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REPORT
of the Stefan Batory Foundation Legal Expert Group
on the impact of the judiciary reform in Poland in 2015-2018

1. Introduction

Article 45 Paragraph 1 of the Polish Constitution guarantees that everyone shall have the right to a fair and open trial by an independent, unbiased and impartial court without unreasonable delay. The right to trial is the cornerstone of a system of protection of civil rights against prejudice by state actors. To be effective, this protection system requires thorough implementation of the principle of separation and independence of judicial authority from the legislative and executive powers, as set forth in Article 173 of the Constitution. Courts and tribunals subordinate to both those branches lose the attribute of independence and citizens who seek justice before such, lose the opportunity to attain it.

The current constitutional crisis in Poland began when the legislative and executive branches mounted an attack against the judicial branch. This attack had been thoroughly thought-through, well planned and effectively implemented. It has resulted in the complete paralysis of the Constitutional Tribunal, which is currently unable to protect citizens from unconstitutional actions of parliament. Historically, the prospect of having laws deemed unconstitutional had mobilized the legislative authorities to care for the quality of laws passed. Currently, the Tribunal is deemed an ally that supports the parliamentary majority in implementing its campaign promises. The Tribunal has begun to interpret the Constitution in favour of government (and thus against the interest of citizens), by issuing rulings in line with the justifications of bills drafted by the government. The situation has certainly made it easier for the current parliamentary majority to adopt laws that directly impinge on the independence of courts and impartiality of judges. They have allowed the Minister of Justice to change the management staff in common courts on a scale unforeseen in a democratic state ruled by law. The process of stripping power away from the Supreme Court and the National Judiciary Council has also been initiated. Significantly, many of the systemic changes concerning the Court and Council have been conducted outside the Constitution by way of regular laws adopted by a parliamentary majority without any public consultations. A chilling effect among judges is already being evoked by disciplinary proceedings initiated by politicians dissatisfied with decisions in cases in which they are personally involved.

The purpose of this report is not the comprehensive discussion of changes implemented in Poland in 2015-2018 in the realm of judicial authority, but only to highlight the gravest threats flowing from such in the realm of civic rights and freedoms. The new legal regulations concerning the Constitutional Tribunal, National Judiciary Council, the Supreme Court and common courts show a concerted and planned strategy designed to destroy the foundations of a democratic state ruled by law.

2. The Constitutional Tribunal Crisis

The Constitutional Tribunal (CT) was the first judiciary institution to come under attack from the current parliamentary majority, Government and the Head of State. The Constitutional Tribunal rules on the constitutionality of laws passed by Parliament and regulations issued by the Council of Ministers, Prime Minister, ministers and the President. The Tribunal's rulings are universally binding and final.

Several laws concerning the Constitutional Tribunal were adopted between 2015 and 2017. They were soon reviewed by CT in its rulings of 3 December 2015 (Ref. K 34/15), 9 December 2015 (Ref. K 35/15), and 9 March 2016 (Ref. K 47/15). Parts of the earlier adopted legislation were found unconstitutional. The specific laws that were reviewed back then are no longer in force, which makes the rulings themselves obsolete. It must be noted, however, that the ruling of 9 March 2016 (Ref. K 47/15), one that ruled the unconstitutionality at its widest, was never published in the Dziennik Ustaw [*Journal of Laws*]. Neither did the Prime Minister order the publication of the other two Constitutional Tribunal rulings, which were unfavorable to the current parliamentary majority, i.e. ruling of 11 August 2016 (Ref. K 39/16) and 7 November 2016 (Ref. K 44/16). Several other Constitutional Tribunal rulings issued in 2016-2017 were published, albeit with much delay (note that pursuant to Article 190 Paragraph 2 of the Constitution, the rulings of the Constitutional Tribunal "shall be published immediately"). Any refusal to publish a CT ruling is constitutional infringement that undermines the separation of powers, the separation and independence of the judiciary and the final nature of Constitutional Tribunal rulings. Failure to publish CT rulings prevents them from coming into force and thus keeping unconstitutional legislation in force.

There are still two significant unresolved issues at the moment and they will be discussed below. First, there are three individuals who are members of the Constitutional Tribunal who have no authority to rule on cases. Secondly, CT is led by an individual who has been unlawfully appointed President of the Constitutional Tribunal. The two issues are interrelated and they have undermined the authority of the Constitutional Tribunal and caused the erosion of public trust in the institution resulting in a small number of citizens' complaints filed in CT these days.

2.1. Election of Constitutional Tribunal Judges and Individuals Unauthorized to Rule on Cases

The Constitutional Tribunal is made up of 15 judges, men and women with outstanding legal expertise, who are individually elected by the *Sejm* [Lower House] for nine-year tenures. There is no

role for the President of the Republic of Poland in the process with the exception that the elected judges are to sworn in before the President.

The Sejm of the previous term adopted a law of 25 June 2015 on the Constitutional Tribunal which contained an interim provision (Article 137) that set a 30-day term from the coming into force of the act, for the submission of candidates for CT judges to replace those whose terms expired in 2015. Pursuant to this provision, the Sejm elected five CT judges on 8 October 2015 to replace judges whose tenures expired on 6 November, 2 December, and on 8 December 2015. The constitutionality of article 137 was challenged by a group of Law and Justice deputies in a petition submitted to the Constitutional Tribunal on 23 October 2015, two days before the parliamentary elections. The petition was withdrawn on 10 November 2015, two weeks prior to date of the hearing. As a result, the Constitutional Tribunal dropped the case (see Decision dated 25 November 2015, Ref. K 29/15).

Notably, a nearly identical petition was filed again with the Constitutional Tribunal by a group of now opposition deputies on 17 November 2015. The case was ruled on 3 December 2015 (Ref. K 34/15). CT stated that Article 137 was constitutional "to the extent it applies to judges of the Tribunal whose term expires on 6 November 2015" and unconstitutional "to the extent it applies to judges of the Tribunal whose terms expire on 2 and 8 December 2015, respectively." With regard to the implications of ruling, the Constitutional Tribunal emphasised that "there are no constitutionality concerns with respect to the legal foundation for the election of three Tribunal judges in place of those whose terms expired on 6 November 2015. The partial derogation of Article 137 of the Act on the Constitutional Tribunal has not affected the legality of their election. In accordance with the principle that a Tribunal judge shall be elected by the Sejm of the term during which the position has been vacated, the election in this case was valid and nothing stands in the way of the finalising the procedure by having the individuals elected to be Tribunal judges sworn in before the President." Consequently, the ruling confirmed the constitutionality of the legal basis for the election of three Constitutional Tribunal judges by the Sejm of the preceding term. Meanwhile, it must be emphasised that the Constitutional Tribunal may consist of only 15 judges. Therefore, having elected that number of judges the Sejm has no authority to elect any more judges until the tenure of any of the previously elected judges is about to expire or is deemed expired prior to the end of their tenure.

Even though neither condition was met, the current Sejm elected on 2 December 2015 five individuals as Constitutional Tribunal judges to fill posts that had not been vacated at the time, and the President accepted their oaths. Furthermore, the President refused to accept the oaths from three judges elected in accordance with the Constitution by the Sejm of the previous term even though the relevant provision of legislation concerning this presidential power (i.e. Article 21 Paragraph 2 of the Act of 25 June 2015) was ruled unconstitutional in the Constitutional Tribunal ruling of 3 December 2015 (Ref. K 34/15), if interpreted "in a way different than that obligating the President of the Republic of Poland to accept the oath from a Tribunal judge elected by the Sejm immediately."

Of the three individuals elected by the Sejm in violation of Article 194 Paragraph 1 of the Constitution, two have since died (Lech Morawski and Henryk Cioch) while one (Mariusz Muszyński) has been subsequently appointed by the President of the Republic to the post of Vice President of the Constitutional Tribunal. The appointment has no legal effect because only a Tribunal judge may be appointed Vice President of the Constitutional Tribunal, pursuant to Article 194 Paragraph 2 of the Constitution. Two new individuals unauthorised to rule on cases (Justyn Piskorski and Jarosław

Wyrembak) have been elected to replace the two deceased individuals. Like the two deceased individuals, the newly elected individuals have been elected in addition to 15 Tribunal judges allowed to be elected by the Sejm pursuant to Article 194 Paragraph 1 of the Constitution. The President has not yet sworn in the three judges elected by the Sejm of the previous term (Roman Hauser, Krzysztof Ślebzak and Andrzej Jakubecki) and they have not been admitted to rule on cases.

Tellingly, representatives of the governing party have made various efforts to conceal the aforementioned constitutional violations under a veneer of legalization.

On 25 November 2015, the current Sejm passed resolutions that voided the resolutions electing judges adopted by the previous Sejm. These resolutions had no legal basis neither in the Constitutional Tribunal Act of 2015 (a resolution by the General Assembly of Constitutional Tribunal Judges is required to terminate a tenure of a Constitutional Tribunal judge and no such resolution has even been adopted) nor in the Constitution (which contains no procedure for terminating a judge duly elected by a constitutional body).

On 12 January 2017, the Prosecutor General, who is also the Minister of Justice, filed a petition with the Constitutional Tribunal to challenge the constitutionality of the election of three CT judges in 2010 (see case Ref. U 1/17). CT has no power to review a single decision in the area of appointments because the Constitutional Tribunal's jurisdiction is over legislative act of parliament. Therefore, this petition is groundless as supported by CT jurisprudence (see ruling Ref. U 8/15). Nonetheless, the case has not been reviewed for more than a year now but has been used for exempting the judges to whom it refers from ruling on certain cases upon the request of the Prosecutor General (see cases Ref. Kp 4/15, K 24/14 and Kp 1/17).

2.2. Unlawful Appointment of CT President

The current Constitutional Tribunal President has been appointed in violation of applicable legislation. Pursuant to Article 194 Paragraph 2 of the Constitution, the President of the Constitutional Tribunal is elected from among candidates presented by the General Assembly of the Constitutional Tribunal Judges, as further explicated in primary legislation.

The process of appointing Julia Przyłębska as President of the Constitutional Tribunal is defined in the Act of 13 December 2016 Provision Implementing the Act on the Organisation and Procedure before the Constitutional Tribunal and the Act on the Status of the Constitutional Tribunal Judges. This Act was published in the *Dziennik Ustaw* [Journal of Laws] on 19 December 2016, the day on which the tenure of the previous Constitutional Tribunal President (Judge Andrzej Rzepliński) expired. It became effective one day after publication. The law has defined a post that is not mentioned in the Constitution, i.e. "acting Constitutional Tribunal President." The President of the Republic of Poland appointed Julia Przyłębska acting Constitutional Tribunal President. The provision that defines this process violates Article 194 Paragraph 2 of the Constitution, which does not provide for appointment of an "acting" President of the Constitutional Tribunal and, more importantly, it does not allow that such individual should be vested with any powers of a constitutional body, i.e. that of the Vice President of the Constitutional Tribunal. Furthermore, this provision violates Article 173 of the Constitution, which sets out the principle of the Tribunal's separation and independence from other authorities. The Prime Minister was expected to officially approve the appointment of Julia Przyłębska

as the law requires that such President's decision be countersigned. In contrast, the Polish Constitution does provide for any mechanism of government control over the appointment of the CT President (see Article 144 Paragraph 3 Section 21 of the Constitution). The General Assembly of Constitutional Tribunal Judges convened on 20 December 2016 by Julia Przyłębska was defective not only because it was not convened by a person with constitutional powers to do so (i.e. the powers of the Constitutional Tribunal President). It was also defective because the Assembly was attended by individuals who were not authorised under the Constitution to take part therein simply because they were not judges of the Constitutional Tribunal. This applies to M. Muszyński, L. Morawski and H. Cioch. Moreover, Constitutional Tribunal Judge Stanisław Rymar was essentially prevented from attending because he was away on holiday on that date and had requested a postponement on these grounds. Since the Assembly was not attended by all "Constitutional Tribunal judges, who had been sworn in before the President of the Republic of Poland," such assembly cannot be deemed "the General Assembly regarding the presentation of candidates for the Presidency of the Tribunal to the President of the Republic of Poland", pursuant to Article 21 Paragraph 2 of the Act dated 13 December 2016. Furthermore, the majority of the General Assembly of the Constitutional Tribunal Judges did not back J. Przyłębska's candidacy; Przyłębska received the backing of six out of 14 individuals present at the Assembly, of whom three were not legitimate Constitutional Tribunal judges. Additionally, there was no resolution adopted to present her candidacy to the President of the Republic of Poland. Note that the said legislation, which created the *pro tempore* procedure for selecting a Constitutional Tribunal President, expressly required, in three paragraphs of Article 21 (see paragraphs 7, 9, and 10), that the General Assembly of the Constitutional Tribunal Judges should adopt a resolution to present candidates for the Constitutional Tribunal President to the President of the Republic of Poland. Even though it was not adopted, such resolution was indeed drafted and signed by J. Przyłębska, and subsequently presented to the President as a resolution of the General Assembly of the Constitutional Tribunal Judges. It was pursuant to this resolution that J. Przyłębska was unlawfully appointed President of the Constitutional Tribunal.

It should be added that J. Przyłębska has taken a series of decisions that blatantly violate applicable law since her defective appointment as President of the Constitutional Tribunal. For example, she has prevented the Vice President of the Constitutional Tribunal, Stanisław Biernat, from ruling on cases by forcing him to take allegedly accrued holiday; she has authorised individuals who are not Constitutional Tribunal judges to rule on cases; she has made several ad-hoc modification in the composition of ruling panels of judges or replaced rapporteurs to make sure that cases which are vital for ruling majority be adjudicated by judges elected by that majority or by non-judges. Finally, she has mainly selected M. Muszyński to be rapporteur even though he is not actually a Constitutional Tribunal judge.

3. Modified Process of Appointing Members of the National Judiciary Council

The ruling majority has also shown appetite to reform the National Judiciary Council (NJC). Pursuant to Article 186 Paragraph 1 of the Constitution, NJC is a steward of court independence and the impartiality of judges. Moreover, NCJ formally recommends individuals to be appointed by the President of the Republic of Poland as judges at all levels and in all court types, pursuant to Article

179 of the Constitution. The National Judiciary Council is made up of the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and an individual appointed by the President of the Republic of Poland, 15 elected judges of the Supreme Court, common courts, administrative courts, military courts as well as four deputies and two senators. This structure of the National Judiciary Council is laid out by Article 187 Paragraph 1 of the Constitution. The provision clearly indicates that NJC should be made up of representatives of all three branches of government but it also gives priority to the judiciary, who are overrepresented in the Council. This seems to be a reasonable format and it has never come under any criticism. No format where the legislative and executive should have the majority would likely defend the independence of courts and impartiality of judges against its own attacks. Notably, the National Judiciary Council has always invited a well balanced and representative mixture of judges at all levels and in all kinds of courts.

The Act amending the Act on the National Judiciary Council adopted on 8 December 2017, has modified the NJC appointments process. It is currently the Sejm that will elect the 15 NJC members for a joint four-year term but will not be bound to maintain a representative mix of judges. This seems to contravene Article 187 Paragraph 1 Section 2 of the Constitution, which requires that 15 members of the National Judiciary Council be elected from "among judges of the Supreme Court, common courts, administrative courts and military courts."

Under the new legislation, candidates for members of the National Judiciary Council may be put forward by a group of at least 2,000 citizens or a group of at least 25 judges, except for retired judges. Candidates put forward in this process are in fact 'candidates for candidates', as actual candidates are to be put forward by parliamentary caucuses and, should the number of proposed candidates be lower than 15, by the Presidium of the Sejm. Subsequently, a Sejm select committee will decide on names to be entered on the list of candidates, and the Sejm will elect members by a qualified 3/5 majority vote with at least 50% of deputies present during the vote. In the event the process fails to result in a positive vote, which is quite likely given the current balance of power in the Sejm, judge members of the National Judiciary Council will be elected by a simple majority of votes cast by at least 50% of deputies. As described, the process has altered the nature of NJC as the legislature has an exclusive mandate to elect 21 of its 25 members, thereby depriving the judicial branch of its right to elect its representatives to that body.

There are further concerns around the constitutionality of the provision concerning the concurrent four-year tenure of NJC members. The provision implies that an individual elected to replace another member whose tenure has terminated prematurely will not serve a four-year term despite it being guaranteed by Article 187 Paragraph 3 of the Constitution.

The adoption of the amended legislation has resulted in terminating the tenures of the current National Judiciary Council members. The mandate of National Judiciary Council judge members elected under the previous legislation is supposed to last until the day preceding the start of the mandate of new NJC members, no longer than 90 days from the entry into force of the new legislation, unless such mandates terminated are a result of the expiry of the tenure. This mechanism contravenes the aforementioned Article 187 Paragraph 3 of the Constitution which provides for a four-year term.

The procedure for electing judges to sit on the National Judiciary Council introduced by the said law has already proven defective. The list of candidates is dominated by common court judges who have been appointed by the current Minister of Justice to administrative positions in their courts and judges seconded to the Ministry of Justice. These individuals are either directly or indirectly reporting to or dependent on the Minister of Justice. The candidate pool includes no judges from appellate courts, the Supreme Court or the Supreme Administrative Court. This raises concerns in the light of Article 187 Paragraph 1 Section 2 of the Constitution and implies that new judges will eventually be put forward to the President by National Judiciary Council made of judges with the least ruling experience.

4. The Dismantling of the Supreme Court

The Supreme Court (SC) has been essentially dismantled as a result of new legislation adopted on 8 December 2017. The Supreme Court's structure has been altered, a new type of appeal known as extraordinary appeal has been introduced, the retirement age of judges has been lowered the extent to which the executive branch can control the Supreme Court has widened.

The structural change involves the emergence of two new chambers in the Supreme Court: the Disciplinary Chamber and the Chamber of Extraordinary Control and Public Affairs. The Chamber of Extraordinary Control and Public Affairs has jurisdiction over cases of extreme importance for the political system, such as certifying the validity of elections and referenda, and other cases under public law, reviewing electoral protests, and complaints about unreasonable delays in trials before common courts and military courts. This chamber will also be vested with authority to review extraordinary appeals, which entails appeals resulting from cassation appeals or cassation. The Disciplinary Chamber has jurisdiction over disciplinary proceedings, including those regarding judges (including Supreme Court judges), prosecutors, legal advisors and attorneys.

The new chambers, especially the Disciplinary Chamber, enjoy a broad autonomy supported by a separate structure and personnel. The autonomy of the Disciplinary Chamber is particularly strong with the powers of the First President of the Supreme Court to control the Chamber's management and financial functions being limited. Furthermore, the interim provisions contained in the new Supreme Court ban any transfers of judges from other chambers into the Disciplinary Chamber until all judicial posts of Supreme Court judges have been filled in that chamber. Members of the new Chamber of Extraordinary Control and Public Affairs will be appointed according to the new procedure described in the Supreme Court Act. Combined with the ramifications of the amended National Judiciary Council Law, we are seeing an unprecedented shift of control over the judiciary to the legislative and executive branch, a grave distortion of the balance of power and the erosion of court independence and the impartiality of judges. There are serious doubts whether a Supreme Court so formed can in fact act impartially and independently (from other bodies) to fulfill a key function that is essential for Poland's democracy as prescribed the country's Constitution, i.e. assess the validity of parliamentary and presidential elections.

The Supreme Court Act has introduced what it calls an extraordinary appeal, a process whereby any court ruling considered final to date can be challenged. Such a complaint may be submitted against a final and binding ruling in any case, if it is deemed necessary for ensuring the rule of law and social justice. The Supreme Court Act provides that submitting an extraordinary appeal

shall be allowed if the contested ruling violates principles or freedoms as well as human or civil rights enshrined in the Constitution, it flagrantly violates the law by defective interpretation or an inadequate application thereof, or where a clear contradiction exists between the court's material findings and the evidence in the case. Grounds that are worded in this fashion and are largely construed on highly general clauses must raise critical questions about the specificity obligation, which is particularly essential in any law or regulation that affects individual constitutional rights. Moreover, the grounds for the admissibility of the extraordinary appeal show there is no clear demarcation between such extraordinary appeals and other types of complaint, including the constitutional complaint or the cassation complaint. Therefore, it can hardly be argued that the extraordinary appeal will effectively solve the problem of lengthy court procedures, which is one of its stated objectives. There is an added risk of distorting the legal order, i.e. the involvement of the jury in cases appealed under the extraordinary appeal procedure. The Supreme Court Act provides a five-year term for filing complaints. Further, cases ruled over the last 20 years can be reopened under the interim provisions. The said terms must raise concerns over the principle of confidence in government and legislation, legal certainty as they infringe upon stability of court rulings, one the constitutional values. With its broad definition and the involvement of individuals selected under the said terms and conditions, the extraordinary appeal may undermine the principle of legal certainty and become a tool for reviewing court rulings for political rather than legal reasons.

As far as the lower retirement age of Supreme Court judges (down to 65) is concerned, the provision falls within the powers of the legislature and no constitutional breach can reasonably be claimed here. However, a significant problem of constitutional nature lies in the lack of interim provisions that would allow judges to complete their active service under existing terms and conditions. This defect is particularly visible with respect to the First President of the Supreme Court, whose tenure lasts six years, pursuant to Article 183 Paragraph 3 of the Constitution and it is unconstitutional to interrupt it.

The provisions of the Supreme Court Act interfere with the constitutionally defined status of judges. After reaching the age of retirement, Supreme Court judges may twice apply to the President of the Republic of Poland to extend their active judicial duty by three more years. The awareness among judges of the inevitability of such decisions to be made by the President may undermine the perception of guaranteed impartiality, both seen internally and externally. A situation in which a judge must apply to the President for the extension of service after reaching a certain age casts a shadow of doubt on compliance with Article 179 of the Constitution, which provides for appointment of judges for an indefinite period of time. Finally, pursuant to Article 144 Paragraph 2 of the Constitution, in order to be valid every decision of the President must be approved by the Prime Minister, the latter being answerable to the Sejm for signing such a decision (exceptions are defined in Article 144 Paragraph 3 of the Constitution). This implies that any decision to extend the service on a judicial post, not unlike nearly every other new power vested in the President by the Supreme Court Act, will require a consensu between the President and the Prime Minister.

The new the Supreme Court Act gives the executive branch more power to control the Supreme Court. The President is expected to define the internal regulations of the Supreme Court by way of an ordinance. These internal regulations will affect matters of great significance such as the number of Supreme Court judicial positions, including numbers in per chamber, the structure of the

Supreme Court and its internal procedures. The President may also appoint a Special Disciplinary Representative (a Supreme Court judge, a common court judge or military court judge) to conduct specific cases concerning a Supreme Court judge. In the case of disciplinary misconduct that constitutes a publicly prosecuted premeditated crime or a premeditated fiscal crime, the President may choose to appoint a State Prosecution Service prosecutor recommended by the National Prosecutor as a Special Disciplinary Representative. The act provides that appointment of a Special Disciplinary Representative is tantamount to a request to conduct an investigation. Any appointment of a Special Disciplinary Representative will require a countersignature from the Prime Minister.

5. Changes to common courts

5.1. Introductory remarks

Changes concerning common courts occurred in phases over the course of 2016-2018 and included numerous amendments to the Act dated 27 July 2001, the Law on the System of Common Courts.

The method of amendment adopted by the legislator is undesirable for two reasons. First, it obstructs substantive discussion about the proposed changes while impeding rational planning of the system and organization of common courts. Second, it harms the transparency of the legislative process, especially by hindering verification of the actual intent behind implemented changes.

The changes implemented by the legislator in the realm of common courts engender controversy not only as to their sense and reasons underpinning them, but primarily as to their compliance with constitutional and international legal standards. Only a wholesale evaluation of amendments introduced by successive acts adopted in 2016-2018 provides a clear image of the actual transformation of the Polish common court system to highlight the threats such carries for the foundations of a democratic state with the rule of law, which include the separation of powers as well as judicial independence and impartiality. Below, the most important changes are presented in chronological order and evaluated with respect to their impact on the system and organization of common courts.

5.2. Changes introduced by the Act dated 30 November 2016 amending the Law on the System of Common Courts and Certain Other Acts

The act contains two material changes concerning common court judges. First, it makes judges financial declarations public. The reasoning for the change is limited to a single sentence, which indicates that introduction of public financial declarations of judges "aims to reinforce trust in courts as institutions and to the judges themselves." Without negating the need for such declarations to be filed and verified, the legislator in no way indicates that making financial declarations public will in any way contribute to achieving the intent for which there filed. There is also no showing that the existing methods of verifying financial declarations by specialized state services do not allow for effective audit of judicial assets and disclosure of any improprieties in this realm. Furthermore, it is

difficult to find convincing the justification put forth by the legislator, i.e. reinforcing trust in the courts, because civic trust in the courts depends to a large extent on the way courts work and the image of the court system portrayed in the mass media rather than the fact of whether judges' financial disclosures are made public or not.

Second, the referenced amendment introduces an important change to disciplinary proceedings against judges. It extends the statute of limitations for disciplinary violations from 3 to 5 years and, in the event of initiation of such proceedings in the above-mentioned period, from 5 to 8 years from the commission of the alleged act. The legislator does not justify this change in any convincing manner, e.g. by referencing statistics showing that in practice there is a problem of numerous dismissals of disciplinary proceedings because their statute of limitations has tolled. The reasons for the bill indicate solely (and enigmatically) the need to "rationalize" provisions concerning disciplinary proceedings. The adopted solution does not beget systemic cohesion, as it introduces statutes of limitation that are longer than for crimes prosecuted by private indictment. Meanwhile, disciplinary violations usually do not even include the elements of a crime. Importantly, a disproportionately lengthy statute of limitations for disciplinary violations may, in practice, be exploited to initiate disciplinary proceedings against judges, e.g. for acts in the distant past, in order to indirectly pressure them. Taking into account the extremely far-reaching authority of the Minister of Justice to interfere directly in the course of disciplinary proceedings, the referenced threat seems actual (*compare* remarks in Section VI).

5.3. Changes introduced by the Act dated 23 March 2017 amending the Law on the System of Common Courts

The amendment produces the far-reaching subjugation of court directors (i.e. the individuals managing the ongoing administrative activities of a court) to the Minister of Justice and deprives the court president and judges of any influence whatsoever over the appointment of court directors. The adopted law now provides that the Minister of Justice shall appoint and dismiss court directors. The legislator has therefore moved away from the prior principle where the appointment took place upon the request of the president of a given court after conducting a competitive candidate selection procedure search as well as moving away from the principle that dismissal is possible based on reasons specifically enumerated in the statute. Secondly, after the amendment, it is the Minister of Justice who is the official superior of the court director, rather than the court president, as had been the case previously. These changes should be evaluated negatively. It is true that the Minister of Justice may intervene in the administration of courts. However, the administration of courts is not completely separated from the judicial sphere in which executive authority may not interfere. Implementation of various and seemingly administrative solutions into the functioning of courts may, in the absence of good faith, be exploited as an intermediate way of hindering judges' administration of justice. The general assembly of judges of a given instance and the court president should therefore have assured material influence over the appointment of the director since, in the system of interconnected bodies that comprise the judicial system, smooth and qualitative cooperation between the court director and its other bodies and judges is necessary. The lack of any participation whatsoever by individuals that are to work on a day-to-day basis with the court director in the

appointment process to that post, seems to clearly favor and privilege executive authority in management of the court system. It is also irrational as it may lead to inefficient execution of the court's duties. Additionally, there is no justifiable reason to get rid of the competitive candidate selection procedure in favor of an arbitrary choice made by a representative of the executive authorities. It seems unreasonable to favor appointment based on a nontransparent choice, which the Minister of Justice is in no way required to justify, over the selection of the best candidate in the course of an open and publicly available competitive process. We take a similar negative view of granting the Minister of Justice authority to arbitrarily dismiss the court director with the attendant lack of any power whatsoever by the president of the court and the judges over such action.

5.4. Amendments introduced by the Act dated 11 May 2017 amending the Act on the National School of Judiciary and Public Prosecution – Law on the System of Common Courts and Certain Other Acts

The act reintroduces into the Polish legal system the institution of a court assessor, intended to constitute a kind of preliminary stage to a judicial career. Importantly, in the ruling dated 24 October 2007, Ref. SK 7/06, the Constitutional Tribunal found that the court assessor institution, when subjugated to the Minister of Justice, violates the constitutional right to trial, which resulted in the expunging of this institution from the Polish legal order. Pursuant to the new regulations, the Minister of Justice appoints an assessor, selects the assessor's registered office and swears them in. The implemented solution raises fundamental constitutional doubts. The Constitution does not provide for the institution of court assessors, while with respect to judges it does provide that they shall be appointed by the President of the Republic of Poland, upon the request of the National Judiciary Council, for an indefinite term. Although, currently, the National Judiciary Council may object to the appointment of a specific individual as an assessor, taking into account that the majority of the Council's members will soon consist of individuals selected by the parliamentary majority (of which the Minister of Justice is also member), this potential objection remains a mere façade.

5.5. Amendments introduced by the Act dated 12 July 2017 amending the Law on the System of Common Courts and Certain Other Laws

1. The referenced amendment implements a far-reaching change in the procedure for selecting court presidents and awards extensive authority in this realm to the Minister of Justice. The Minister of Justice has now gained the authority to freely appoint presidents of common courts on all levels. The statute defines no criteria for the above choice nor does it involve representatives of the judicial bar association in any way. Notably, prior to the amendment, court presidents were appointed by the Minister of Justice after consultation with the general judicial assembly of a given instance and, in the case of regional courts, also in consultation with the President of the Court of Appeals. If the judicial assembly negatively opined a candidate, the Minister of Justice could appoint him only after obtaining a positive opinion from the National Judiciary Council. A negative opinion of the National Judiciary Council was binding upon the Minister of Justice. Meanwhile, district court presidents were appointed by the President of the Court of Appeals after consultation with representatives of the judges. The

procedure for appointing vice presidents of common courts were similar. The implemented amendments violate the principle of the separation of powers and independence of the courts, which the Constitutional Tribunal construes to mean a prohibition against awarding the Minister of Justice a dominant position in selecting individuals to hold the post of court president, because it is not possible to unequivocally separate the judicial and administrative functions performed by these individuals. The new statute threatens judicial impartiality as a court president who is dependent on a representative of the executive authority has far-reaching opportunities to influence judges' execution of their official obligations. This influence runs from issues related to a judge's employment relationship and ends with the authority to evaluate a judge's work, which impacts their professional development, e.g. finding defects in the efficacy of court proceedings, petitioning to initiate disciplinary proceedings by the president of a regional or appeals court.

2. The referenced amendment authorizes the Minister of Justice to dismiss the president or vice president of the court in cases that include the "perseverant failure to perform official duties" or a finding of "particularly low effectiveness in the administrative supervision or organization of work in the court or lower courts." Wording that allows a purely political body, i.e. the Minister of Justice, discretion to practically fill-in these imprecise terms violates the standards of bona fide legislation and application thereof may become a way to interfere with the independence of courts and impartiality of judges. We also negatively evaluate the weakening of the National Judiciary Council's position in the procedure of opining on the intent to dismiss court presidents and vice presidents. A negative opinion is no longer binding upon the Minister of Justice in every situation, but only when such decision is made by a two-thirds majority.

3. A transitory provision awards the Minister of Justice unlimited authority to dismiss court presidents and vice presidents in the course of their terms for a period of six months from the date the law comes into force. Application of this authority does not even require the Minister of Justice to provide justification and is thereby completely discretionary. Furthermore, presidents of appellate and regional courts active upon the date the law comes into force as well as those newly appointed pursuant to the procedure provided in the amendment, shall be required to, within six months, review administrative positions (department heads and their deputies, section managers, inspectors) in their subordinate courts and, during that period, may dismiss any judge without granting them the opportunity to submit justifications and without seeking opinion from the board of the court. Permitting the arbitrary termination court presidents and vice presidents prejudices the independence of the judiciary because the duration of the terms of common court presidents and vice presidents is one of the factors reinforcing the independence of individuals directly responsible for the functioning of the judiciary, both within that community as well as with respect to the other branches of government. Set term lengths produce a statutory guarantee of autonomy in managing courts even in the face of having to take decisions unpopular within the judicial community. With respect to the legislative and executive authority, set terms allow for the separation the world of politics from the courts and reinforcement of judicial authority, which keeps the other two branches of government in check. The adopted amendment enables the Minister of Justice to select court staff according to his own murky and undisclosed criteria. Meanwhile, the lack of an obligation to present any reasoning for making personnel changes evidences a lack of respect for the separation of powers and the view that judicial authority is an extension of the power of the Minister of Justice, which evokes pejorative associations

with the Communist People's Republic of Poland. As found by the Constitutional Tribunal in its ruling dated 18 February 2004 (K 12/03), the authority of the Minister of Justice to dismiss a court president does not contain the risk of undue and arbitrary interference by the executive power into the functioning of the court only when it is based on definable and predictable foundations.

The legislator reinforced the chilling effect over the judicial community by applying a temporary "period of consideration" by the Minister of Justice over firing court presidents and vice presidents and adding an obligation for them to review administrative positions (department heads and their deputies, section managers, inspectors) in subordinate courts. This review engendered a double negative effect, because it gave rise to the temptation to dismiss judges only for the purpose of fulfilling the Minister's expectations while also attenuating the authority of the justice system, as the public interprets such activity as a form of "purging" the judiciary.

4. Other changes that require evaluation are those in the procedure of internal administrative oversight over inspections of particular court departments, the manner in which inspectors are appointed, as well as the abolition of provisions on the work evaluation and career planning systems for judges. Prior to enactment of the amendment, particular court departments were inspected every four years. Currently, they will be conducted "as needed," particularly taking into account the results of administrative oversight, a fact to be decided in each instance by the court president. Importantly, as part of inspecting a court department, the evaluation of a judge's work includes their efficacy, professional competence with respect to the methodology of work and professionalism, as well as specialization in reviewing particular kinds of cases. The new approach moves away from the principle of the quadrennial review of every court department in favor of discretionary decisions to order inspections where no criteria have been defined aside from the general provision "as needed." The new procedure for selecting judicial inspectors include a requirement to obtain approval of the candidacy from the Minister of Justice.

5. The referenced amendment introduces a model of a powerful system of control by the Minister of Justice over the common courts. That system is based on proprietary authority to supervise as well as powerful influence over individuals holding posts in courts, which, in the minds of its authors, is intended to improve court efficacy. However, granting this powerful authority to the Minister of Justice was not preceded by material analysis and therefore it is unclear on what basis the authors prognosticate "returning the courts to the people" and the end of "judgeocracy." These aims are to be implemented by management staff selected anew by the Minister of Justice, who will have interim direct influence over court presidents and vice presidents or indirect influence (over other functionaries) on the appointment of nearly 4000 administrative positions in the common court system. The scale of potential changes raises questions about the future of the judicial system and serious doubts as to the limits of allowable interference by the executive into the system and functioning of judicial authority. The changes laid out above also upend the system for evaluation of judges' work introduced in 2012, which implemented a permanent and cyclical process for evaluating the work of every judge based on significant evaluation criteria such as professionalism, respect for the rights of the parties and professional education.

6. The analyzed amendment provides that when a judge reaches the age of retirement, the Minister of Justice may consent to his or her continued service, considering the rational use of judicial common court staffing arising from the workload of particular courts. That procedure is set in motion at the

initiative of a given judge who notifies the Minister of Justice of the desire to continue in a given post and presents certification that he or she is of appropriate health to perform judicial duties. Prior to adoption of the act, the physician's certification was binding in allowing judges to continue ruling. Currently, irrespective of the judge's health, the Minister of Justice is granted completely discretionary power here. We evaluate this formulation negatively as did a ruling of the Constitutional Tribunal dated 24 June 1998, (K 3/98), which directly found that it is impermissible to grant the consent outlined above to a political body, as had been the case in the People's Republic of Poland.

5.6. Amendments implemented by the Act dated 8 December 2017 to the Law on the Supreme Court

1. It is important to highlight how far-reaching the authority of the Minister of Justice - who is a politician, and his post currently amalgamates the function of the Public Prosecutor General and, as such, has broad authority to influence the functioning of the prosecutorial service, including the ability to directly interfere in the course of every ongoing criminal proceeding – in the sphere of the organization and course of disciplinary proceedings. As adopted, the amendment radically disturbs the proper balance between proceeding participants and threatens the neutrality and impartiality (especially objective impartiality) of disciplinary bodies.

2. These regulations provide that the Minister of Justice shall control the selection of judges to review disciplinary cases. The Minister shall appoint a disciplinary court judge at a Court of Appeal by selecting a judge of the common court with at least a 10-year judicial tenure. This shall occur after the Minister applies for a nonbinding opinion of the National Judiciary Council, which is appointed by the governing parliamentary majority. The Minister of Justice shall further define, by way of an ordinance, the number of judges sitting in disciplinary courts at the courts of appeal.

3. The Minister of Justice also has extensive authority to appoint disciplinary investigators in the disciplinary cases of common court judges. The Minister appoints the Disciplinary Investigator of Common Court Judges and two Deputy Disciplinary Investigators of Common Court Judges. Meanwhile, the Disciplinary Investigator of Common Court Judges appoints deputies of the disciplinary investigator acting at appellate courts and at regional courts. The appointment is made from among three candidates presented by the judges. This is the extent of the judges' influence on the process of selecting disciplinary investigators in disciplinary cases. Furthermore, the Disciplinary Investigator of Common Court Judges and his Deputies may take over any case being conducted by another investigator, which decision shall be binding upon the latter. The Minister of Justice may also appoint a Disciplinary Investigator of the Minister of Justice to conduct any case concerning a judge, and such appointment excludes another investigator from acting on the case. In practice, this means that the Minister of Justice has discretionary authority to initiate disciplinary proceedings in any disciplinary case and may, at his discretion, appoint an investigator in such a case. Furthermore, the judges sitting on the disciplinary court (in the first instance) are also appointed thereto by the same Minister of Justice. Importantly, the Disciplinary Investigator of the Minister of Justice may be any judge of the common courts or Supreme Court and the manner and criteria for their selection are completely arbitrary. What is more, in cases of disciplinary violations that meet the elements of intentional indictable offenses, The Disciplinary Investigator of the Minister of Justice may also be a

prosecutor indicated by the National Public Prosecutor. Thereby, the prosecutor who is a party to the criminal proceeding ongoing before the court, may also initiate and join ongoing civil proceedings, attains the authority to charge a judge in a disciplinary proceeding.

4. The far-reaching authority of the Minister of Justice over judicial disciplinary proceedings also appears in the course of said proceedings. The disciplinary investigator is not independent in investigating the case he or she is conducting. If the disciplinary investigator finds there is no foundation to prosecute a judge, the Minister of Justice may file an objection to that decision, which obligates the investigator to continue the proceeding and carry out the Minister's binding directives. The disciplinary investigator will therefore be forced to conduct a proceeding even in the event he or she is convinced the investigated behavior of the judge does not amount to a disciplinary violation.

5. Aside from the form of organization of disciplinary proceedings, we would like to expressly highlight the flagrant and systemic violations of the right to a fair trial in the course of disciplinary proceedings.

First, the amendment provides that the disciplinary court will conduct proceedings despite the warranted absence of the notified accused or their attorney, unless this is deemed to prejudice the good of the disciplinary proceeding.

Second, an evidentiary preclusion has been introduced in disciplinary proceedings, hitherto unknown in criminal proceedings in such form. It provides that in providing notice of charges, the disciplinary investigator requires the accused to present in writing explanations as well as any evidentiary materials within 14 days of receipt of the disciplinary charges. If the accused judge violates this obligation, the disciplinary investigator may exclude evidentiary materials submitted by the accused after the 14-day term, unless the accused shows he or she was previously unaware of the evidence. A similar formula also applies in proceedings before the disciplinary court.

Third, disciplinary proceedings provide for the possibility of assigning the accused judge an *ex officio* defense lawyer although the activities associated with assigning an *ex officio* defense lawyer and his or her initiating a defense, do not stay the course of proceedings. Therefore, while the defense lawyer receives notice of appointment and begins to review case files, contact the client, and prepare a defense, the proceedings may continue or even be completed. As such, the accused judge is deprived of the opportunity to take part in the proceedings when he or she cannot do so for objective reasons. Further, the guarantee of respecting the judge's rights in the form of appointing an *ex officio* defense lawyer is actually only illusory, since the lawyer receives no opportunity to prepare for the defense.

6. The amendment has significantly expanded the scope of disciplinary penalties that decrease the pay of judges found in violation. The possibility of decreasing pay of up to 50% for a term ranging from six months to two years has been implemented in lieu of a maximum 20% pay reduction. The levying of such a fine automatically blocks the judge from promotion to a higher judicial post for a term of five years. Therefore, the effects of a disciplinary decision may be extremely financially damaging for a judge.

6. Conclusions

The measures adopted by the ruling majority, the Government and the President outlined in this Report appear to intend to ensure that the executive and legislative branch can take control of the judiciary and as such they raise serious concerns about the separation and independence of courts and tribunals is in place in Poland, as required by Article 173 of the Polish Constitution. By mandating

individuals with no powers to rule on cases in the Constitutional Tribunal to do exactly that and to manage the institution and by allowing it to be lead for an individual appointed Constitutional Tribunal President in breach of applicable legislation the ruling majority has annihilated the centralized constitutional review process in Poland. The constitutional court is bare active and it gives priority not to cases filed by citizens but to those filed by the governing majority. The reform of the Supreme Court with the underlying intention to destroy an 100-years old institution, to replace it with a court controlled by the executive authority, raises serious concerns. By lowering the retirement age of Supreme Court judges the institution will see the attrition of its most experienced jurists and the influx of judges seconded by the Minister of Justice. The termination by statute of the constitutionally defined six-year term of the First President of the Supreme Court and the four-year terms of members of the National Judiciary Council appointed from among judges constitute a dangerous precedent, which may cause the practice to spread. The parliament can begin to dismiss constitutional bodies that are neither controlled nor answerable to parliament. The appointment of 19 National Judiciary Council members elected by the Sejm represents a complete takeover of this body by the lower house of parliament. The National Judiciary Council with members who are not endorsed by their peers or are political appointees will not safeguard the independence of courts and impartiality of judges, as required by Article 186 Paragraph 1 of the Constitution.

Furthermore, the reform of common courts implemented between 2016 and 2018 is clearly leading towards courts and judges being captured by the executive branch represented by the Minister of Justice. The overall assessment of the amended the Law on the Common Courts System has demonstrated that the Minister of Justice has been vested with a far-reaching and often completely discretionary power to interfere with the staffing of common courts and to indirectly influence judges and control their careers. First and foremost, the Minister of Justice has gained control over appointing court assessors. Combined with the control over the education of future assessors and judges at the National School of Judiciary and Public Prosecution, the powers of the Minister are now enormous in terms of who administers justice in Poland. Secondly, not only can the Minister of Justice control the administration of courts but he/she will have extensive authority to appoint common court bodies, including court presidents, vice presidents and directors. Thereby, the Minister of Justice exerts an extremely powerful influence over the workings of courts and indirectly over the careers of judges and the quality of their working environment. Note the discretionary nature of the Minister's decisions and the near-complete marginalisation of the professional associations of the judicial branch. Thirdly, the Minister of Justice has extensive influence on issues that materially affect the status of common court judges. Examples include the discretionary consent for judges to continue serving after reaching the retirement age. However, the most significant is the alsmost total control over the appointment of bodies responsible for conducting disciplinary proceedings against judges and for prosecuting in these cases, as well as the capacity to directly influence any disciplinary case, anything from opening cases to forcing continuation even when the disciplinary ombudsman finds no reasonable ground for it. The above is compounded by disciplinary hearing regulations that violate elementary procedural fairness and by the unreasonably long statute of limitations, which applies to disciplinary violations. The big picture of the reform provides ample evidence of the unreasonably excessive ministerial control of the entire system of justice. Equally significant is the fact that these control mechanisms lead to actual risks of abuse and informal pressure on judges. Furthermore, there

is a chilling effect associated with the very awareness among judges of the sheer power of the Minister, e.g. through disciplinary proceedings. This power may easily be abused to repress judges who fail to meet the expectations of their political masters. The disproportionate influence of executive power over courts is of a systemic nature. It is visible at every stage of the judicial career, from the appointment of an assessor, through the appointment of a judge, possibly the administrative functions of the common court body, to the discretionary power to extend one's active judicial career beyond the retirement age. This complete image cannot reasonably be reconciled with the respect for the rule of law, democracy, the division of powers, including the separation of judicial authority, as well as court independence and judicial impartiality.

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The **Legal Expert Group** operating since 2016 at the Stefan Batory Foundation evaluates legal changes proposed by the government and parliament that concern the state system and locus of public and civic institutions in the legal order. Group Members monitor legal bills and analyze them primarily for compliance with the Polish Constitution, international norms, and the democratic rule of law. They also evaluate the level of interference of regulations with civil and human rights as well as the course of systemic changes set by adopted law.