increasing the workload of judges and public prosecutors who hold managerial functions. However, it seems that these Acts do not take enough consideration of the problem that in bigger units supervised by particular post-holders it may be difficult to run those efficiently when more and more extra tasks are added to their duties.

has been Rzepliński who, quite firmly, protested against numerous actions by political forces to influence the Tribunal's activity. Disclosed in spring, clearly contrary to the Constitution, draft of Act amending the Act on the National Council of the Judiciary introduces a new mode of selection of judges – members of the Council through Parliament, which seeks to politicize this constitutional body safeguarding the courts and judicial independence. It would give the ruling party possibility to influence the selection of judges, their career path and disciplinary proceedings. Such actions cannot be seen as nothing else than an open attack on the independence of judiciary and the judges of ordinary courts especially if we consider it altogether with the new Law on Ordinary Courts which gives the Minister of Justice – General Prosecutor Public the power to dismiss and appoint, in an arbitrary manner, all presidents of ordinary courts. In this context one shouldn't forget about an attempt to terminate all tenures of judges sitting currently in the Supreme Court and to replace them by Minister of Justice – General Prosecutor Public nominees. It seems that in July this year, just before the presidential vetoes, Poland has been at the verge of autocracy (only the optimists can call it illiberal democracy). Unfortunately, the final shape of Presidential bills on the Supreme Court and the National Council of the Judiciary showed that President Duda applied his power of veto not to sustain the rule of law and independence of judiciary in Poland but only to reinforce his own political position within the ruling camp.

It may seem that some information about the intentions of the ruling party towards judicial authority can be found in the draft of a new Polish Constitution prepared by the L&J party in the past and published on the Internet. The draft did not come into force and at the end of 2015 was removed from the internet site after the information about it was published by journalists, that it aimed at the introduction of an authoritarian government. The spokeswoman of the Law and Justice party commented then that it was only one of many discussed suggestions which were not binding. According to Article 145 part 2 of above-mentioned draft, *“a judge whose behaviour shows that they are unable or unwilling to perform their duties in a reliable and serious way, may be removed from their post by the President of Republic of Poland at the request of the Council for the Judiciary expressed in a resolution adopted by majority of 3/5 of the statutory numbers of the Council by conducting proceedings specified in the Act, with participation of the person concerned. The Act of President of Republic of Poland is not subject to appeal.”* Considering the fact that the above-mentioned Article enables the President to remove a judge on the basis of a not fully specified, general clause and without the possibility to appeal this decision, one may come to the conclusion that this rule not only limits but in fact removes the independence of judges. The cited part of the draft of Constitution, prepared by L&J, vividly recalls the provision of Article 61 part 1 of the Act – Law on Ordinary Courts in force at the time of the communist regime, according to which the Council of State could dismiss the judge if he doesn't *“give a guarantee of proper performing of judicial duties”*. Only one question arises, whether at the beginning of the twenty-first century, in a country situated in the centre of Europe, which is a member of EU, it is allowed to seriously consider the return of the institutions of deep communist origin, which defies the rules of the democratic state of law.

During an Extraordinary Congress of Polish Judges on 3 September 2016 professor Andrzej Zoll, one of the most outstanding legal authorities in Poland, a former President of the Constitutional Tribunal and former Ombudsman, when analysing the actions of the ruling

party described them as a “*creeping assault on Constitution*” and stated that “*we are approaching an authoritarian system very quickly*”. One thing is clear: no matter how far the current Parliament will actually manage to go in order to destroy the basis for the democratic rule of law in Poland, in particular the separation of powers and the independence of courts and judges, Polish lawyers who respect these rules are already experiencing the effects of the curse “*May you live in interesting times*”.

About the authors:

Dariusz Mazur is a criminal court judge who currently holds the position of the Chief of the Third Criminal Division of Regional Court in Cracow. He has recently become a member of the “Themis” Polish Judges’ Society. He specialises in international co-operation in criminal matters. As a lecturer on these matters he works with the Polish National School of Judiciary and Public Prosecutors, and with European Judicial Training Network (EJTN). Last year he has been honoured with the title of European Judge of the Year 2015, which was granted by the Polish Section of the International Commission of Jurists (ICJ) for the statement of grounds for the decision concerning the refusal of extradition of Roman Polański to the USA.

Waldemar Żurek is a civil court judge adjudicating in the Second Civil Appeal Division of the Regional Court in Krakow. He holds the position of a spokesman of the National Council of the Judiciary. He has now been a member of the National Council of the Judiciary for two terms. In 2016 he was chosen as the Best Judge by the survey called “Golden Paragraphs” organised by the Legal Journal newspaper. In their justification, the Jury of the Rewards pointed out that *“He has always been present when it was necessary to defend the grounds of democratic rule of law of the state, and he has a gift for talking about complicated matters in a simple way”*.

Both of the authors of this article have been the judges of common courts of law for many years and they have never had any connections with political parties or political groups in Poland. They assert that, although judges cannot get involved in any political action, they have a right, sometimes even a duty, to take part in a public debate concerning the protection of the democratic rule of law, especially the separation of powers and independence of courts and judges. This article shows that they are deeply concerned with the fact that these principles may not be followed in Poland.