



IUSTITIA

Polish Judges Association

**THE RESPONSE OF THE POLISH
JUDGES ASSOCIATION "IUSTITIA"**

TO THE WHITE PAPER

**ON THE REFORM
OF THE POLISH JUDICIARY PRESENTED**

**TO THE EUROPEAN COMMISSION
BY THE GOVERNMENT
OF THE REPUBLIC OF POLAND**

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THE RESPONSE OF THE POLISH JUDGES ASSOCIATION "IUSTITIA" TO THE WHITE PAPER ON THE REFORM OF THE POLISH JUDICIARY PRESENTED TO THE EUROPEAN COMMISSION BY THE GOVERNMENT OF THE REPUBLIC OF POLAND

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Introduction

Courts in Poland need good and stable legislation, informed reforms and public confidence. Judges in Poland do not question the importance of improving judiciary procedures and structures; on the contrary, they have urged politicians to make reforms for years.

The White Paper on Judiciary reforms presented to you by the Polish Prime Minister could have been a point of departure for an open and unfettered debate on the desirable reforms. Unfortunately, the content of the document suggests that it is not designed to lay down the facts that make the case for change in the enabling legislation and the structure of the judiciary. Facts must be based on the truth, the whole truth and nothing but the truth. Meanwhile, the White Paper does not present the whole truth; some facts and linkages are ignored; some facts may sometimes be true but suggest false impacts. Hence, the document has a different objective than the stated one. We believe it has been drafted to disguise a political attack against independent judiciary.

Therefore, we present our response to the White Paper (further also as WP) which seeks to:

- explain and present facts that have already occurred;
- defend the reputation of Polish judges, who are indeed European judges as well.

We cannot agree to be accused of the responsibility for the shameful rulings of the Communist courts in the 1950s. Most Polish judges started their careers in free and independent Poland.

The legislation that governs the judiciary has been gradually amended between 2015 and 2018. Change has accumulated and the single themes are now coming together to unveil a completely new perspective on the reform. Without changing the Constitution, the judiciary system and the status of courts within the three branches of government have been changed and exposed to political control. The judiciary is no longer a partner in the checks and balances mechanism. This marks the return of concepts that were known under Communism but were rejected in the Constitution of 1997. In Poland's history, the judiciary has hardly ever been respected and recognised by the political powers and this seems to be coming back now. When we raise our voice in defence of the independence of courts it is suggested that judges who turn against political authority will be ruthlessly eliminated through disciplinary proceedings (Deputy Minister of Justice Łukasz Piebiak).¹ Similarly, the Irish court which has filed a query to the EU Court of Justice and expressed its concern about the meaning of the

¹ <http://wpolsce.pl/magazyn/2495-prosze-to-wyjasnic-edyta-holdynska-rozmawiala-z-lukaszem-piebiakiem-wiceministrem-sprawiedliwosci>

judiciary reform in Poland, has been described by Deputy Minister of Justice Marcin Warchol as politically motivated².

While we have actively sought opportunities to debate issues we have not been given the chance to raise the topic of reforms with the Prime Minister or the Minister of Justice. Now, when the rule of law infringement procedure has been launched against Poland we feel saddened, hurt and embarrassed. However, we are open to discussion about the required reforms provided that the foundation, i.e. court independences of politicians, is preserved. We will support the Government in any change that respects this fundamental principle.

This response to the White Paper presented by the Polish government to the European Commission has been drafted by the Iustitia Association of Polish Judges and a panel of experts in order to provide a thorough and accurate portrayal of the reform of the Polish justice system that has continued over two and half years in Poland.

The response generally follows the structure of the White Paper. A separate chapter has been added about disciplinary proceedings to emphasise its importance and for reasons of methodology. The order of chapters has been slightly modified. We always match our specific points of our response with the relevant chapter. We hope this format is clear enough.

The Iustitia Association has presented its response to the White Paper³ compendium in a separate document.

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² <https://www.irishtimes.com/news/crime-and-law/poland-accuses-high-court-of-playing-political-games-1.3429921?mode=amp>

³ <https://iustitia.pl/informacje/2172-response-to-the-white-paper-compendium-on-the-reforms-of-the-polish-justice-system-presented-by-the-government-of-the-republic-of-poland-to-the-european-commission>;
https://iustitia.pl/images/pliki/response_to_the_white_paper.pdf.

I. Why does Poland need to reform its judiciary **(Chapter 1 of WP, except points 27-32, which are discussed in Chapter IV)**

1. Low Public Confidence in the Justice System (points 1-3)

Survey results quoted in the White Paper are selective and biased. A low level of public confidence in judges presented in the Court Watch report quoted in the White Paper, is coupled with a generally low public confidence in the legal system in Poland.

Individuals whose opinions stem from personal experience with administration of justice are equally likely to express positive and negative views about courts, with a slight overrepresentation of favourable opinions (50 per cent versus 45 per cent)⁴.

According to the 2017-2018 World Justice Project, the Polish judiciary has a strong record on the no corruption scale (the index is 0.86, where 1 is an ideal situation). The legislative branch is on the other extreme with the index at 0.52⁵.

Auditors and consultants at Grant Thornton have calculated that 27,118 standard pages of primary and secondary legislation (laws and regulations) were adopted in Poland in 2017. This was 15 per cent less than in the previous record year when some 30,000-32,000 pages of new laws had been promulgated⁶. The practice, widespread in the years 2018-2018, of submitting bills by a group of Members of Parliament, which allows bypassing public consultations, is conducive to inflation of legislation. The inflation of legislation, in turn, must have a detrimental impact on public confidence in the legal system.

Such low public confidence in the legal system also has its source in the lack of meaningful publicly funded legal assistance. Poland is among EU Member States with the lowest public spending on legal assistance equal to a modest EUR 0.65 per capita (compare it to Lithuania: EUR 2.02 euro, Estonia: EUR 2.92, Germany EUR 8.5, Ireland EUR 17.32)⁷.

It must not be a response of the ruling party to the perception of courts as not trustworthy to politicise them and to use the excuse that its decisions are fulfilling the will of the sovereign whom this party represents. More than 60 % of Poles oppose politicisation of courts and this means that making courts more politicised will not make them more trusted.⁸

⁴ Centrum Badania Opinii Społecznej. 2017. Społeczne oceny wymiaru sprawiedliwości. Komunikat z badań nr 31/2017. http://www.cbos.pl/SPISKOM.POL/2017/K_031_17.PDF

⁵ <http://data.worldjusticeproject.org/#/groups/POL>

⁶ http://barometrprawa.pl/wp-content/uploads/2018/02/barometr_prawa_2018.pdf

⁷ https://public.tableau.com/views/Budget2010-2012-2014/GDPBudget?:embed=y&:display_count=yes&:toolbar=no&:showVizHome=no

⁸ <http://m.newsweek.pl/plus/peryskop/sondaz-polacy-sprzeciwiaja-sie-upolitycznieniu-sadow,artykuly,421269,1,z.html>

More than half of the respondents (53%) believe that NCJ judges should be elected by judges and only every fifth respondent holds the view that they should be elected by the Sejm.⁹

In the view of judges themselves, (a survey on judicial independence carried out by the European Network of Councils for the Judiciary¹⁰) one out of three judges in Poland are not sure about objective criteria of promotion. This aspect received the lowest score among judges in Spain — 74 % of respondents feel that judges in their country are promoted based on criteria other than experience and competency and as many as 84 % actually criticise the promotion process in this respect. Meanwhile, the Polish Minister of Justice has pointed to no other country than Spain as a role model for Poland.

Hard statistics, i.e. statistics not based on perceptions (e.g. in the World Bank reports), but on data from court case registers, reveal that trials in Poland are not excessively long in comparison with other EU Member States. According to the EU Justice Scoreboard, Polish courts fall in the mid-range of the distribution of the time needed to close a civil or a business case in the first instance¹¹. The duration of criminal cases is shorter than the median of the Council of Europe member countries (in the first instance, it is 99 workdays with the median at 112; in the second instance it is 37 days with the median at 75)¹² (see point I.2)

At the same time, Poland scores 4th in Europe in terms of the number of cases filed in 1st instance courts per capita (with about 26 cases per 100 citizens; compare with Czech Republic: about 9 or Italy: about 6). The number of judges per 100,000 inhabitants puts Poland on position number 8 according to the EU Justice Scoreboard and the numbers are falling each year. There are not standing non-professional judges in Poland as opposed to France which has about 6,900 such¹³ or Spain with about 7,600¹⁴.

The legislation enacted as part of the reform of the judiciary (on the National Judiciary Council, the Law on the Common Courts System and on the Supreme Court) has no provisions that would help shorten court trials. On the contrary, the forced retirement of a large proportion of judges and the introduction of an extraordinary appeal directs a massive wave of cases concluded with final and binding judgments over the last 20 years (since 1997) back to courts. This will make proceedings even longer.

As far as spending on courts is concerned official EU statistics show that Polish spending on courts fall within the European average (EU average = EUR 36/per capita, Poland = EUR 37/per capita)¹⁵.

⁹ <http://www.rp.pl/Polityka/170139767-Sondaz-Rzeczpospolitej-Kto-powinien-wybierac-czlonkow-Krajowej-Rady-Sadownictwa.html>

¹⁰ European Networks of Councils for the Judiciary. 2016. Independence and Accountability of the Judiciary and of the Prosecution. ENCJ Report 2014-2015.

¹¹ http://ec.europa.eu/newsroom/document.cfm?doc_id=43918

¹² https://public.tableau.com/shared/364DJG7ZT?:display_count=yes&:showVizHome=no

¹³ http://www.coe.int/T/dghl/cooperation/cepej/evaluation/2016/publication/REV1/2016_1%20-%20CEPEJ%20Study%202023%20-%20General%20report%20-%20FR.pdf

¹⁴ <http://www.poderjudicial.es/cgpi/es/Temas/Estadistica-Judicial/>

¹⁵ European judicial systems. Efficiency and quality of justice. CEPEJ Studies No.23

2. Excessive length of court proceedings (theses 4-9)

Excessive length of court proceedings affects but many European justice systems. The extent of this problem is clearly evidenced by the case law of the European Court of Human Rights. For the 16,399 sentences issued by Strasbourg in the years 1959-2016 that found at least one violation of the right or freedom guaranteed by the European Convention for the Protection of Human Rights and Fundamental Freedoms, as many as 5,541 rulings found a breach of the right to a trial by the court without undue delay¹⁶. Importantly, ECtHR observes that the excessive length of proceedings before national courts as well as the ineffectiveness of mechanisms that would prevent this are related to a number of systemic and structural problems of the judiciary. In the present decade, ECtHR established the existence of these issues in **Germany**¹⁷, **Greece**¹⁸, **Bulgaria**¹⁹, **Turkey**²⁰ and **Hungary**²¹. Prior to that, the problem of excessive length of proceedings has been faced by **Italy**, among others .

It is true that **ECtHR found a systemic problem regarding the excessive length of proceedings in Poland** (in the decision of 7 July 2015 regarding the case Rutkowski and others against Poland²²). However, **the decision mainly concerned the faults in the structure and operation of the means of protection against excessive length of proceedings in Polish law, i.e. the complaint about the length of proceedings, rather than the duration of court proceedings in Poland**. Consequently, corrective measures have been introduced by the legislator (Act of 30 November 2016 amending the Act on the Common Court System and certain other acts²³, which entered into force on January 6, 2017).

An investigation of the excessive length of court proceedings should not be based solely on subjective factors (opinion polls). In the era of the technological revolution, when tools than enable rapid access to information and communication have become widely available (mobile phones, e-mail, instant messaging, social media), it is hardly surprising that the proceedings of judicial authorities are perceived to be too slow by members of the general public. This perception can breed misunderstandings and lead to social disapproval. However, fulfilling the expectations of the general public regarding the duration of court proceedings is impossible for one important reason. **In democratic states that respect the rule of law, procedural regulations must guarantee that the rights of individual citizens will be observed, which frequently slows down the progression of court proceedings.** For instance, according to the ECtHR, the right to a sufficient time and ability to prepare a

¹⁶ Violations by Article and by State 1959-2016 - http://echr.coe.int/Pages/home.aspx?p=reports&c=#n1347956700110_pointer.

¹⁷ Cf. ECtHR decision of 2 September 2010 in the case of Rumpf v. Germany, application No. 46344/06.

¹⁸ Cf. ECtHR decision of 21 December 2010 in the case of Athanasiou and others v. Greece, application No. 50973/08; ECtHR decision of 3 April 2012 in the case Michelioudakis v. Greece, application No. 54447/10; ECtHR decision of 30 October 2012 in the case of Glykantzi v. Greece, application No. 40150/09.

¹⁹ Cf. ECtHR decision of 10 May 2011 in the case of Dimitrov and Hamanov v. Bulgaria, application No. 48059/06 and 2708/09; decision of the ECtHR of 10 May 2011 in the case of Finger v. Bulgaria, application No. 37346/05.

²⁰ Cf. ECtHR decision of 20 March 2012 in the case of Ümmühan Kaplan v. Turkey, application no. 24240/07.

²¹ Cf. ECtHR decision of 16 July 2015 in the case of Gzásó v. Hungary, application No. 48322/12.

²² Applications No. 72287/10, 13927/11 and 46187/11.

²³ Journal of Laws of 2016, item 2103.

defence is one of the basic rights of the accused and part of the minimum European standard. At the same time, **one should doubt in broad public support to a radical acceleration of court proceedings at the expense of the reduction of rights of the person who is a party to these proceedings.**

An investigation into excessive length of court proceedings should not be based on the selective use of any particular indicator (e.g., the number of judges presiding in courts). Judicial efficiency does not only depend on the number of judges employed in courts, but also on other factors such as the caseload and the number of office staff employed in courts. The White Paper cites statistical data on the number of judges in Poland in comparison to the number of judges in Germany and France. Crucially, however, the data is presented in an extremely biased manner, and does not paint a truthful image of the Polish judicial system in the European context.

- First, the White Paper states that Poland has the second largest number of judges among the European Union member states (after Germany). However, in terms of the number of judges per 100,000 inhabitants, Poland ranks behind such countries as the Czech Republic, Croatia, Slovakia, Slovenia, Serbia and Hungary, and has a ratio almost identical to that of Bulgaria, a fact that the White Paper neglects to mention. Another factor entirely left out of the analysis is the number of lay judges; in many countries lay judges adjudicate (often independently) in cases that require a professional judge in Poland²⁴.
- Second, the White Paper states that France, which is twice as large as Poland, has a lower ratio of judges per 100,000 inhabitants than Poland even if lay judges are included in the total. It is worth noting, however, that according to the latest report of the European Commission for the Efficiency of Justice (CEPEJ) published in 2016 (based on data from 2014), Poland has 10,096 professional judges while France has 6,935. The number of lay judges is 13,933 and 24,921, respectively. Thus, while it is true that there are more professional judges in Poland, it is also true that Poland has far fewer lay judges than France. It should be further emphasised that lay judges in Poland cannot settle cases independently of a professional judge. In France, the competences of lay judges extend to certain cases under the labour law and most commercial and bankruptcy disputes²⁵. This clearly shows that a significant number of court disputes that require involvement of a professional judge in Poland are settled by lay judges in France.

Another key factor neglected in the White Paper is the courts' caseload. In Poland, the caseload indicator per 100 inhabitants was 2.83 for criminal cases resolved in the first instance, and 3.19 for civil and commercial disputes resolved in the first instance. These indicators for France were 1.52 and 2.64, respectively; in Italy they were 2.43 and 2.61, and in Germany 1.31 and 1.78²⁶. The above data demonstrate that **simple comparisons of**

²⁴ European judicial systems. Efficiency and quality of justice. CEPEJ STUDIES No. 23, p. 95-97.

²⁵ European judicial systems. Efficiency and quality of justice. CEPEJ STUDIES No. 23, p. 90, 95-96.

²⁶ CEPEJ data for 2014 https://public.tableau.com/shared/364DJG7ZT?:display_count=yes&:showVizHome=no.

the number of professional judges are not enough to allow for any conclusions about a possible defect in the Polish judiciary system.

The White Paper indicates that the reason for the excessive length of proceedings is not related to underfunding. The paper argues that Poland is at the forefront with regard to public spending on the judiciary as a percentage of the central state budget and GDP. However, **if funding for the judiciary is calculated per capita, Poland drops to the middle of the ranking, spending significantly less than Western European countries and Slovenia²⁷.**

It is clear that state funding is not the only important indicator of the financial state of the judiciary. In addition, it is worth emphasising that there is no data connecting the amount of funding to the quality of the judiciary process. To confirm the existence of this relationship it would be necessary to verify how judiciary funding is spent in terms of investments, fixed assets, remuneration, etc., and how these factors affect the long-term efficiency of court operations.

The White Paper does not present any evidence that the reforms carried out will accelerate court proceedings, solving the problems of the Polish justice system. Without doubt, neither the reform of the National Council for the Judiciary nor the Supreme Court reform will improve the situation in this respect. In recent years, out of several million cases resolved every year by the courts, over 11,000 have been sent to the Supreme Court. Furthermore, changes in the organisation of the Supreme Court will increase the waiting period for decisions of the highest instance, at least in the nearest future. **No mechanisms that could feasibly accelerate the speed of court proceedings in any way have also been introduced in the reforms of the Polish common courts. In fact, rather than improve the current situation, the introduced changes will cause it to deteriorate further. The changes in the system of common courts, which enable the Minister of Justice to yield direct influence on the activities of courts, will result in a progressive erosion of trust and cooperation between judges, without which proper and effective administration of justice is inconceivable.** As the Minister of Justice uses arbitrary criteria for appointing and dismissing court authorities (presidents, vice presidents, directors) without any consultation with the judiciary, and often against the express opposition of the judges' self-government bodies for the manner and nature of the changes, the plausibility of the above-mentioned scenario is vividly demonstrated.

Contrary to the assurances of the executive that the aim of the judiciary reforms is to speed up ongoing court proceedings, it should be pointed out that the measures taken so far not only cannot cause this effect, as exemplified by the laws changing the construction and members of the National Council of the Judiciary and the Supreme

²⁷ A. Siemaszko, B. Gruszczyńska, M. Marczewski, P. Ostaszewski, A. Więcek-Durańska, Sądownictwo. Polska na tle pozostałych krajów Unii Europejskiej [Judiciary. Poland compared to other European Countries], Warsaw 2016, p. 16 (based on CEPEJ data for 2014).

Court, but would also disorganise the work and obstruct the operation of the judiciary in its current form.

This is clear from the fact that the Minister of Justice can block the appointment of judges to vacant judicial positions. According to the Association of Polish Judges "Iustitia", as many as 880 judges are unable to adjudicate in court as a consequence of the actions and omissions of the Ministry of Justice. It is estimated that there are 540 vacant judicial posts due to the lack of announcements that begin the nomination procedure for new judges²⁸. This equals approximately 5% of all positions for judges in Poland. It should be taken into consideration that in lower-level courts, particularly departments that only employ several judges, each vacant post could mean shrinking of staff resources by a much larger percentage than the 5% estimated above. To illustrate the scale of shortages in the number of judges, it is close to the number of judges in the entire Poznań appellate court district. With 820 judges, the Poznań appellate court district is one of the largest districts in Poland, with 1,122,236 cases resolved in 2016. Such significant staff shortages would obviously translate into the number and speed of resolved cases. Failure to fill vacancies also has negative consequences for the Supreme Court. It should be pointed out that only 83 out of the 93 judge positions in the Supreme Court are currently filled²⁹. In May 2017, the National Council of the Judiciary adopted a resolution to present the President of the Republic of Poland with three candidates to serve as judges in the Criminal Chamber of the Supreme Court. Although this number constitutes over 10% of the Chamber, these judges have not been appointed to this day. **Therefore, taking into account that none of the actions undertaken could realistically improve the length of court proceedings, it is clear that the executive power's declarations of concern for the individual's right to have disputes resolved within a reasonable period amounts to no more than political rhetoric.**

Empirical data indicates that between 2016 and 2018 not only was there no acceleration in the number of resolved court cases but the situation deteriorated. **Recent statistical data for the first half of 2017 indicate that the number of unresolved cases has increased significantly in recent years. While in the first half of 2015 there were 2,268,086 unresolved cases, this number rose to 2,649,956 in the first half of 2016, and in the first half of 2017 it is already at 2,890,207 cases.** There was also a notable increase in the average disposition time of first instance cases. **While in the first half of 2015 court proceedings lasted on average 4.1 months, in the first half of 2016 this number climbed to 4.4 months, and already in the first half of 2017 it peaked at 5.3 months³⁰.** Contrary to government declarations, we are dealing with a situation in which the efficiency of courts is falling, and neither the nature nor the scope of the reforms appear to be able to counteract this problem.

²⁸ <http://www.iustitia.pl/informacje/1538-ujawniamy-517-nieobsadzonych-etatow-sedziowskich-w-polsce>

²⁹ As at December 31, 2016. Cf. Information on the activities of the Supreme Court in 2016, Warsaw 2017, p.15.

³⁰ Basic information on the activities of common courts - the first half of 2017 compared to previous statistical periods, Warsaw 2017, pp. 7 and 19.

In conclusion, not unlike the judicial systems in other countries, the Polish judicial system is at risk of excessive length of proceedings. However, the nature of changes introduced to the justice system by the government precludes improvement in the efficiency of court proceedings. The changes affect the organisation of the judiciary, whose impact on the duration of proceedings is distant at best. More importantly, however, **the introduced changes allow for a complete exchange of judiciary personnel (especially the changes regarding the Supreme Court and the presidents of common courts), which has nothing to do with improving the efficiency of court procedures.** It should also be emphasised that despite the personnel shortage in the judiciary, the Minister of Justice failed to ensure that the existing vacancies in the judges' posts be filled. Crucially, this appears to confirm that **the real purpose of changes in the justice system is not to accelerate court proceedings, which would primarily require the existing staffing needs to be addressed quickly and case administration procedures to undergo reform, but rather aims to exchange judiciary personnel through the politicisation of the National Council of the Judiciary, which proposes candidates for vacant judges' positions (see also thesis 47).**

3. Failure to settle with communism (theses 10-24, see also the answers to theses 184-200, below - in the last chapter).

1) Theses contained in items from 10 to 24 of the White Paper, entitled "Failure to settle with the communism", aim at creating the impression that even though almost 30 years have passed since the collapse of communism, the Polish judiciary is its last unchanged bastion in Poland. **This suggestion is not based on facts. The main thesis presented in the discussed points of the White Paper, that is the thesis on the failure to settle the accounts with communism in the Polish judiciary after 1989 is untrue, as demonstrated in detail in response to theses 184-200. Therefore, the remedy applied by the Government of the Republic of Poland in the form of a systemic reform of the Supreme Court and the removal of 40% of adjudicating judges is completely disproportionate. The very unverified statement that unspecified judges are "unworthy" of adjudicating cannot constitute grounds for unprecedented shortening of their term as justices of the Supreme Court, as well as shortening the term of office of the President of the Supreme Court. Such actions constitute a breach of the principle of irremovability of judges, which is the quintessence of independence.**

a) **First**, in 1990, 81% of judges were removed from the composition of the Polish Supreme Court, in comparison with the composition of this court before 1989. At the same time, other judges ruling in communist times remained in the Polish judiciary, as in other spheres of public life. Not every judge, just as not every public official working for the Polish state before 1989, performed their duties in an unworthy manner and thus should be deprived of the possibility to continue serving Poland. Meanwhile, the theses presented in the White Paper give the impression that the mere performance of office in the communist era by some

judges currently adjudicating in Poland constitutes a kind of contamination in the Polish judiciary. These claims also suggest that this contamination can only be removed by measures taken as part of the SC reform of 2017. These measures, however, are unconstitutional and lead to a personal purge in the Polish judiciary and which allow future political pressure on the judges. The position of the Polish Government in this respect is particularly difficult to understand due to the fact that among the MPs of the currently ruling party there are many people performing public functions in the communist era. A special case in this regard is MP Stanisław Piotrowicz who in the communist era, including during martial law, was a prosecutor and accused oppositionists, and was a member of the Polish United Workers Party in 1978-1989. Currently, he is the Chair of the Parliamentary Committee on Justice and Human Rights and is the main person responsible for changes to the Polish judiciary presented in the White Paper. We share the view that the past of a prosecutor or other state official is not an automatic obstacle to serving justice in free Poland. We apply this principle to everyone, equally. We regret that in the White Paper similar reasoning has not been applied to the judges.

- b) **Secondly**, the position presented in points 10-24 is based on the principle of collective responsibility unacceptable in a democratic state of law. Even if one accepts the claims about the lack of post-communist settlements of the Polish judiciary in goodfaith, the basis for such settlement should be the principle of individual responsibility of individual judges, not the collective responsibility of the judiciary as a whole. If it is stated that there are still people in the Polish judiciary who, due to their activities prior to 1989, are not worthy of being a judge, the Polish government should create a legal framework for conducting individual assessments of the conduct of these persons, with all procedural guarantees, including their active participation in the evaluation process and the right to defense. If it is found that there are actually grounds for a negative assessment of the activities of these people, it should be possible to make an individual decision regarding the continuation of their functions as judges. Meanwhile, without any assessment of the behavior of individual people, a legislative solution was proposed in 2017 to remove all judges from the Supreme Court from the judicial function (as was envisaged by the original draft law on the Supreme Court, supported by Minister Zbigniew Ziobro). After the President of the Republic of Poland vetoed the law containing this proposal, the Polish Parliament adopted a bill that ultimately removed 40% of the Supreme Court, again not judging individually the historical behavior of the judges currently forming its composition. Such action bears all the hallmarks of applying the principle of collective responsibility and as such does not fit in any way with either Polish constitutional standards or the standards of Western legal culture.
- c) **Thirdly**, it should be emphasized that the legislative tool adopted to settle the communist past of the Polish judiciary is contrary to the Polish Constitution. A careful reading of the presidential draft law on the Supreme Court (which was subsequently adopted by the Polish Parliament and became the applicable law)

indicates that the legislative tool that was deemed suitable for post-communist settlements was the reduction of the retirement age for Supreme Court justices down to 65 years of age. As the justification reads:

"It is often repeated that de-communization was carried out in the Supreme Court and there are no persons there who were involved in the activities of the Polish United Workers' Party. Meanwhile, it turns out that indeed, after 1989, the de-communization of the Supreme Court did take place, but, unfortunately, people who were associated with the Party were appointed to perform the honorable office of Supreme Court justices in free Poland. (...) Of course, it is possible to ask whether after such a long time that has elapsed since the beginning of the transformation, it is possible to investigate the justices of the Supreme Court regarding their commitment and use of the benefits in the People's Republic of Poland. Right after the change of the system, the jurisprudence of the Constitutional Courts of Central and Eastern European countries accepted cooperation with the previous system as a valid and admissible condition for elimination. Yet, in Poland such a step was never taken, and the Supreme Court and Constitutional Court have softened or directly pointed to the incompatibility of lustration laws with the Constitution of the Republic of Poland. They were often opposed by widely-understood judiciary circles, and many of those who did it under the slogans of defending democracy, did in fact, as it turned out later, defend themselves. It seems that currently it is difficult to construct a different objective verification condition than that resulting from the age limit and cooperation with the security services of the People's Republic of Poland."³¹

When assessing the legislative idea of the President of the Republic of Poland in terms of compliance with the Constitution, it should be pointed out that in accordance with Art. 180 (1) of the Constitution of the Republic of Poland, judges are irremovable, which is a key element of the constitutional protection of their independence. Regarding the principle of irremovability, Article 180 of the Constitution of the Republic of Poland provides exceptions, which - according to the *exceptiones non sunt extendendae* maxim - should not be interpreted in a broad manner. One of the exceptions provided for in Art. 180 of the Constitution is the retirement of a judge "as a result of illness or infirmity which prevents him discharging the duties of his office." (Art. 180(3) of the Constitution of Republic of Poland). In addition to this exception, Art. 180 4 of the Constitution of the Republic of Poland states that "a statute shall establish an age limit beyond which a judge shall proceed to retirement". The provisions of art. 180 (3) and (4) should not be interpreted in isolation from each other, and so in such a way that the determination of the age at which judges retire may be made freely and without connection with the reasons provided for in Art. 180 (3), that is illness or infirmity. If that were the case, it would mean that the parliament could determine at any time any age limit after which judges retire (e.g. 45 years), although judges at this age have adequate health to perform their function (*reductio ad absurdum*). The above interpretation leads to the conclusion that the statutory setting

³¹ Justification of the presidential draft law on the Supreme Court - <http://www.prezydent.pl/prawo/ustawy/zgloszone/art,17,projekt-ustawy-o-sadzie-najwyzszym.html>

of the age limit upon which the judges retire must be closely related to the loss of strength or illness. However, as the analysis of the justification of the adopted Act on the Supreme Court indicates, when determining the reduced age, after which the judges of the Supreme Court are to retire, the criteria contained in Art. 180 (3), so the issue of illness or infirmity, were not considered at all. In particular, it has not been shown that in recent times the health of 40% of the Supreme Court's composition has significantly deteriorated or the judges lost their strength to perform their functions. The only justification for lowering the retirement age is the need to make post-communist settlements specified in the justification to the act. The presidential draft clearly indicated that these settlements constitute its purpose, and the use of the age criterion is a tool for the implementation of these settlements ("objective verification condition resulting from the age limit and cooperation with the security services of the People's Republic of Poland"). The problem is that the Constitution of the Republic of Poland does not recognize de-communization as a constitutionally justified goal allowing to establish the age limit after which the judges retire. This means that the establishment of this limit not in order to prevent judges who, for physical reasons, are unable to adjudicate from doing so, but in order to make post-communist settlements is contrary to the Polish Constitution.

- 2) Responding to the individual theses contained in items from 10 to 24 of the White Paper, it should be pointed out that the vast majority of statements made there are strictly historical description of fraud and judicial offenses committed by the Polish communist regime using the judiciary and the active participation of certain judges. Nobody denies that these historical events occurred in Poland. However, due to the passage of time, these events have no impact on the functioning of the modern Polish judiciary (e.g. the trials conducted in Stalinist times, 60 years ago), or they require individual settlement of specific individuals, as mentioned above (in case of trials of oppositionists under martial law). Under no circumstances do these events justify the mass dismissal of Supreme Court justices and they cannot constitute a constitutionally acceptable reason for such changes in the judiciary that the Polish Government conducted.
- 3) It is not true, and on several levels, that changes introduced by the Polish government in the Polish judiciary are justified by the fact that for many years the judiciary was unable to judge the most important officers of the communist regime, including generals Wojciech Jaruzelski and Czesław Kiszczak. Bringing people to justice is always the result of many factors, only one of which is the functioning of the judiciary. Other key factors are the quality of the law on the basis of which judicial proceedings are conducted, for which the legislative authority is responsible, as well as the quality of the accusation for which the executive authority, represented by the prosecution, is responsible. The White Paper seems to indicate not only that in the case of the trials of the communist regime officers all the blame for their length lies with the judges, but it even suggests that the judges "could not close their trials" and thus prevented justice from being served. At the

same time, the authors of the White Paper do not give any justification for blaming the judges for failing to prosecute the prominent communist officers - a typical example of insinuations contained in the White Paper. Apart from all of the above, the White Paper does not show in any way why an adequate way to remedy the above errors would be changes in the Polish judiciary proposed by the Polish government, in particular how the seizure of political control over the National Council of the Judiciary and exchange of judges at the Supreme Court would have lead to a fair trial of communist officers.

- 4) A symbol of inadequacy of the White Paper regarding the communist past of Polish judges and the reforms proposed by the Government of the Republic of Poland is the case of Captain Pilecki, presented in the Paper. It is rightly portrayed in the Paper as evidence of the disgrace of the communist judiciary. However, the authors of the paper commenting on the case from 70 years ago do not mention that after 1989 in Poland the rehabilitation trial of Captain Witold Pilecki took place before the Supreme Court Military Chamber, and Stanisław Zabłocki acted as the defender there. He is currently the judge of the Criminal Chamber of the Supreme Court and the President of this Chamber. As a result of changes in the judiciary, carried out by the current authorities, justice Zabłocki, due to his age exceeding 65, will be removed from the Supreme Court. As it has been shown, his removal is in the opinion of the Polish authorities a way to settle the communist past of Polish judges. It is difficult to find a more glaring example of the inadequacy of changes introduced by the Polish authorities in light of the objective declared by these authorities.

4. Imbalance between judiciary and other powers

In thesis 25 accusations were raised concerning the ailments of the justice system, which, however, concern the relationship between the citizen and the court, and not the very principle of balance of powers. The seriousness of the accusations of the judges, relating to their respect for the right to a fair trial require an answer.

A. THE ACCUSATION CONCERNING LIMITED ACCESS TO THE COURT

- a) There are *a lot* of factors behind the *belief* that courts are *inaccessible*. The *major* lies in the poor level of legal education. Polish schools do not provide students with classes on the basics of *the law*. Such classes have been organized by SSP "*Iustitia*" and other NGO's for the past few years. However, through its negative recommendation regarding UE grants the Polish government has prohibited the Association from expanding such educational activities in schools.
- b) Difficulties in accessing courts also stem from the fact that Poland has no real system of providing legal advice. *Poland – along with three other former Eastern Bloc states (Slovakia, Hungary, and Croatia), as well as Malta - is among those UE members that spend the least money on such help. Our country's expenditure on that purpose is only 0.63 Euro/citizen (Latvia,*

Romania, Slovakia, Malta, Hungary, and Croatia spend even less). In the overwhelming majority of EU Member States, budget expenditure on legal aid is much higher than in Poland.³²

- c) Legal aid in the courts. The level of compulsory professional legal representation in court is among the lowest in Europe (only in the Supreme Court).
- d) High costs of legal proceedings are another, real obstacle. Moreover, lately the Ministry of Justice *has proposed* to increase those costs – some even four-fold (!) For instance, the cost of filing a divorce petition *was supposed to be* 2000 PLN (circa 500 Euro), *which could* significantly limit access to court.
- e) The claim regarding the “formalism cult” is unsubstantiated. It is difficult to tell *where* the authors of the White Paper find arguments in support of the claim, regarding the proceedings of some judges. It is also unknown how many judges it concerns.

Claiming that there is a simple dependency between a formally correct sentence and its injustice is a manipulation. In fact, formalism is one of the factors guaranteeing fair trial and legal order as such. Of course it is also important to keep the level of *formalism* in check.

An illustration of how the above thesis is unreliable consists in the changes proposed by the Ministry of Justice (MJ) to the *proceedings concerning commercial cases*. They significantly increase formalism, which will certainly have adverse effect on pursuing claims by entrepreneurs. The Legislative Council to the Prime Minister has also drawn attention to this in its opinion on the Ministry’s draft amendment to the civil procedure³³.

In Poland it is not the judges but politicians who decide what level of formalism the judges must maintain. It is the deputies and the senators who lay down laws, mainly on the initiative of the government. Therefore, the claim of the Prime Minister is in fact the following: judges act wrongly because they obey the law which is laid down by the politicians, among them – the authors of the White Paper.

The claim that the source of the cult of formalism (among some judges) stems from the disruption of the mechanism of tripartite separation of powers is completely incomprehensible. It is difficult to guess what may be the impact of the separation of powers on judicial formalism.

Perhaps the idea is that the de-formalisation of the procedure should consist in judges considering current political needs in their rulings. This may be indicated

³² England, Wales, Ireland, the Netherlands and Sweden spend even several dozen more times on legal aid, cf. Sądownictwo. Polska na tle pozostałych krajów Unii Europejskiej, IWS, Warszawa 2016 r., https://public.tableau.com/views/Budget2010-2012-2014/GDPBudget?:embed=y&:display_count=yes&:toolbar=no&:showVizHome=no.

³³ <http://radalegislacyjna.gov.pl/dokumenty/opinia-z-8-lutego-2018-r-o-projekcie-ustawy-o-zmianie-ustawy-kodeks-postepowania-cywilnego>

by the thesis referring to the lack of "external stimuli to decide in a different way", as the White Paper puts it. The judge should decide on the basis of the law and their own conscience, not on the basis of external stimuli. This is what judicial independence is all about.

- f) A Polish judge is a European judge. The Polish judges are not only giving examples of independence now, but also have done so recently. In their judgements, they verify the conformity of statutory regulations with international law and the Constitution. A good example is the judgment of the Court of Appeal in Wrocław of 27 April 2017 (Case No. II AKa 213/16), in which the use of evidence obtained as a result of provocations (the so-called fruit of poisonous trees) with reference to the regulation of the European Convention on Human Rights was questioned. Such a ruling is not in line with external political factors.

In response, Deputy Minister of Justice Marcin Warchoń stated that judges were not competent to control the constitutionality of legislation and explicitly announced that in this case the issue of not only their disciplinary but also their criminal liability remained open³⁴. The Minister of Justice Zbigniew Ziobro posed threats that judges who did not apply the law due to the conflict with international law, which is an obligation under the Polish Constitution, would have disciplinary proceedings in the new Disciplinary Chamber of the Supreme Court³⁵.

The aforementioned MP Stanisław Piotrowicz argued that there is no legal basis for using the term "European Judge" in relation to the Polish Judge³⁶.

B. THE PRINCIPLE OF SEPARATION AND BALANCE OF POWER.

- a) *According to the Constitution, the system of government of the Republic of Poland shall be based on the separation of and balance between the legislative, executive and judicial powers (Art. 10 (1)).* Unfortunately, there has never been a *real* balance of powers because the political authorities (*the executive branch consolidated with the legislative branch*) in an obvious way have dominated over the judicial branch (e.g. through administrative supervision of a politician over courts, through the fact that politicians shape the court budgets at their discretion, through seconding judges to the MJ, through restructurisation of courts).

Entering into force of the three acts "reforming" the ordinary courts, the Supreme Court (SC) and the National Council for the Judiciary (NCJ) leads to introduction of a system of uniform political power.

These concerns and the understanding of external stimuli affecting judges are confirmed by the numerous statements made by prominent politicians:

³⁴ <http://www.rp.pl/artykul/1324444-Dowody-zdobyte-z-przekroczeniem-granic-prowokacji-sa-nielegalne-wyrok-Sadu-Apelacyjnego-we-Wroclawiu.html>

³⁵ <http://www.radiomaryja.pl/informacje/ziobro-jesli-sady-angazuja-sie-polityke-czynienia-powrotem-praktyk-skrajnej-postaci-czasow-prl/>.

³⁶ <https://naszdzienik.pl/artykul/195109>.

- The Deputy Minister of Justice, Łukasz Piebiak, who said, “Judges must always be on the side of the state. (...) It is a dangerous situation when judges turn against the executive and legislative power. In the corps of 10 thousand judges there will always be some black sheep and our role is to make sure that there are as few of them as possible, and to ruthlessly eliminate the ones that are there”³⁷.
 - A few months ago, the Chairman of the Committee of Justice and Human Rights, Stanisław Piotrowicz from PiS, explained in a speech to the Sejm, that what he was seeking was “to ensure that a quality change takes place among judges that would turn them into people with mentality subservient towards the state and the nation”³⁸.
- b) It is difficult to say whether court judgments are supposed to be a result of a peculiar political compromise. There exists a shocking note in which – according to media reports - Jan Parys (former Chief of political cabinet of the dismissed Foreign Minister Witold Waszczykowski), indicated, “Decisions are needed that will not only explain our intentions but will eliminate controversy. (...) Briefly speaking, changes in the Act on the Institute of National Remembrance (IPN) **cannot be a result of a compromise between the Constitutional Court, the Sejm and the PiS leadership**. The changes need to be consulted with the SD (State Department – ed.)”³⁹.

Re. 26. *The following claim is incomprehensible and false:*

The existing model of judicial appointments and assessment of court performance placed practically exclusive control in the hands of judges themselves, without any external agents being able to influence these processes. This violated the balance between the judiciary and the two other powers.

A. First, the NCJ has always been composed of 4 MPs, 2 senators, Minister of Justice (*who is now, again, also the Prosecutor General*), representative of the President. They are the ones who represent the other two branches of power in the Council. It is unclear what the authors of the White Paper have in mind when they write about the sufficient impact of the mythical “external agents”. Perhaps they have in mind the current regulation, according to which, through the NCJ judges elected by politicians, *the great majority of whom* have ties with the MJ, they will have total control over who may become a judge in Poland. If the factor deciding about the balance of powers is to be whether the other branches of power *may* have influence on *judicial appointments*, it should be pointed out that the judiciary has no influence on the appointment and functioning of the other two branches of power and nobody puts forward an absurd claim that this is something that distorts the balance of powers.

³⁷ <http://wpolsce.pl/magazyn/2495-prosze-to-wyjasnic-edyta-holdynska-rozmawiala-z-lukaszem-piebiakiem-wiceministrem-sprawiedliwosci> (od 24. minuty)

³⁸ Odpowiedź S. Zabłockiego <https://youtu.be/D3vPV8Y0ync> w wersji angielskiej

³⁹ <http://www.polsatnews.pl/wiadomosc/2018-03-07/msz-notatka-z-992018-ma-charakter-niejawny-podjelismy-kroki-prawne/>

B. It is also obvious that the system of the election of judges cannot be identified with the existence or lack of the principle of separation and *balancing* of powers. In other words, it is an example of **falsehood to reduce the separation of powers and its distortion to the manner of electing judges**. It is difficult to question the existence of Art. 10 in the Polish Constitution (the principle of separation and balance of powers). Unfortunately it is not respected and the current political authorities understand “it in their own way”. It is an example of **falsehood to ignore** in the White Paper the unconstitutional destruction of the *system of checks and balances* (with regard to the structure and the rules of functioning of the Constitutional Court, SC and NCJ) perpetrated in the years 2015-2018, described in the documents of the Venice Commission. (see chapter 8)

5. The aim of the reforms: restoring balance, strengthening ordinary judges, democratization (theses 33-36)

A. The claim that the actions of politicians in power in Poland **do not lead to subordinating the judiciary to the other branches of power** is as untrue as it is cynical. As this document demonstrates, the changes implemented over the last 2 years are an evident attack on the right of every person to have their case heard by an independent court and an independent judge. (Art. 45 of the Polish Constitution). The guarantees of judicial independence are being breached one by one (see points I.4.C., II, III.2). The separation and balance of powers is being substituted with the principle of the uniform state power with subordinated and politicised courts. These actions resemble the model applied at the time of the communist Polish People’s Republic (see points I.4.B).

B. Claiming that these actions strengthen, first of all, **the ordinary judges**, suggests that there is a group of “extraordinary judges”, whom the authorities do not protect. Such rhetoric is used by the politicians of the ruling party but also by the President of the Republic and suggests the existence of a significant split within the judicial community. It has not been indicated, however, which judges support these *new reforming steps of the ruling camp*. Therefore it must be pointed out that a *significant* part of judges is critical about the current steps undertaken by politicians *towards the judiciary*. Several dozen assemblies, *grouping judges of all levels*, associations of judges (SSP „Iustitia” itself groups approx. 3600 judges), but also the Forum for Cooperation of Judges, have adopted similar resolutions condemning the changes in the judiciary and the manner of their implementation. It should be added that there is a relatively small group of judges who dissociate themselves from the views of the majority. This applies *in particular* to the judges who work *as officials* at the Ministry of Justice (approx. 160), the presidents and vice presidents of courts, newly appointed by the MJ (approx. 150), members of the new NCJ *elected by the Sejm and the people related to them*. Therefore it must be clearly stated that the actions of the government *aiming at weakening the independence of courts and the independence of judges* have not caused any serious rift in the judicial community and do not enjoy the support of the majority of judges.

Therefore the *politicians who use such expressions have no right* to refer to the so called ordinary judges. Almost all judges, the ordinary and the extraordinary ones, are firm opponents of the actions that devastate Polish courts, actions *that are* *incompliant* with the Polish Constitution and with international standards.

C. With regard to the **balance of power**, it must be noted that the powers of the judiciary vis-a-vis other branches of power are in fact limited to the individual control of the behaviour of the executive branch and declaring the validity of elections. It is the courts that provide a shield protecting citizens against politicians. This protection is currently *seriously endangered* by the process of politicising the courts. Here are a few examples:

- 1) **It is politicians who lay down laws, sometimes unconstitutional, and elect all the judges of the Constitutional Tribunal.**
- 2) **It is politicians (MJ and his deputies) who supervise the courts and are responsible for the efficiency of the courts' activity, which they criticise themselves.**
- 3) **It is politicians who decide about establishing or abolishing a court.**
- 4) **It is politicians who sit on the NCJ, elect lay judges, and appoint the entire panel of NCJ – therefore they are the ones who decide who will be a judge, including a disciplinary judge and the judge who will assess the validity of elections.**
- 5) **It is a politician (MJ - PG) who appoints and removes presidents, vice presidents and directors of courts – without any participation of the judicial self-government.**
- 6) **It is a politician (MJ - PG) who decides which judges are seconded to individual courts.**
- 7) **It is a politician (MJ – PG in the case of judges of ordinary courts; President – with respect to judges of the SC) who decides who may continue to be a judge after reaching the retirement age.**
- 8) **It is a politician (MJ – PG or President) who decides about appointing judges to courts.**
- 9) **It is politicians who arbitrarily determine the budget for the courts and use the available financial measures to destroy the authority of the third estate (e.g. the smear billboard campaign “Just courts”)**
- 10) **It is a politician (MJ – PG) who decides who adjudicates and accuses and in some situations who is the lawyer for defence in disciplinary proceedings against judges.**

Therefore to claim that the Polish government provides guarantees of judicial independence or enhances it, is either to show terrible ignorance or to purposefully mislead the readers of the White Paper. Are the unverifiable and secret nomination of candidates to the NCJ, and electing them without a public hearing to set the new standards of transparency? Perhaps it is the new disciplinary proceedings based on the inquisition principle, where a judge elected by the MJ-PG wears the hats of the prosecutor, the judge and the defence attorney. Is this the substitute for the “new separation of powers”?

- D. The authors of the White Paper write about creating mechanisms to prevent the ills which the judges have not been able to fix on their own. This is another manipulation. First, it must be shown and proven that such ills do take place. The authors of the White Paper did point to such ills, but this *concerns only the effects of their own actions* (politicising the Constitutional Court, NCJ, SC and the ordinary courts). It should be recalled once again that *currently the composition of the NCJ is not decided by judges* but by members of the parliament. Judges do not avoid cooperation and debate about the necessary changes. They present their own proposals, including on disciplinary proceedings. The point is that the representatives of the *ruling camp* and the President of the Republic do not enter into any *serious* dialogue with judges.
- E. The judges are definitely in favor of increased *participation* of the the civic factor in the courts (Article 182 of the Constitution), and thus their direct participation - without the mediation of politicians - in the administration of justice. They have prepared several projects on this matter (including on lay judges in commercial matters, currently discussed by the Social Codification Committee); are ready to discuss and introduction of magistrates to the Polish legal system (on 23 April 2018 an international conference on this subject is organized in Warsaw); they are in favour of full transparency of disciplinary proceedings, nomination processes for judges and elections to the National Council of the Judiciary (cf. the draft acts submitted by Iustitia and undergoing social consultations). In this regard, the current authorities either do nothing or introduce their own regulations based on completely different assumptions. The Ministry of Justice headed by *Zbigniew Ziobro* already *in 2005-2007* advocated limiting the participation of lay judges in the courts. Different projects have not been submitted so far.

The courts are to protect citizens from politicians, and they can do it effectively when everyone is entitled to an independent court (Article 45 of the Constitution). Therefore, it is necessary to distinguish the participation of citizens in courts from the appropriation of courts by politicians.

- F. The thesis that '*the judiciary must remain **independent of other authorities** - and it remains so*' is completely false. The above arguments show that all changes in the judiciary are directly or indirectly aimed at subordinating the judicial power to political power. This happens through the politicization of the courts. Political power is trying to influence the course of processes, for which there are numerous examples. One way is to influence the composition of the *court*. Inconvenient judges are asked to withdraw or they are not allowed to continue their office. The result is that the composition of the court changes and in penal cases the process has to start again.

Examples:

- a) *In Warsaw, judge Justyna Koska-Janusz was removed from office and accused of lack of competence. She sued the Minister of Justice for infringement of her personal rights. The Minister tried to torpedo the process, requesting the exclusion of all judges of the District Court in Warsaw from the proceedings.*

- b) In Kraków, in a trial against doctors in a matter related to the death of the father to *Minister Zbigniew Ziobro*, the prosecutor's office was involved. The prosecutor initiated the *proceedings* concerning de facto the presiding judge, and then the prosecutor filed a motion to exclude her from the case.
- c) *In Suwałki, judges who issued judgments concerning persons who protested against the actions of political power faced disciplinary proceedings - with the active participation of newly appointed presidents of courts (formally, the allegations concern other matters).*
- d) During proceedings in his own case in the District Court in Warsaw, Deputy Minister of Justice Patryk Jaki threatened the judge conducting the trial with potential disciplinary proceedings.
- e) Another Deputy Minister of Justice, judge Łukasz Piebiak, talks about the merciless extermination of black sheep *among judges*.

Commenting on cases and non-final rulings by politicians, including comments by the Ministry of Justice, has become standard. This causes a chilling effect on judges.

These are just some examples confirming the falsity of the theses from the White Paper. Below, we will show you how the new systemic regulations practically deepen the *dependance of the courts* on the Ministry.

G. *It is good that the government notices certain obvious issues. They claim that: "The problems of justice described above require actions taken simultaneously on at least three fields. They include:*

- *a reform of ineffective procedures;*
- *changes in the organizational and personal structure of the judiciary;*
- *providing citizens with greater access to justice."*

Reality, however, looks different. We have not seen any *real* reform facilitating access to court for citizens, so far. At the beginning of the current parliament's term of office, the long-established reform of the criminal procedure was withdrawn. *Also in the civil proceedings no significant changes have been made so far. Those currently proposed by the Ministry partially meet the postulates of the judiciary. However, they are selective and fragmentary. They deepen the incoherence of the Code of Civil Procedure, and to some extent complicate the civil process, making it more formal. In particular in the field of business cases, they are a step backwards when compared with modern European codifications.*

H. So far, as part of the implemented "reforms", nothing has been done to *make it easier for citizens* to gain access to court and improve the efficiency of justice. The result of these activities has until now been the deterioration of court results. The assurances given in the White Paper are in contradiction with the actual actions of the government. As of now, there are several hundred vacancies for the positions of judges, which is one of the reasons that the duration of proceedings is prolonged⁴⁰. Personal changes equal, in fact, purges in the courts and appointments of *people*

⁴⁰see: <http://www.iustitia.pl/100-procent-prawdy/1887-ponad-1-1-mln-spraw-zaleglosci-w-sadach-dzieki-min-sprawiedliwosci>.

who do not receive the approval of the judicial environment. For two years, the Ministry of Justice has been announcing significant changes in the organizational structure of the courts, but does not disclose them. There is a fear that they will be made *in the same way* as in the case of the prosecutor's office and the Supreme Court. Politicians may once again *want to* make use of this reorganization and pursuant to Art. 180(5) of the Constitution of the Republic of Poland, all judges will be re-verified.

- I. *The politicization of courts results in a decrease in trust in the justice system, not the other way round.* The best example is the Constitutional Tribunal. All surveys show that Poles do not want politicians either in the National Council of the Judiciary or in the courts.
- J. *It is sad and alarming - because it shows that the government does not possess elementary knowledge - when the government claims that* the introduced changes will not only contribute to the repair of the Polish judiciary, but also remain in full compliance with the standards on which the European Union is based. The recipients of the White Paper may be intentionally misled; something that should be realised with equal sadness and embarrassment, given *who created the Paper and who it is addressed to.*

Destruction cannot be equalled with repair. One can not disregard statements made by the European Commission, the Venice Commission, and all major legal organizations (national, international, academic) that directly point to the brutal violation of the basic principles on which the democratic rule of law and the EU are based. It simply does not befit the government.

II. European Commission's remarks against the backdrop of the legal system in Poland and in other EU Member States (arguments 37-46 of the WP)

37. *According to the Commission, nearly all changes introduced to Poland's judiciary over the past two years represent a threat to the rule of law. In its proposal under Art. 7 of the Treaty on European Union, the Commission states they lead to an increased influence of the legislative branch on the composition, powers, and administration of judicial authorities, ultimately producing a risk of a breach of the principle of separation of powers.*
38. *In its analyses, the Commission seems to overlook three issues. First, the principle of separation of powers is inextricably linked with the principle of checks and balances. The changes recently introduced by the Polish government have restored the checks and balances, which were until recently significantly disrupted—and that is not only in the interest of the general public, but also judges themselves.*

Comments on arguments 37-38 of the WP

In article 10, the [Polish] Constitution of 1997 introduced the principle of the separation of the three powers expressed as “the separation of and balance between” the three state authorities. The concept of the political authorities dominating the judiciary—the state of things over the period preceding the year 1990—was thereby rejected.

The changes introduced since 2015 have, in fact, had a single purpose: that of enabling the executive branch (the Minister of Justice and the President of the Republic of Poland in particular) and the legislative branch to gain wider than ever influence over all aspects of functioning of the judiciary and over the professional careers of judges (e.g. the administrative supervision, the disciplinary matters of judges, the selection of the members of NCJ).

The legislature and executive authorities have presently gained a huge influence over the functioning of the judicial system, while the judiciary has lost most of its safeguard instruments. The aforementioned manifests itself in the influence over the disciplinary proceedings for judges and the processes of designation and appointment of the vast majority of NCJ members. However, in accordance with the European Charter on the statute for judges (1998): “In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest

representation of the judiciary.” (item 1.3) (see also The Recommendation of the Committee of Ministers of the Council of Europe of 2010).

Of significance here is the complementarity of the changes and the synergy of their operation. As the Venice Commission states in the conclusions to its Opinion CDL-AD(2017)031 (on judicial reforms in Poland) “the combination of the changes (...) amplifies the negative effect of each of them to the extent that it puts at serious risks the independence of all parts of the judiciary in Poland.

39. The judiciary has so far retained (and will continue to retain) full independence from other branches, but no effective mechanisms were in place that could address the pathologies within the system of justice that made judges dependent on sympathies and antipathies within their community, thus undermining their internal independence.

Comments re argument 39 of the WP

Up to this time, the disciplinary proceedings were a mechanism for addressing any pathologies. The Polish system for disciplinary responsibility of the judges, in place since 2017, complied with European standards (pursuant to §33 of the Venice Commission Report on judicial appointments, CDL-AD(2007)028, “(T)he Minister of Justice should not participate in all the council’s decisions, for example, the ones relating to disciplinary measures.”). the Act on the Supreme Court of 8 December 2017 grants the Minister of Justice the right to demand the resumption of any disciplinary proceedings concluded with a valid judgement issued by the disciplinary ombudsman before the date of entry into force of that law. This applies to proceedings with final determination in favour as well as against the charged party. This solution not only undermines the basic principles of the legal order, but can also serve as an instrument of repression against judges for the judgements they passed prior to the reform. In this manner, judges are being made dependant (their internal independence being influencing) of a political authority (Minister of Justice).

The 2016-2017 ENCJ survey among judges cited by the Polish Government makes apparent that Polish judges perceive the main threat to their internal independence to be coming from the government and Parliament (both of these sources were indicated by over 70% of the respondents) rather than from Court Management (including the Court President), NCJ, Supreme court, Constitutional court or from any associations of judges (each one of those sources was indicated by less that 10% of the respondents).

The introduced changes are not aimed at increasing the effectiveness of disciplinary proceedings, but exacerbating system repressiveness. They make the procedural situation of a charged judge less favorable than that of a defendant in criminal proceedings. The changes significantly increase the powers of the Minister of Justice, who will become the de facto organ conducting disciplinary proceedings. This will inadvertently upset the balance between the executive and the judiciary, especially since both the prosecutor in disciplinary proceedings and members of disciplinary courts may be dependent on the executive power's representative.

40. *Second, all changes recently introduced into Poland's judiciary are in harmony with long-standing standards in other European Union countries and the regulations that were in the Polish legal system before. That is the case with the reformed procedures, structural and personnel changes in the judiciary, as well as new appeal remedies available to the public.*

Re. 40

The content of the argument 40 exemplifies the method used in the White Paper, under which incomplete truth conceals the truth. The respective examples of individual solutions cited in the White Paper do indeed exist in other EU Member States. Nonetheless, they occur there as components of different mechanisms operating in different normative environments. No comparison of similar components can lead to conclusions about similarity of a mechanism or about similarity of effects of its operation.

As examples of a clear breach of European standards, we can cite such solutions as:

- the method of electing judges to membership of judicial councils (the standard being that these are proposed or elected as candidate members by judges, with a political authority competent to formally carry out the nomination or appointment);
- the change in the [mandatory] retirement age of judges, (e.g. the Universal Charter of the Judge, approved by the International Association of Judges on 17 November 1999, article 8: "Any change to the judicial obligatory retirement age must not have retroactive effect.");
- the shortening of the constitutionally defined term of office for some members of NCJ (according to article 187.3 of the Constitution of the Republic of Poland this term lasts 4 years; the new law violates this provision as it shortens the terms of office of the NCJ members who are judges while the term of office of other members of NCJ remain unchanged);
- the discrimination of women judges in the new Law on the Common Courts System wherein the age of mandatory retirement for women judges is that of 60 years while for men it is 65 years of age;
- we also need to assess as radically non-compliant with European standards the provision that makes extending the adjudication by the judge reaching the age of mandatory retirement entirely dependent on the discretion of the Minister of Justice.

41. *It is obvious that the new Polish regulations are not an exact copy of the Spanish, British, German or French legislation. It is completely natural for the legal regimes of specific EU Member States to differ. Such differences stem from distinctive national and legal identities, which are protected by the European Union's treaty law. However, those differences are not significant enough (e.g. mechanism of appointing judicial members for the National Council of the Judiciary varies from Spanish system only in details) to warrant claims that solutions resembling regulations that have proved themselves in other EU countries for years (and that have never presented any threat to the rule of law) should violate the tripartite separation of powers in Poland.*

Comments Re. argument 41 of the WP.

The references made in the White Paper to the examples from other countries are an exercise in ‘cherry-picking’ and involve drawing comparisons with selected elements forming part of more complex mechanisms and legal institutions, without regard for their normative environment. This applies in particular to guarantees protecting the judiciary against excessive influence of the other authorities. Those guarantees do not always rely on the existence of formally enacted legal provisions. They can also stem from systemic or constitutional customs. The White Paper passes over the practice of the ministers of justice and/or parliaments recognising as binding the recommendations to membership in judicial councils proceeding from the judicial community (Sweden, the Netherlands).

In Spain, judges are appointed as judicial council members by the parliament (a practice criticised both in Spain and throughout Europe); nonetheless, the candidates are nominated exclusively by judges, with the initial vetting of the candidates list, in an open procedure and in accordance with transparent evaluation criteria (something that has not been foreseen in Poland) performed by the Electoral Council composed of representatives of the judiciary, including the president of the Supreme Court chamber presiding and two other Supreme Court judges; the selection of the candidates is based on an assumption that they should represent all the levels and types of courts.

42. *Third, the Commission—while accusing Poland of arbitrarily picking features of diverse legal systems and putting them together into one—itself fails to take note of a big portion of solutions that either have been here for a long time or have been introduced by the recent changes. The first category should include provisions about the very broad judicial immunity, the appointment of judges solely from candidates put forward by the judicial community, and the life-long status of a judge. The other one should include the new provisions on random allocation of cases, the ban on transferring judges between court divisions, or on greater influence of rank-and-file judges on the composition of the National Council of the Judiciary.*
43. *By so doing, the Commission—censuring Poland for cherry-picking—actually embraces that approach itself, ignoring those features in our legal system that provide for proper safeguards of judicial independence and render concerns about threats to the rule of law groundless.*

Comments re. arguments 42-43

The existence of judicial immunity or of the principle that the composition of NCJ includes a representation of judges or of the formal guarantee of lifetime retention of status by judges do not dispel doubts about the method of selecting the judicial representation to NCJ. The White Paper commits an error in its argumentation here when it conceals the fact that both the NCJ related provisions as well as the practice of their application already in evidence in the year 2018 testify of the overwhelming influence of the Minister of Justice on the composition of the representation of judges to NCJ. Thus, the proposed increased influence of ‘rank-and-file’ judges on NCJ is not in evidence. On the contrary, the judges elected to NCJ

by the Sejm in 2018 are directly or indirectly associated with the Ministry of Justice (as judges delegated to the ministry or promoted by it to the positions of court presidents).

The new provisions on the random allocation of cases, contrary to the claims made in the White Paper, do not increase transparency of the cases allocation process; the new system, in fact, reduces that transparency. The central random draw system is controlled by the Minister of Justice, who is also the General Prosecutor. The Ministry of Justice has refused to provide the draw algorithm or the source code to it, which means that there is no clarity on how the case allocation system actually operates.

The system of random assignment of cases was not introduced in the Supreme Court or the Constitutional Court. The Supreme Court will while the Constitutional Court already does hear cases assigned on arbitrary basis by their presidents. In comparison with the previous system, that represents a regress.

The ban on the transfer of judges between court departments constitutes a partial guarantee, which is discussed in greater detail in the Supreme Court's response to the White Paper under 11.

44. *It is also worth indicating that the content of acts adopted in December 2017 significantly varies from the regulations that were vetoed by the President of the Republic of Poland in July 2017. Most importantly, the rules for electing judicial members of the National Council of the Judiciary changed (now only other judges or a group of 2.000 citizens may put forward their candidates – political institutions were deprived of such competence). The role of the Minister of Justice was also decreased – some of its powers were attributed to the President. It shows that Poland is open to dialogue with critics of the reforms.*

Comments Re. argument 44 of the WP

The argument 44 is an incomplete representation of the truth. The most important reservations regarding the amended NCJ Act are not included in it, i.e. the electing of NCJ members by politicians rather than by judges, and the shortening of the constitutionally defined term of office of the current NCJ member judges. The lists of support for the NCJ candidate members have been classified by the Speaker of the Sejm, which reduced the transparency of the elections.

45. *In the latter part of this document we explain the changes that were introduced to the Polish judiciary, what are the reasons for introducing them, their intended effect and what other legal systems inspired particular regulations. We also present a number of opinions and reports of the Venice Commission and other international organisations, as well as quotes of judges themselves and other legal scholars – indicating that the model of judiciary as amended by the reform not only does not deviate from European standards, but is desirable in many aspects, especially from the point of view of separation and balance between powers.*

46. *Certain tension between the executive, the legislative and the judiciary lies in the very nature of democratic systems – it is inherent to the very idea of separation between powers. Intensive debate over the direction of the reforms proves that Polish democratic system works really well and functions properly. Debates as such took place before and will continue to take place, in other EU countries as well. We believe that this document will contribute to a further reasoned dialogue about those issues – and that it will be a basis to achieve a solution desirable both for Poland and for the European Union.*

Comments Re. arguments 45-46

The declaration under items 45 and 46 are empty rhetoric. We presented the arguments for the incompatibility of the Government's actions with European standards in our discussion of the respective institutions. No debate was ever held during the work on the Polish justice system reform. Repeated requests from associations of judges, non-governmental organisations and legal professions for consultations or meetings were consistently ignored. The parliamentary majority in the Sejm of the Republic of Poland rejected in first reading the NCJ Act bill drafted by the Iustitia association judges and sponsored by opposition parties, arguing that the bill comes "too late" (the vote on the acceptance of the bill for further consideration took place on the same day as the vote on the government bill), whereas the comments reported e.g. by NCJ or the Ombudsman were completely ignored. It is thus difficult to ascertain the meaning conveyed in the phrase: "a further reasoned dialogue about those issues."

III. Independence of judges

Judicial independence is one of the foundations of a democratic state based on the rule of law. It is a prerequisite for exercising the right of court (Art. 45 of Polish Constitution). It is a very delicate mechanism and there is a number of systemic safeguards to protect it.

It has been indicated in the WP that so far, presidents of courts could transfer judges between court divisions even without their consent. This provided them with a potential tool to exert pressure on judges „unyielding” to the court president (and indirectly also to the Minister of Justice). Court cases were allocated to judges by heads of court divisions. The Minister of Justice could appoint court presidents only in appellate and regional courts (less than 15% of all courts in Poland). He did not have such power with respect to district courts. Thus he did not have any real instrument to react to ineffective management of those courts;

The White Paper, describing the most important changes in this respect, clearly states that:

- New law on composition of common courts directly forbids transferring judges between court divisions without their consent. It only may happen in exceptional circumstances – and the judge has the right to appeal the decision;
- Cases are now allocated randomly, by a computerized system. Head of division (and – indirectly – the court president or the Minister of Justice) is no longer able to manipulate the adjudicating panel to affect who should resolve the case;
- Minister of Justice may appoint court presidents in all common courts. They may also be revoked – granted that the National Council of the Judiciary does not express its objection by a two-thirds majority (such majority is wielded by judicial members of the NCJ alone);
- Trainee judges (judges on probation) are introduced, as a default first step in judicial career. It should improve the quality of justice through verifying in practice whether a person after judicial training and exam actually possesses the abilities to adjudicate for a life tenure;
- In the opinion of the authors of the WP, barring the transfer of judges without their consent and random allocation of cases strengthen “rank-and-file” judges’ position towards heads of divisions and presidents of the courts – and indirectly towards the Minister of Justice, as well;
- Their independence not only is threatened but enhanced. The Minister of Justice is granted with an instrument to address irregularities in court system

- but it is limited to the administrative scope. There are no means of influencing verdicts or the decision who is going to resolve the case;
- As the WP claims, during first 6 months since the law on composition of common courts was amended, that is until 12 February 2018, the Minister of Justice dismissed 18,6% court presidents and vice-presidents. The scale shows that it was never a purpose to “purge” courts, but to proportionally address the flaws in management of some courts;
- The mechanism of prolonging judicial retirement age exists in British and French legal system. It does not pose a threat to judicial independence: a judge at the peak of their career is rarely susceptible to potential pressure or political influence “in exchange” for another year or couple of years of tenure – especially that at this point they would usually have achieved full possible pension bonuses.

Below are the comments to the main arguments and claims included in the WP concerning judicial independence. The changes related to disciplinary proceedings, an element of key importance for safeguarding the judicial independence, will be discussed in another section.

1. Mechanism of judges’ retirement – the issue of discrimination of women (points 99-106 of the WP)

A. It is not true that changes in the system of retirement of judges is compliant with European standards and do not endanger judicial independence.

- a) The amended Article 69 Paragraph 1 of the Law on the Common Courts System adopted on 12 July 2017 (Journal of Laws of 2017, Section 1452) in combination with the amendments in the Law on Amending the Law on Old Age and Disability Pension Paid by the Social Securing Fund and Certain Other Laws of 16 November 2016 (Journal of Laws of 2017, Section 38), which entered into force on 1 October 2017 'automatically' triggers the retirement of female judges as soon as they turn 60.

The law of 12 July 2017 has also added Letter b) to Article 69 Paragraph 1 of the Law on the Common Courts System which gives freedom to the Minister of Justice to decide whether individual judges may continue their service after they reach the age that is contemplated in the law.

The provisions that authorise the Minister of Justice to issue his or her consent to a continued service of a female judge who turned 60 years, as legislated on 12 July 2017, are a manifestation of gender discrimination and are contrary to Article 157 Treaty on the Functioning of the European Union (TFEU) and Directive of the Council 2006/54/EC of European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation.

The equality of men and women is one of fundamental values underlying the European Union.

- b) The key piece of secondary legislation seeking to adopt equal treatment of men and women in social security is the Directive 79/7/EEC. Its main objective is to gradually implement the rule of equal treatment of men and women in the area of social security. , Member States may adopt provisions that differentiate between men and women with respect to statutory retirement age in order to compensate for welfare, family or economic hardships faced by women, and so to derogate the principle of equal treatment of under Article 7 Paragraph 1 Letter a of the Directive. Article 7 Paragraph 2 of Directive No. 79/7/EEC puts an obligation on Member States to review from time to time the relevance of such derogation of the principle of equality in light of continuing social progress. Moreover, pursuant to its Article 8, MSs have an obligation to keep the European Commission informed about such derogations being sustained. Given the goal of the directive, which is to phase in full equality, it is only apparent the European Union is ultimately seeking to level the retirement age. Indeed, it is reaffirmed in the CC in ruling of 15 July 2010 (K 63/07). The context suggests that the freedom of a Member State to reverse gender equality and reintroduce retirement age diverse should be restricted. Moreover, the option to maintain a different retirement age for men and women allowed in Directive No. 79/7/EEC in general retirement systems does not actually apply to specific schemes, such as additional or professional schemes, for example the unique retirement procedure for judges.
- c) Equal rights for men and women in specific schemes versus general pension schemes are safeguarded by Directive No. 2006/54. Article 9 Paragraph 1 Letter f of the Directive defines different gender-based retirement age as a manifestation of gender discrimination. This means that gender-based differences in the retirement age of judges may per se violate EU legislation regardless of the fact that it makes a step backwards from the established gender equality. The retirement reform appears not only to violate the provisions of the Directive but also of Treaty on the Functioning of the European Union. In light of the Court of Justice jurisprudence, retirement benefits defined in specific retirement schemes are defined as remuneration, pursuant to Article 157 TFEU (case C-262/88, Barber versus Guardian Royal Exchange Assurance Group). It appears this should also apply to specific benefits of the income substitution nature such as the ones paid to retired judges. Needless to say, remuneration must not differ depending on gender, whereas retirement diversity does exactly that. Benefits paid to retired judges are equal to 75 per cent of their salaries in Poland. Under the new system, female judges would receive benefits that are 25 per cent lower than those due to their male colleagues for five years. Furthermore, men would enjoy five more years to improve their professional status and thus their salaries, which would result in a higher retirement package.

- d) Among stated reasons behind the amended Law on the Common Court System is the intention that the diversity in retirement age should serve "to ensure a balance between retirement benefits in the general pension scheme and the retirement benefits for judges". This perspective fails to address a vital aspect of the difference between the acquisition of the pension right to at the retirement age and the obligation to retire after reaching a certain age. One may or may not choose to exercise one's right to retire whereas retirement in the case of judges essentially results in leaving the profession unless you obtain a consent from the Minister of Justice to continue as an active judge.

Consequently, the retirement of female judges five years earlier than of male judges is by no means a (compensatory) privilege but an act of direct gender discrimination. This is supported by established jurisprudence of the Court of Justice of the European Union that asserts that "national rules which permit an employer to dismiss employees who have acquired the right to draw their retirement pension, when that right is acquired by women at an age five years younger than the age at which it is acquired by men, constitute direct discrimination on the grounds of sex" (ruling C-356/09 in the Kleist case). A similar ruling was passed by the Polish Supreme Court on 19 March 2008, (I PK 219/07) in the railway pension case.

- e) Note that pursuant to Article 33 of the Constitution women and men have equal right to education, employment and promotion, to equal pay for equal work, to social security, to jobs and positions and to public offices and honours.

Article 69 Paragraph 1 of the Law on the Common Courts System in its wording applicable since 1 October 2017 is in collision with Article 113 of the Labour Code.

- f) The female judges who are now covered by the amended Article 69 Paragraph 1 of the Law on the Common Courts System could hope to remain judicial service till they reached 67 before the day of its entry into force. Such as sudden reduction of the age bracket the limits the judicial service forces women to discontinue their careers altogether without the ability to secure their future income and other aspects of life in advance.
- g) The Law amending the Law on the Common Court System has been criticised by the European Commission. The Commission is predominantly concerned about gender discrimination linked to the different retirement age for female (60) and male (65) judge. According to the Commission, it contravenes Article 157 TFEU and Directive 2006/54 on equal opportunities and equal treatment of men and women in matters of employment and occupation.

The European Commission has announced that it will commence a procedure under Article 258 TFEU against Poland. The Commission has informed "about preparations to launch proceedings regarding a breach of a Member State's obligations in relation to a possible infringement of EU

legislation" in connection with the amendment of the Law on the Common Court System in Poland.

- h) In practice, the provision of Article 69 Paragraph 1 of the Law on the Common Courts System in its wording applicable since 1 October 2017 has been used extensively by the Minister of Justice. Female judges who file for the extension of their service are expected to attach medical statements. Meanwhile, male judges are not required to do so before they turn 65. In practice, some female judges have filed all the required documents and received short letters signed by an undersecretary of state on behalf of the Minister of Justice stating that the Minister of Justice does not agree her continued service as a judge, under Article 69 Paragraph 1, 1b and 3 Sentence 1 of the Law on the Common Courts System. Such letters do not state any reasons whatsoever or inform the recipient on the terms of appeal. Stating the reasons for any administrative decision is mandatory. This is a reflection of respect to the individual who is subject to the decision as well as respect to the sovereign who has entrusted the public office with powers to exercise authority. Hence, the Minister of Justice makes arbitrary decisions and the whole "procedure" is not transparent. Deputy Minister, Łukasz Piebiak has publicly stated that the Minister of Justice intends to use the amended Law on the Common Court System to "rejuvenate the judicial ranks" whereas the legislature has made continued judicial service condition upon "a rational use of human resources in common courts and the needs related to the operational burden on individual courts"⁴¹.

2. The scale of systemic changes to the judiciary and their impact on the guarantees of judicial independence (points 33-35, 42-43, 80-82, 84 of the WP)

A. It is not true that the legal system in Poland, as it has evolved over the past two years, provides sufficient safeguards of independence to judges and that concerns about threats to the rule of law are unreasonable.

- a) As a matter of fact the legislation deeply affects a number of aspects in an attempt to reform the judiciary. In particular, it focuses on the components of the legal system which ensure adequate guarantees of independence for judges. It does so while lowering the position of judges in the system and violating the principle of the separation of the judiciary which is a cornerstone of the rule of law. The reform has been multifaceted and includes not only legislation on common courts but also on the Constitutional **Court**, Supreme Court and the National Council **for the Judiciary**. The prosecution services was reformed earlier. The position of the Minister of Justice has been merged with that of the Prosecutor General, which has no precedence in the European Union. The scale, extent and subject matter of change present a threat to the rule of law in Poland.

⁴¹ <http://www.rp.pl/Sedziowie-i-sady/171129057-Kempa-i-Piebiak-w-Kaliszu-na-otwarciu-nowego-gmachu-Sadu-Okregowego.html>,

- b) The devastation of CT that has led to erosion of authority that is indispensable in the exercise of constitutional functions has indeed deprived courts and judges of an unbiased arbitrator that can assess the government policies that target the judiciary branch (see Chapter VII). The judiciary has no other instruments to protect itself against the arbitrariness of the executive branch and the legislation that disturbs its position within the democratic system. **The newly appointed NCJ** has essentially been put under the control of the legislative branch, as the latter has the power to appoint NJC members (except for persons who are ex officio members of the Council: the Senior President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court and one member appointed by the President of the Republic of Poland). NCJ members are not representatives of the judicial community. This raises the question whether the Council will be the steward of the independence of judges and courts, in particular whether it will be able to stand its ground against any attempted interference from other branches of government in the exercise of judicial functions and pressure for more control over court rulings (see Chapter VI). There are similar concerns regarding the reformed disciplinary courts. The new governance and new judges may be employed to discipline other judges for their rulings and extrajudicial public engagements. These concerns are quite legitimate as politicians of the ruling party are making open statements about the need to vet judges and pointing their fingers at some of them whose track record allegedly disqualifies them from the profession (see Chapter IV). Furthermore, the amended Supreme Court Law is seeking to replace half of its membership and portends a disarray of the judiciary given the role of SC and its verdicts in the interpretation of legislation.
- c) The reform has redefined the status of judges in the political system and stripped the judiciary of the institutional safeguards of independence, including the protection by a politically independent NCJ, professional and nonpartisan disciplinary courts, CC effectively averting unconstitutional legislation, especially one that affects the judiciary and a stable judicial oversight.
- d) There is more to come with newly announced legislative amendments that will legitimise transfers of judges to other courts or making them retire pursuant to the provisions of Article 180 Paragraph 5 of the Constitution. There have even been suggestions that the reform should ensure that all active judges should be vetted by launching a reappointment procedure. It must be stressed that the political statements of senior government officials strongly suggested that the Supreme Court reform is a result of a critical assessment of its jurisprudence track record. The push for reforms in this atmosphere must clearly leave a stigma on the individual sense of independence among judges and is likely to breed conformism.

B. It is not true that the reform has significantly strengthened the independence of judges.

- a) While the new legislation contains provisions designed to improve the status of line judges by reducing the arbitrariness of court presidents' and section chairpersons' decisions it does not compensate for the negative impact on the fundamental principle of the independence of judges and courts enshrined in the Constitution.
- b) Obviously, judges have not been deprived of all guarantees to exercise judicial functions independently. It is true judges are protected by immunity and each of them is appointed for life. Candidates to judicial nominations are indeed selected in a process that is largely controlled by the judicial self-government. It is not true, however, that NCJ presents only nominees who are recommended by the community of judges because such recommendations are not binding for NCJ). Nevertheless, the current Polish President refused, without stating his reasons, to nominate 10 individuals who have been fully endorsed in the entire nomination procedure. Moreover, the position of independence enjoyed by judges has not remain not unaffected as courts are losing their independence and the judiciary is being stripped of its separate status by pressure from other branches of government. All measures that restrict courts independence jeopardise the independence of judges.
- c) The amended governing legislation has restricted the already limited competences of the judicial self-government. Consistent reforms are leading to increased administrative control by the Minister of Justice. All major decisions that have a profound impact on courts are made by bodies that are subordinated to the Minister. Strangely enough, the judicial self-government has now fewer competences in the process of appointing court presidents than it did before 1989 (when the Minister of Justice was obliged to consult the college of judges of the court at hand). The process of appointing court presidents and vice-presidents has been modified in such a way as to give the Minister of Justice autocratic powers where he/she does not even consult anyone regarding the candidates. In addition, no binding objection from a college of judges is now possible against a candidate for a deputy chairperson nominated by the president (the provision stating that a negative review of the college of judges about a candidate chairperson be binding on the president has been deleted) and competences of the college of judges to review and candidate for a visiting judge have been transferred to the Minister of Justice. In the latter case, the Minister's opinion is not only to cover competences of a candidate to exercise the duties of a visiting judge but also management aspects, including a decision whether a position of a visiting judge is needed in a particular court in the first place. This modification has visibly extended the space of external control at the expense of the powers of bodies elected by judicial self-government. It seems highly unlikely that this will warrant a selection of better quality candidates for visiting judges, i.e. individuals of supreme professional standing and authority in the judicial community.

- d) With the judicial self-government's position being so weak, court presidents may start feeling controlled by a government minister for justice which may lead them to put pressure on judges in individual cases. In fact, court presidents do have instruments to exert pressure on judges. They may refuse to extend the deadline for case reasoning and then trigger a disciplinary proceeding against the judge for missing the deadline; they may not agree not to assign a new case even though the judge at hand has been assigned to case that is exceptionally cumbersome; they may not agree to grant a leave on request or may take over personal control over some part of the judge's caseload. The court president has the power to revoke an unlawful administrative measure that undermines the efficiency of court proceedings or is not reasonable for other reasons; they may issue a written alert that points to irregularities where such a written alert is attached to the personal file of the judge; they decide which of judges will stand in for another judge or assessor and which judges will be appointed to cases specified in the law; they may raise an objection if a judge is willing to take a teaching or academic position at a university; they grant or refuse a payment of a single benefit under the insurance of accidents at work; they determine the amount of such payment, they agree to a relocation of a judge to another community, and they trigger disciplinary proceedings.
- e) Competences to make HR decisions about judges have also been given to Secretaries and Undersecretaries of State at the Ministry of Justice (see the resolution adopted by a panel of seven Supreme Court judges of 17 July 2003, III CZP 46/13, which states that competences of a public administration body that have been granted to it under specific legislation but not being part of the public administration mandate, must not be assigned to any other party). Furthermore, courts may now be audited by judges seconded to the Ministry of Justice under Article 77 of the Law on the Common Courts System. This entails equal powers to ministerial officials and visiting judges. Again, this is a new tool of administrative control exercised by bodies and individuals who directly report to the Minister of Justice.
- f) The modification of the appointment procedure of court presidents, the introduction of new monitoring tools and the gradual disempowerment of the judicial self-government result in the emergence of a control system tightly subordinated to the Minister of Justice, intensified functional relations between the judiciary and the executive and a limited autonomy of the governing structure of the judiciary. This may further build up an environment where judges will be dependent in adjudicating functions on factors other, than just the legislative provisions such as pressure on the quantity and speed of processed cases at the expense of the quality of judgements through to the alignment of verdicts with suggestions, expectations or instructions of third parties.

3. Randomised allocation of cases (points 70-72 of the WB)

It is not true that the random case allocation system has improved transparency.

- a) A random case allocation existed prior to the reform. Cases were tried on a first-in-first-out basis. Civil cases were governed by common courts rules of procedure (Paragraph 43 and the following paragraphs) criminal cases by Article 351 of the Criminal Proceeding Code. This approach complied with the recommendations of the Committee of Ministers of the Council of Europe R(94) 12 with regard to independence, efficiency and the role of judges. The focus is on the need to remove any influence of the parties from the process to assigning judges to the case and it highlights the benefits of alphabetical assignment of judges to adjudicating panels (Item I 2.e). Every citizen was in fact able to identify the guiding principles of assigning his/her case to a particular judge.
- b) The central random case allocation system is fully controlled by Minister of Justice/Prosecutor General, i.e. by a party or a potential party to court proceedings, which is contrary to international standards (ECHR ruling of 10 October 2000, *Daktaras versus Lithuania*, petition No. 42095/98). It is the Ministry that houses the system servers, which means that should a failure occur the random case allocation will come to a standstill Poland.

Importantly, the system has not been deployed in the Constitutional Court or the Supreme Court. Until recently, the Supreme Court randomly selected its adjudication panels. Today, they will be appointed by Presidents of Chambers, themselves appointed not without political influence.

- c) In order for a computer-based random case allocation system to promote transparency and equity of case allocation, the operating rules of the system should be clearly specified and operations must be documented and traceable. Meanwhile neither the operating rules nor the operations per se have been disclosed to the public. This mainly applies to the source code and the random selection algorithm. When queried under the access to public information provision, the Ministry of Justice refused to disclose the random selection algorithm to the e-Government Foundation and the Watchdog Poland Civic Network.

Consequently, it is not clear what entry parameters are and how they affect the outcomes (for example workload or availability of judges or other aspects not yet understood because of the lack of transparency of the system), as well as who determines or influences or has a technical capacity to modify them.

It is no clear how randomness is defined and accomplished or how entry parameters or settings of the system affect the probability distribution:

- whether and to what extent the system is based on software-generated random selection (using pseudorandom numbers);
- whether the knowledge of these algorithms makes it possible to anticipate future outcomes;

- whether the system operator is able to repeat the same sequence of random numbers (e.g. by restarting the system or a part thereof).
- d) The lack of transparency resulting directly from the lack of publicly available operating rules, monitoring rules and random selection protocols practically prevents any evaluation of the system performance.

It is not clear whether and to what extent the system is adaptable to changing legal and structural contexts, e.g. future changes in procedures, and whether and how the system will be modified during its life cycle.

- e) Errors and poor design have been spotted early in the short history of the system which suggests the system was deployed under time pressure and testing was rather limited before roll-out.
- f) The system must be maintained and changes in court procedures may lead to more associated costs. It may or even is the case already that a crucial part of the judiciary will be dependent on a contractor who will have no competition and so will be in a position to charge high prices. Unfortunately, contrary to the transparency claim the budget of the system, or the number of people who are implementing it, have not been disclosed. No cost and benefit analysis can therefore be performed so it is not clear whether or not the project is a success.
- g) No assessment is available regarding whether and how the system may affect the duration of procedures in court. It is troubling that an additional one-day delay has been added between the entry of a case into the system and the case assignment reported back by the system the following day. Modern computer systems are capable of operating in real time, especially if they process such a small amount of data. It is not clear why this delay is supported and what its purpose is.
- h) No risk assessment has been published regarding the transition from a distributed local system managed by court presidents to a centralised one, which is likely to make it more vulnerable to failures, attacks and other threats characteristic of modern computer networks.
- i) The system operator's responsibilities have not been defined nor is it clear how they will be monitored and enforced, which raises an issue with the commitment to transparency.
- j) Finally, it is not clear whether personal or sensitive data (such as judges' sick or holiday leaves) that are mandatory input data are actually collected in the system and who has access to them (for example, to process them)

4. Transfer of judges between court divisions (Points 73-78 of the WP)

It is not correct that the change in the provisions concerning transfer of judges between court divisions has significantly enhanced the position of a judge vis-à-vis the president of the court.

- a) The amended law has indeed introduced the requirement to obtain the consent of the judge to be transferred to another division (Art. 22a § 4a of the Act on Ordinary Courts - AOC), however, this requirement may be waived if no other judge in the division from which the transfer is made has given consent for being transferred (Art. 22a § 4b (2) AOC). In practice, the problem of changing the division without the judge's consent appears exactly when no judge agrees to such transfer. Therefore the amendment does not change the situation of a judge in any significant way, although it does mitigate the negative consequences of such a staffing decision because it bars such a change with respect to a judge who has been transferred without his/her consent to another division within the period of three years and requires that (as far as possible) the length of service of the judge in the division be taken into account.
- b) Another exception allowing the transfer of a judge to a different division without his/her consent is transfer to a division that hears cases from the same domain. Such a transfer may also constitute a potential means to exert pressure – as pointed out in the White Paper – in the light of the fact that a judge transferred to another division is, in principle, obliged to continue working on the cases open in the previous division until their completion. If the request to be released from this obligation is refused, there is a risk that the judge will be overloaded with cases, which may constitute a significant inconvenience.
- c) The system of appeal against the transfer decision (to the board of the court of appeal) has been in force since 2012 (under the act of 27 September 2011 amending the law – Act on the Organisation of Ordinary Courts and certain other acts), therefore it is not a change introduced as part of the reforms carried out by the current government.

5. Internal and external independence of a judge (points 67-69 of the WP)

It is not true that the changes introduced in the Polish judiciary enhance the internal and external dimension of judicial independence.

- a) Judicial independence is one of the fundamental principles of the administration of justice, according to which a judge, when adjudicating a case, shall be subject only to the Constitution and the statutes, shall not be subject to any pressure or any external dependence, especially from the executive branch. Independence is linked to the judge's autonomy in adjudicating, it does not, however, mean lack of subordination within the existing structure of the judiciary. According to this principle, judgment can be reviewed only by another court and the review must be carried out in a manner specified by the law. Ensuring independence of judges and courts is justified by the interest of the public. It is expected to ensure the stability in the administration of justice regardless of changes that may take place in the legislative and executive bodies.
- b) Since independence is a necessary element of impartial adjudicating, and a judge who is dependent on other authorities, including judicial authorities, is not able

to adjudicate impartially, the internal dimension of judicial independence should be emphasized, first of all, as it has its source in the personal attributes of a judge. The White Paper erroneously defines the internal dimension of independence, narrowing it down to "independence of individual judges from representatives of their own community".

Whoever decides to become a judge should exhibit the highest ethical qualities and self-awareness of the importance of independence and impartiality that are required of him/her. Internal freedom of a judge, related to the presence of the desired personal attributes, is expected to constitute a barrier protecting him/her against attacks on his/her independence and to make him/her impartial. The high moral qualities cannot be replaced by any legal guarantees, because a judge must, all the time, resist more or less evident attempts to violate his/her impartiality and independence.

- c) However, one should not underestimate the importance of the external aspect of judicial independence, whose role is to support and enhance judge's internal independence. It consists of guarantees of various nature: organisational, financial, functional, procedural and systemic, yet their detailed description is beyond the scope of this document. It is the task of the legislative and the executive branches to ensure that the external guarantees are in place, as it is part of the role of the two branches of power to support the third branch in building its authority and trust of the public, without which the judiciary will not fulfil the role vested in it by the Constitution.⁴²
- d) The White Paper does not make any reference to this body of judicial decisions of CT and devotes dramatically little time to this issue in general. The issue has been reduced to only two threats to judicial independence originating from court administration: allocating too many cases to a judge compared to other judges or transferring a judge between court divisions. Whereas the everyday reality in which Polish judges work, in a hierarchically structured system of judicial administration with the dominating position of the Minister of Justice who has at his disposal presidents of courts subordinated to him as well as court managers, this reality brings more new threats, impossible to list here.

The most frequent and the most typical practices of court management which may easily lead to violation of independence have provided the basis for compiling, by contrast, "A Collection of Good Management Practices"⁴³. The collection is a result of the work of the Forum for the Cooperation of Judges.

⁴² This is confirmed by the body of rulings of the CC (judgment of 24 June 1998, K. 3/98 (OTK ZU No. 4/1998, p. 334, ruling of CC dated 9 November 1993, Ref. No. K. 11/93, OTK in 1993, part II, p. 367)" - K 8/99, judgment of CC dated 28 November 2007, Ref. No. K 39/07, OTK ZU No. 10/A/2007, item 129)

⁴³ Full text: <http://iustitia.pl/informacje/2176-a-collection-of-good-management-practices;>
<https://twojsad.pl/en/2018/03/21/a-collection-of-good-management-practices/>

6. Influence of the Minister of Justice on common courts, relations between the Minister of Justice and presidents of courts and between presidents of courts and judges (points 77, 79-87 of the WP)

A. It is not correct that the Minister of Justice did not have any tools at his disposal to react to the ineffective management of district courts or that the Minister of Justice and court presidents subordinated to him do not have means to exert influence on judicial independence.

- a) The organisational structure of the common courts is based on hierarchical subordination, while the administrative supervision over the activity of the courts has been entrusted to the Minister of Justice (Art. 9 AOC). In accordance with the provision of Art. 22 § 3 AOC, with respect to managing the administrative activity of the court, the president of the court is subject to the president of the superior court and to the Minister of Justice. Until now, presidents of district courts were appointed and removed by presidents of appellate courts (since 2012), who, in turn, were accountable to the Minister of Justice for the effectiveness of the units subordinate to them. They could be removed by the Minister of Justice during their term of office, for instance, for gross failure to perform their professional duties. For the same reasons, the Minister of Justice could remove presidents of regional courts (Art. 27 § 1 (3) AOC before the recent amendment). Therefore there is no doubt that the Minister of Justice – through the possibility to influence the presidents of superior courts, including the power to remove presidents of appellate and regional courts before the end of their term – had real influence on the mode of operation of individual courts and had means to exert pressure allowing him to respond if any irregularities had been discovered in the functioning of courts.
- b) It should also be added that the Minister of Justice has had and still has the possibility to exert influence in case of detected organisational irregularities and to counteract excessive length of proceedings (see point 83 of the White Paper) not only through repressive measures but primarily through proper and needs-driven distribution of staff and resources, on which the judicial community currently has no influence.

The model of administrative supervision existing so far has been strongly criticized by the judicial community as giving too much space for interference of the executive branch of government with the manner in which judicial power is executed and for infringing upon their organisational autonomy. The amendment of the act on court system organisation has gone even further in extending the functional links between the judiciary and the executive branch of government, allowing even greater interference with the structure and functioning of the judiciary.

- c) The amendment of the provisions pertaining to the procedure of appointing and removing presidents of common courts of all levels has eliminated the

participation of judicial self-government from the process of selecting candidates. Until now, opinion on candidates for court presidents was given by judicial self-government bodies and a negative opinion, if sustained by the NCJ, was binding for the Minister of Justice. Today, the decision in this respect is taken single-handedly and arbitrarily by the Minister of Justice. Such a solution is in obvious contradiction with the existing jurisprudence of the CC and breaches the constitutional principle of judicial independence (see K 11/93). Currently, the voice of the Minister of Justice in the process of electing presidents of courts is not only dominating but simply exclusive. Such a situation, where the competence to appoint the president of the court is given into the hands of an administrative body, allows – in the opinion of the CC expressed in the judgment K 11/93 – unlimited influence of the administrative body over judicial actions by filling the position with which the performance of such actions is closely connected. Performance of the function of court president (and also vice president) by a person appointed by an exclusive and discretionary decision of the minister, without any, even minimum, influence of the judicial self-government, raises also some serious objections from the point of view of the principle of balance of powers which is derived directly from Art. 10 (1) of the Constitution.

- d) The Minister of Justice also has power to remove the president of any court. His decision in this respect may be blocked by the NCJ with the majority of 2/3 of votes (such a mechanism has been in force since 2012). The truth is that judges in the NCJ have such majority, however, it must be remembered that these are people elected by the Sejm, without any participation of the judiciary self-government in the selection process. The process itself is not transparent (the lists of those who supported the candidates are not disclosed, the justification for party recommendations for individual candidates is not required). In practice, it has led the situation where most of the newly elected members of the NCJ have ties with the Ministry of Justice (some of them, immediately before being nominated as candidates worked at the Ministry of Justice or were appointed presidents of courts by the current Minister of Justice⁴⁴ – The election process and the circumstances in which the candidates were nominated raise concerns whether the NCJ will fulfil the constitutional role of safeguarding the independence of courts. It is about protection against the influence of the executive branch, including the Minister of Justice.
- e) The current composition of the NCJ is being questioned as inconsistent with the Constitution and the European and international standards (see Chapter VI). Apart from the power to select and remove court presidents (and vice presidents), the Minister of Justice has been also given power to impose sanctions on them and to award them with financial bonuses. Pursuant to Art.

⁴⁴ See the map of such ties published by Civil Development Forum:
<https://embed.kumu.io/fad65ba32328e8c0c40c0a3af92c5183#krs>

37ga § 1 AOC, if the Minister of Justice finds deficiencies in court management or internal administrative supervision, or in pursuing other administrative activities, he may issue a written notice addressing the deficiency to the president or vice president of the court of appeal and demand the removal of its consequences. The notice may be joined with reducing the special allowance in the range of 15% to 50% of the amount of the allowance, for a period of one month up to six months, with the scope of duties remaining unchanged (Art. 37ga § 5 AOC). Such a financial sanction may become an important means of exerting pressure on presidents of appellate courts who, guided by the interest of the administration of justice, will not follow the Minister's instructions. Similar financial consequences may fall on any court president as a result of a negative assessment by the Minister of Justice of the annual report on the court activity (Art. 37h § 11 AOC). A positive assessment with distinction may, in turn, result in an increase of the post allowance by as much as 150% (Art. 37h § 12 AOC). The introduced system of financial incentives which depend on arbitrary decisions of the Minister may constitute an effective measure to exert pressure. The solution draws upon the measures that were in place in the People's Republic of Poland, when it was an instrument used by politicians.

- f) The claim about lack of influence of court presidents on the independence of judges subordinated to them organisationally is expressed in the provision of Art. 9b AOC, according to which duties within the scope of administrative supervision shall not enter the domain in which judges and deputy judges are independent. How this stipulation is actually implemented depends to a great extent on the personality of the people who hold supervisory functions because it is impossible to clearly separate the adjudicating and the administrative functions of court presidents (see the CC judgment K 12/03). In order to implement the constitutional principle of judiciary independence it is therefore necessary to ensure the appropriate participation of the judicial self-government in the election of the court president. The participation of the judicial community in the process of appointing court presidents is, in addition, a guarantee protecting judicial independence because it safeguards the court presidents and indirectly also judges against attempts to exert pressure by the Minister of Justice – the Prosecutor General, who is a politician, implements government agenda and represents the interests of the prosecution office.

That is why it must be clearly stated that in order to justify the mechanism that eliminates any participation of the judicial self-government in the process of appointing and removing court presidents, a false claim is invoked about the lack of impact of these changes on the sphere in which judges shall remain independent.

- g) Internal administrative supervision over the court activity performed by court presidents pursuant to Art. 9a § 1 in connection with Art. 8 (2) AOC consists in ensuring adequate internal operation of the court specifically related to the

administration of justice, that is, to the sphere of adjudicating in which judges shall be independent. In addition, the court president has been given powers to assign judges to court divisions, to set the scope of judges' duties and determine the manner in which they participate in allocation of cases as well as to set the on-call and substitution rosters. In this context, the unlimited influence of the Minister of Justice on the appointment of court presidents and the potential ability to exert pressure on them by the threat of removing them, may lead to undue influence of the Minister – via the court president he has appointed – also on the adjudicating activity. Lack of a safeguard in the form of the adequate participation of the judicial self-government makes such a threat real.

B. It is untrue that the cases of Minister of Justice removing court presidents within 6 months from entering into force of the recent amendment of the Act on the Organisation of Ordinary Courts were only responses to the irregularities noticed in the courts.

- a) Most of the staffing decisions have met with the criticism of the judicial community while the official justifications of the decisions contained incorrect or manipulated data. The most frequent justification for removing court presidents, given in ministerial statements, were poor results of the work of the units subordinate to the removed court presidents. The Ministry did not take into account the fact that a significant number of those courts had been affected by staff shortages for which the Ministry was responsible. Approximately 500 judge posts remained blocked because of the lack of ministerial announcements that initiate the appointment procedure. This number is increased by judge posts taken away from courts and the positions held by judges who do not adjudicate, who have been seconded to the Ministry of Justice itself. For the sake of comparison, it should be indicated that the number of judges in the Poznań appellate courts' jurisdiction (one of the biggest appellate courts' territorial jurisdictions in Poland) is 820, whereas the number of cases resolved in this jurisdiction in 2016 was 1,122,236⁴⁵. Such substantial staff shortages must have affected the number of cases resolved by the courts. Meanwhile, the data concerning the growing number of outstanding cases are used by the government to put the blame for the poor results on the judges and to justify the need for changes and staff purges in the judiciary.
- b) One should fully agree with the position of the NCJ of 20 December 2017 on removing court presidents and vice presidents, that in a democratic country based on the rule of law, every decision taken by a public administration body should be properly justified so that its regularity could be verified by the public. When taking a decision to remove a president of the court, the Minister of Justice should therefore be guided by actual and merit-related reasons, presented

⁴⁵ Source: <http://www.iustitia.pl/100-procent-prawdy/1887-ponad-1-1-mln-spraw-zaleglosci-w-sadach-dzieki-min-sprawiedliwosci>

in the justification for such decision. Whereas some of the dismissals either did not have any justification at all or the justification was extremely brief. None of the official notifications contained an in-depth analysis of the statistical data, taking into account the circumstances pertaining to the specific court and a longer time-frame. Decisions resulting in staff changes were also taken by the Minister of Justice – Prosecutor General in breach of the duty to introduce the newly-appointed court presidents to the relevant general assemblies or meetings of judges pursuant to the procedure provided for in Art. 23 - 25 AOC. The form of communicating the decisions to the persons being dismissed as well as the information published on the website of the Ministry of Justice was an example of disregard for the persons holding important offices of presidents and vice presidents of common courts, disregard for the entire judiciary and was harmful for the reputation of the judiciary.

- c) Over the period of 6 months, the Minister of Justice has removed almost every fifth court president or vice president (18,6%). Such a high percentage of dismissals cannot be justified with the statistical data. Poland ranks in the middle of the list in Europe with respect to the length of proceedings. The average duration of civil and commercial litigation in Poland is 195 days, that is, a little more than half a year. It appears, therefore, that Polish civil courts, compared to other countries on the same list, are quite efficient, because the average duration of litigation is 282 days, that is, more than 9 months. On the other hand, resolution of cases before criminal courts in Poland take 114 days, that is, less than 4 months. The average duration of criminal cases for EU countries is about half a year (175 days). Thus it is not possible to legitimately accuse so many courts of poor organisation of work and excessive length of proceedings. In reference to the invoked charge concerning the biggest number of judges per inhabitant in the entire European Union, it should be noted that this indicator does not reflect the essence of the problem. The real problem lies in the number of cases received by courts. It turns out that Poland ranks 10th with respect to the number of civil and commercial litigious cases received by courts per 100,000 inhabitants, and it ranks 1st (!) with respect to the number of non-litigious civil and commercial cases per 100,000 inhabitants, 3rd with respect to the number of criminal cases received by courts and 8th with respect to the number of misdemeanours per 100,000 inhabitants⁴⁶ (See Chapter I.2)

It should be noted that out of 11 appellate courts (that is, courts that are at the top of the common courts hierarchy, reporting directly to the Minister of Justice and performing administrative supervision over subordinate courts on his behalf), the current Minister of Justice has appointed 10 presidents, including 3

⁴⁶ Sądownictwo. Polska na tle pozostałych krajów Unii Europejskiej, opracowane na podstawie bazy danych CEPEJ z 2014, Andrzej Siemaszko i inni:
https://www.iws.org.pl/pliki/files/IWS_S%C4%85downictwo.%20Polska%20na%20tle%20pozosta%C5%82ych%20kraj%C3%B3w%20Unii%20Europejskiej.pdf)

replacing court presidents removed before the end of their term of office. Considering this data one can claim that the real reason for staff changes was not the need to respond – as the White Paper justification states - to the detected flaws, but an intention to put in place new supervision personnel.

- d) The Minister of Justice, Zbigniew Ziobro, exercising his extraordinary powers given to him by virtue of Art. 17 (1) of the Act of 12 July 2017 on amending the Act on the Organisation of Ordinary Courts, dismissed almost 150 court presidents and vice presidents before the end of their term of office set in the statute.

In many cases these decisions were strongly criticised by the bodies of judicial self-government because they lacked substantive justification or because the justification provided contained incorrect information⁴⁷.

⁴⁷ For the full list of the resolutions, the reasons given for dismissal of court presidents and the real data, see <https://iustitia.pl/informacje/2178-the-summary-of-resolutions-of-general-assmeblies-of-common-courts-regarding-dismissal-of-court-presidents-and-their-deputies>; <https://twojsad.pl/en/2018/03/21/the-summary-of-resolutions-of-general-assmeblies-of-common-courts-regarding-dismissal-of-court-presidents-and-their-deputies/>

IV. Disciplinary proceedings

(theses 27-32, 61-66 of the WP included in chapters I and III)

This section will provide an overall response to the allegations regarding the disciplinary proceedings against judges. The authors of the White Paper discussed the issue in chapters I and III and connected it, for example, with procedural issues (see theses 27-32, 61-66, theses 7, 13 of the compendium).

The political authority treats the disciplinary responsibility of the judges in an instrumental manner as a means of implementing its program. The latest example of such an approach is the announcement by the Minister of Justice at a press conference on March 17, 2018, in connection with the Supreme Court's ruling, that changes will be introduced in this area leading to an increase in the liability of judges.

In response to the amendment of the regulations announced by the Minister of Justice, the management board of the Polish Judges Association "Iustitia" stated that it agrees that in order to maintain the highest ethical standards of judges, each judge who has been finally convicted for an intentional crime should be removed from the profession. Their guilt should be pronounced by a court independent of politicians. The words of the Minister, who indicated that he or the ministry will provide for an appropriate composition of such a court, are disturbing. This puts into question the independence of decision making by the members of the National Council of the Judiciary to which decisions on this subject should belong.

Due to the above reasons and due to the importance of the subject, the issue of disciplinary proceedings has been separated and presented in a comprehensive manner below.

1. The scale of disciplinary proceedings against judges and the penalties.

The data on disciplinary proceedings and penalties presented in the Paper are residual. Data held by Iustitia, Polish Judges Association for the period between 2013 and mid-2016 do not indicate that disciplinary proceedings against judges are ineffective. **During this period, about 270 final disciplinary proceedings were held, in which judges were charged with 289 charges. Most of the allegations concerned excessive length of time in preparing justifications or delay in taking up actions due to work overload. Only in 17 cases were the judges charged with committing a crime, including:**

- corruption offences - 1
- crimes against road safety - 3
- offences against the functioning of state institutions (civil servants, i.e. failure to fulfill one's duties or arrogation of powers) - 2
- crime of document falsification - 1

In 5 cases, the judges were charged with minor offences.

In case of 188 allegations, various disciplinary sanctions were imposed on the judges. In 24 cases, the matter was considered on the merits, but identified as minor and the penalties were waived. In 21 cases, a disciplinary offense was found to have been committed, but due to the

period of limitation, the proceedings in the scope of punishment were discontinued. In only 8 cases, the proceedings were not considered on the merits and were discontinued. In 48 cases, the judge was acquitted.

The data provided above all indicate that cases of disciplinary offenses committed by the judges are rare, given that circa 10,000 judges adjudicate in Poland. **In the audited period, there were only 17 cases in which a judge was accused of committing a crime, an average of about 5 cases per year. This indicates that committing disciplinary offences by the judges is a marginal phenomenon.**

The disciplinary proceedings are too lengthy indeed, but this is a phenomenon that the government claims concerns all court proceedings in Poland, including criminal ones. Therefore, the solution to the problem of excessive length of disciplinary proceedings should consist in improving the penal procedure, according to which disciplinary proceedings are conducted. **Meanwhile, the government, instead of undertaking such reforms, has only created a very restrictive model of disciplinary responsibility of the judges, without many fundamental procedural guarantees enjoyed by all other Polish citizens.**

Additionally, it is worth to provide data that describe the decisions of disciplinary courts regarding applications for permission to bring a judge to criminal responsibility:

- permission to bring a judge to criminal responsibility - 12
- refusal to allow the judge to be held criminally liable - 8
- refusal to accept the application (due to formal defects) - 29
- discontinuation of the application for a judge to be held criminally liable - 3
- considering the application ineffective - 3
- leaving the application to bring the judge to criminal responsibility without being examined - 1

As indicated above, there are no data confirming the thesis about the ineffectiveness of disciplinary proceedings against judges. Consequently **the thesis that the low effectiveness of disciplinary proceedings has an impact on social trust in the judiciary is groundless.** Also a few cases of charges enumerated above do not prove a phenomenon at a large scale, especially since they concern the period between 2009 and 2016. The case of the President of the District Court in Gdańsk has been described in the White Paper in a manipulated way, suggesting that the judge established a way of resolving the case by phone with an outsider. The pro-government media also described this matter in a false way. Meanwhile, the judge did only determine the date of the court session. Of course, such behavior is reprehensible and the judge was disciplined for it.

2. The real reasons for changing the model of disciplinary proceedings against judges.

The Law and Justice party ruling in Poland has for many years been announcing a change in the model of the judiciary. **The real aim of the changes was to limit the independence of judges and courts by subordinating the judiciary to the executive and legislative authorities. This occurred through unconstitutional amendments to the laws**

on the Constitutional Tribunal, National Council of the Judiciary and the Supreme Court. Currently, the Polish government is carrying out the last stage of this process, consisting in subordinating the common courts to the ruling party.

Two basic directions of action of the rulers can be distinguished:

- 1) depriving the judiciary of the influence on the appointment and dismissal of court presidents, which has already been discussed in the previous section.
- 2) a change to the model of disciplinary proceedings of judges in a way that allows politicians to remove people inconvenient for a given political power from the position of a judge. **It will be possible thanks to:**
 - granting the Minister of Justice an arbitrary right to designate disciplinary ombudsmen initiating proceedings,
 - appointing disciplinary judges and
 - change of the disciplinary procedure to limit the procedural guarantees of the judges, including the rights of the defense.

Removing inconvenient judges will have an influence (**chilling effect**) on other judges, some of whom may start to worry about their professional career and adjudicate in accordance with the expectations of the ruling politicians. (see chapter VI-VIII.A).

3. The activities of political authority leading to social support for the new model of disciplinary proceedings.

Political authorities take action to undermine the social trust in the judges and increase support for the changes introduced in the judiciary, including changes in the model of disciplinary proceedings of judges.

In the last two years, the Ministry of Justice has been conducting a negative campaign against judges and courts. **Already in the first months after the takeover of power**, a special department was created in the National Public Prosecutor's Office to prosecute crimes committed by judges. **Then, on the initiative of the Ministry of Justice**, a law was adopted to tighten penalties for judges committing corruption offences. **The ruling party tried to create the impression that crimes perpetrated by judges constitute a huge social problem.**

In these circumstances, Iustitia, the Polish Judges' Association asked the Ministry of Justice to provide statistical data on judges committing offences or corrupt acts. In response, the Ministry of Justice provided information that it does not collect such data, and the idea of tightening the responsibility of judges committing corruption offences has occurred to the Ministry following various press reports. Similarly, **the Ministry informed that it does not**

collect data on disciplinary proceedings against judges.

The climax of the whole process in which negative image of judges was built in the Polish society was a media campaign - on television, in press, on the radio and on street billboards under the "Fair Courts" slogan. The campaign was carried out on behalf of the Polish government by the Polish National Foundation, which has at its disposal financial resources coming from government-controlled companies. **During the campaign, false and manipulated information concerning courts and judges was also disseminated. For example, the following was claimed: *On 18 September 2016, a judge emeritus of the District Court in Łódź was caught by the security guards of one of the shops stealing trousers worth PLN 129.99.* However, it was not stated that the judge had retired twelve years before due to a severe non-somatic illness.**

The witch-hunt of governmental media has been accompanied by a certain decrease of trust in the courts on the side of the public. **This decline in confidence in judges - caused by the government - is given as the reason for changes in the judiciary, including changes in the model of disciplinary proceedings concerning judges.**

4. Characteristics of the new model of disciplinary proceedings against judges.

The newly introduced model of disciplinary proceedings of judges:

- 1) extends the apparatus for the prosecution of disciplinary offences;
- 2) subordinates the conduct of disciplinary proceedings against judges to the Minister of Justice,

Granting the Minister of Justice wide powers in appointing disciplinary ombudsmen and judges of disciplinary courts, as well as the possibility of influencing any disciplinary proceedings is contrary to the constitutional principle of checks and balances and means providing the disciplinary proceedings of judges with features characteristic of an inquisitorial process.

The current model of disciplinary proceedings will give the executive power a possibility to exert enormous pressure on the judge, which carries a serious threat to the independence of judges. The tools that the Minister of Justice is equipped with, and even the very possibility of using them, could be a source of influence on the sphere in which judges are independent and, in consequence, lead to "politicization of judgments" as well as disciplinary sanctions for the content of judgments. First such cases have already occurred.⁴⁸

The standards regarding judges' right to defense are lower than those used in legal proceedings against other citizens.

The most important solutions that constitute a new model of disciplinary proceedings

⁴⁸ <https://siecobywatelska.pl/kolegium-sadu-okregowego-suwalkach-o-postepowaniu-dyscyplinarnym-sedziego-dominika-czereszkiwiczka/>

towards judges are indicated below.

- a) **Introduction of a 24-hour accelerated procedure for the recognition of a motion for authorization to bring to justice or provisional arrest of a judge apprehended in the commission of certain offences, and the immediate enforceability of the resolution on this very subject.**

In its judgment of 28 November 2007 in case K 39/07, the Constitutional Court ruled that provisions providing for a special accelerated procedure for the recognition of the motion for waiver of immunity are unconstitutional.

The Law on the system of common courts introduced an obligation to finish "ordinary" immunity proceedings within 14 days. This solution does not raise any serious reservations. However, against the verdict of the Constitutional Court, in case of certain crimes an accelerated, special procedure of immunity proceedings which is to be completed within 24 hours has been introduced. This term is unrealistic in the course of fair proceedings.

The 24-hour deadline deprives immunity proceedings of the guarantee function and removes one of the guarantees of judicial independence. At the same time, it is unnecessary if a short 14-day term of "ordinary" immunity proceedings is introduced. In the last 6 years, there have been 12 cases in which a motion was filed to waive the immunity in situations appropriate for the application of the accelerated procedure. Thus, for the sake of 2 cases per year, a new unconstitutional mode of immunity proceedings is being built. This solution should be considered disproportionate. The ordinary procedure for waiving immunity sufficiently disciplines the courts regarding deadlines, and at the same time preserves the fairness of the proceedings.

Constitution of the Republic of Poland in art. 181 prevents judges from being detained - without the prior consent of the court - except in the case of catching them in the act of committing an offence. **Any non-final decision may be changed by higher instances of the court, and therefore a consent expressed in a "non-final" manner is not the same as "consent". Thus, the provisions of special immunity proceedings that speak of the immediate enforceability of a disciplinary court ruling on immunity can not be considered compatible with Article 181 of the Constitution, where the "court's consent" is mentioned.**

What deserves a particularly negative opinion is the postulate that the **failure of the defense lawyer to arrive at the hearing for the waiver of immunity does not stop the examination of the motion.** Such a regulation is a denial of the right of defense of the judge against whom proceedings are pending. They cannot bear the negative consequences of failure to appear by a defender appointed ex officio, which failure may be resulting from fortuitous

events, independent of the defender.

b) Granting the Minister of Justice an arbitrary right to appoint judges to serve in a disciplinary court.

In a situation in which judges to the National Council for the Judiciary (having fundamental influence on the appointment of judges) are elected by the Sejm (the ruling party), and the Minister of Justice as the representative of the same political option appoints disciplinary judges, there is a risk of judges being politically dependent and favoring ruling politicians. These judges, as disciplinary judges, will be able through disciplinary proceedings to remove judges inconvenient for the authorities from the office or infringe on their independence with a threat of disciplinary proceedings. Already in Poland, the politicians of the ruling party publicly provide names of the judges who, in their opinion, should not perform their functions because of issuing judgments unfavorable to the representatives of the ruling camp.

The disciplinary judges should be elected by the self-governing bodies of the judiciary or, as currently, the duties of the disciplinary judge should be performed by all judges of the given court, chosen to hear a particular disciplinary case at random.

c) Changes in the limitation period.

The regulation providing for the limitation of disciplinary offenses has been repealed **for offences at the time when the punishment of an offense was punishable, and a delay period for the limitation period for the disciplinary offense was introduced during the proceedings before the court. Such a solution is not provided in the case of criminal liability even for the most serious crimes or professional liability of other people.**

d) Changes in the scope of disciplinary spokespersons.

The Minister of Justice was granted the right to choose a Disciplinary Ombudsman **of common court judges, and two deputies, at their discretion. This ombudsman can take over to investigate the disciplinary case of any judge.**

In addition, the Minister was granted the right to appoint a special Disciplinary Ombudsman of the Minister of Justice to conduct the case of an individual judge. **The ombudsman may institute disciplinary proceedings at the request of the Minister of Justice against each judge or join any pending proceedings.**

e) Introduction of solutions that determine the position of a judge in disciplinary proceedings as significantly worse in relation to the position of

the accused of an offence in criminal proceedings.

At a justified motion of the accused judge who cannot take part in the disciplinary proceedings due to illness, **the president of the disciplinary court, or the disciplinary court, appoints a public defender for them.** However, the activities related to the assigned counsel and their preparations for the defense do not stop the course of the proceedings. This means that the **right to defense is in fact only apparent.** It cannot be ruled out that the case is terminated or procedural steps relevant in the case could be taken by the time the counsel is appointed or by the time they undertake the defense (which involves, among other things, the necessity to get acquainted with the case files and establish a defense line with the accused judge).

Rules have been introduced, **according to which it will be possible to carry out procedural steps in disciplinary proceedings if the judge or their counsel fail to appear, and there is no proof that they had been notified about them.** This means depriving the defendant of procedural guarantees available to defendants in criminal proceedings in Poland.

Introducing **the possibility of conducting disciplinary proceedings by the Court despite the justified absence of the defendant or their counsel.** This concept deprives the defendant of the opportunity to present arguments in their defense. It is blatantly contrary to the basic principles of a fair trial, including the constitutional principle of the right to defense and Article 6(1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms.

Limiting the right of the judge to defense in comparison with the accused in penal proceedings, by appointing the term of 14 days to submit motions as to evidence under pain of omitting them. **In effect, this means departing in disciplinary proceedings from the principle of substantive truth, which is in force in Polish criminal trials; for the judges who are accused in disciplinary proceedings, this introduces principles concerning motions as to evidence which are less favorable than the provisions of the Polish Code of Criminal Procedure.**

Exclusion of the application of *reformatio in peius* to judges in disciplinary proceedings, which means that a disciplinary appeal court may convict a judge who had been acquitted at first instance or who was dismissed or conditionally dismissed at first instance. This is another example of how the trial situation of the accused judge is worse when compared to that of the accused in criminal proceedings. There is no justification for such differentiation, because in disciplinary proceedings the criminal procedure applies, except for regulations resulting from the nature of disciplinary liability.

f) The competencies of the Minister of Justice in disciplinary proceedings.

- 1) The Minister of Justice shall be entitled to appeal to the disciplinary court regarding cases in which they had filed a motion to institute the disciplinary proceedings, but these proceedings were discontinued.
- 2) In addition, they obtained the right to object against the decision of the disciplinary spokesman to refuse to institute disciplinary proceedings and against any decision to discontinue the proceedings. Granting the Minister of Justice the power to raise objections will make their position significantly privileged in relation to other entities permitted to submit a request for a disciplinary hearing to be conducted by the ombudsman. The said objection will be binding on the disciplinary ombudsman, as well as indications as to the further course of action. This means that the disciplinary ombudsman may be obliged to initiate or continue disciplinary proceedings, even though in their opinion there is no basis for doing so. **Taking that into consideration, the Minister of Justice will de facto** become a body that conducts disciplinary proceedings. What is more, the said power will be completely arbitrary and the possibility of raising objections repeatedly in the same case may - in extreme cases - result in a continuous prolongation of the situation in which disciplinary charges will be charged to a particular judge. This concept should also be assessed in the context of another provision, according to which the statute of limitations does not run during the disciplinary proceedings until the day when the disciplinary proceedings are finally concluded. This means that the Minister of Justice will have the possibility to significantly influence the course of disciplinary proceedings by keeping certain judges in a permanent state of accusation. Such a solution not only undermines the independence of the judge, but also is in clear contradiction with the nature of the statute of limitations.

g) Lay judges in disciplinary proceedings.

Introduction of lay judges elected by the Senate to the adjudication panels of disciplinary matters in the Supreme Court, means the politicization of disciplinary courts. **It should be emphasized that the lay judges deciding on the disciplinary responsibility of the judges, including their removal from the profession, will be elected by active politicians. A lay judge does not have to have legal education. A requirement to have at least secondary education has been introduced.**

V. Procedural reform

1. General remarks.

A. The current legal situation:

The assumption that the procedures are lengthy, complicated and ineffective is a gross simplification. It is doubtful whether the indicated measures without a thorough reform of the judicial law will lead to the desired goal, that is, the acceleration of proceedings.

It is not correct that in the current system of the Code of Civil Procedure there are no provisions that would require the court and the parties to the proceedings to act with efficiency. The principle of evidence concentration entails the introduction into civil proceedings of a universal assumption that both the court and the parties are active during the proceedings. The system assumes that the court uses its powers and performs its duties while at the same time the parties exercise their rights and fulfil their obligations in the proceedings in such a way that the case may be resolved swiftly. The duty of the court is specified in the general obligation to support the proceedings under the provision of Art. 6 § 1 CCP [Code of Civil Procedure]. This means that the court should take all the actions provided for in the Code of Civil Procedure (and in the EU law) to ensure that the proceedings take as little time as possible and do not extend beyond what is needed; the court should also refrain from such actions that could prevent or impede the achievement of this objective. It is a duty of the court to resolve the case on the first hearing – if possible – and to organise the proceedings in such a way as to ensure that the case is resolved as swiftly as possible. With respect to the parties, this issue has been regulated in a general manner by Art. 6 § 2 of CCP, which provides for the obligation of the parties to support the proceedings. The essence of the obligation to support the proceedings is the requirement of the parties to submit all the facts and evidence without undue delay so that the proceedings may be conducted efficiently and quickly. In practice, the obligation to support the proceedings includes submitting the facts and the evidence by both, the plaintiff and the defendant. The abovementioned general concept is further specified in the following provisions: obligation to submit facts (Art. 126 § 1 (3) , Art. 187 § 1 (2) and Art. 210 § 1 sentence 1), obligation to respond to the statements of the other party (Art. 210 § 2) and the burden of proof in the formal sense (Art. 3 in 1. fin, Art. 126 § 1 (1), Art. 210 § 1 sentence 1 and Art. 232 sentence 1), reinforced by the regulations providing for omission of late statements and evidence (Art. 207 § 6, Art. 217 § 2, Art. 344 § 2 sentence 2, Art. 381), regulation aiming to prevent protraction of the proceedings by the parties (Art. 217 § 3), and the so called costs sanction (Art. 103 § 1 and 2 of the CCP). To conclude, it is wrong to assume *a priori* that the existing system of evidence concentration makes it impossible to conduct proceedings efficiently, especially in the light of the introduction of evidence preclusion in commercial proceedings.

To say that "Justice delayed is justice denied" is to state the obvious and it is difficult not to agree with this statement. However, problems with the efficiency of proceedings occur in all legal regimes, whereas the indicated legal solutions do not solve the problem and, what is more, improvement of the efficiency of proceedings must not be achieved at the expense of citizens' rights and freedoms.

Linking court proceedings and judicial law with the issue of disciplinary proceedings is totally inexplicable. In the context in question it amounts to manipulation which, on the one hand, aims to make an impression that court proceedings end in unfair judgments while, on the other hand, disciplinary proceedings take much too long. It is not possible to agree with such manipulation and making such a connection is unjustified.

B. Significant changes:

- a) "A new code of civil proceedings will introduce an obligation for the court to set an organizational hearing, for detailed planning the rest of proceedings."

It is disputable whether the introduction of the organisational hearing in the form indicated, alone, without discussion about the concept of the subject matter of the proceedings, the pre-trial and discovery hearings and with the unchanged scope of legal assistance and the requirement to be represented by a lawyer before the court will bring the expected effect, and in particular, whether it will be possible to plan the entire trial and all actions needed to take evidence on the organizational hearing.

- b) "All further hearings should be scheduled upfront, so that there would not be several months' periods between them (save for extraordinary circumstances) – this should accelerate the proceedings and minimize pointless waiting for any activity in the case."

The problem of failure to set dates for court sittings, the number of sittings, their duration and dates during the trial is often related to the excessive caseload of judges, which in turn is linked to the system of management of ordinary courts, which requires a certain number of court sessions to be scheduled per month and the number of cases to be heard during such a session to be specified. However, this issue should be, primarily, the matter of work methodology and good practice of judges and not the subject of statutory regulation.

- c) "A new remedy – extraordinary appeal – widens the scope of civil rights protection. The Ombudsman or the Prosecutor General will be authorized to lodge it in case that principles or freedoms and human and civil rights laid down in the Constitution have been violated, in the event of another flagrant violation of law or when there is an obvious contradiction between significant material findings of the court and the evidence collected in the case;"

It is a misinterpretation to say that the extraordinary appeal widens the scope of civil rights protection. The extraordinary appeal interferes substantially

with the principle of stability of court judgments and, in this context, it is difficult to see how it can widen the scope of the ordinary citizen's right to court if an element that guarantees this right is the stability of court judgments. In particular, in the judgment of 24 October 2007, File No. SK 7/06, OTK ZU no. 9/A/2007, item 108, p. 1364-1365, the Constitutional Tribunal (CT) expressed the view that legal validity is, on its own, a constitutional value and questioning the legal validity must each time be the subject of careful balancing of values." (See judgment of CT of 1 April 2008, File No. SK 77/06). In this judgment, the Constitutional Tribunal stated, *inter alia*, that the requirement to shape the court procedure in accordance with the standards of procedural justice does include the imperative to establish measures that will properly protect an individual against legally binding judgments that contain serious flaws and violate constitutional values; however, when drafting a law that enables re-opening of proceedings in such a situation, the legislator must balance very carefully all the colliding values, taking into consideration particular importance of the stability of legally binding court judgments as a constitutional value. In this context, there are justified doubts whether the Proponent of the solutions in question has indeed properly balanced these values. In the Polish legal system, there are both ordinary and extraordinary methods of appeal that serve this purpose, such as, in particular, the cassation appeal in civil proceedings or cassation in criminal proceedings as well as, depending on the type of judicial proceedings, a complaint or an application for re-opening of proceedings. From this perspective it seems more rational to redefine the grounds on which such appeals may be based rather than increase the number of appeal remedies⁴⁹. It must be emphasised that the extraordinary appeal is evidently ill-adapted to the existing legislative solutions because it is clearly in conflict with the functions of the cassation appeal.

From the practical point of view, the introduction of the extraordinary appeal poses a real threat to the stability of the court judgments system, particularly in civil cases but also in criminal cases, as judgments from the last 20 years may be challenged, and what is more, by a panel whose composition has been selected entirely by a political body – since 2 Supreme Court judges will be selected by the politicised National Council of the Judiciary, while the lay member of the panel will be elected directly by the Senate. The panel may also include a common court judge seconded to adjudicate by the Minister of Justice. Distortion of the stability of the law during the transition period may involve cases dating even 20 years back, and may affect about 60 million judgments. After that, court judgments may be challenged on a regular basis. The retroactive nature of this provision, with the assumption of the priority of the public interest, may only raise doubts as to the principle of confidence in the state and the law

⁴⁹ See the Opinion of the Supreme Court (SC) on the President's draft Act on the Supreme Court: http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/NewForm/2017.10.06_Opinia_do_prezydenc_kiego_projektu_ustawy_o_SN.pdf

enacted by it (Art. 2 of the Constitution of Poland). Therefore such a regulation may, globally, only violate the principle of citizen's confidence in the state rather than enhance such confidence. With the use of this legal instrument a number of practical problems may arise, for instance related to the issue of grounds for the judgments of 20 years ago in situations when such grounds had not been written down (which will now be obligatory).

On the one hand, an instrument is introduced that specifically duplicates the existing system of extraordinary appeal measures in civil and criminal cases, on the other hand, by allowing interference in the sphere of facts, the possibility is extended to challenge legally binding judgments that go back 20 years.

C. Effect of the changes:

- a) Swift proceedings will enhance the level of citizens' rights protection – and thus the rule of law in general.

It is incorrect that the intended isolated effect of accelerating the proceedings will lead to strengthening the rights of citizens and thus strengthen the rule of law. Contrary to these claims, the proposal is directed against citizens and its guided objective is to shorten the duration of proceedings, which may take place at the expense of citizens' rights. An example may be the harassment of entrepreneurs by introducing the system of evidence preclusion applying to them, to replace the system of evidence concentration existing so far, resolving evidently unjustified claims during hearings held in camera and without the recourse to cassation or the planned extension of the so called horizontal complaints. The draft provides for an increase in court fees as well as introduction of some new fees, not applied so far. Lack of professionalism in preparing the draft amendment as well as failure to adapt the legislation to other institutions may render the achievement of the primary goal, that is, acceleration of proceedings, impossible, while on the other hand, the parties' right to court, with regard to the procedural guarantees in the form of access to court and ensuring that proper procedures are observed may be significantly limited.

- b) Shortening the time of case resolution will diminish economic risks of contracting; in case the other party fails to perform it would be easier and quicker to seek redress before the court of law.

There are no arguments that would justify the claim that the proposed shortening of the time of case resolution will have impact on legal certainty and will diminish the risk of contracting. To the contrary, there is a risk of legal uncertainty caused by introducing a mechanism which, in the planned form, amounts to misuse of the law and restoring the system of preclusion in commercial cases. A possibility to lodge an application to declare a final and binding judgment unlawful will not contribute to accelerating the proceedings but will only impede the functioning of the Supreme Court.

- c) It should overall account to increase of legal safety, and also to greater social trust – both towards the state and between the citizens.

This claim - in view of the fact that the amendment will limit the parties' right to court with regard to procedural guarantees such as the guarantee of access to court and guarantee that the proper procedures will be ensured and applied and in view of constitutional and treaty-related doubts whether the body conducting the proceedings actually bears all the attributes of a court – this claim is an empty claim. In particular, the proposed Art. 41, barring the abuse of procedural law, accompanied by the sanctions provided for in the following provisions is not consistent with the general clause of Art. 3 of CCP currently in force and will give rise to numerous doubts as to its application. The concept which assumes almost “automatic use of the notion of procedural law abuse” will not reduce the risk of contracting.

- d) Extraordinary appeal does not threaten stability of judgments in any way. It may be lodged only by public authorities in exceptional circumstances. These regulations are similar to a special cassation procedure in criminal proceedings that exists in the Polish legal system for years (and there is no time-frame for lodging it). Prosecutor General exercises this recourse as rare as 300 times per 11 million verdicts each year.

It is not correct that the extraordinary appeal does not threaten the stability of judgments in any way (see Section 55).

- e) There is also a similar remedy in the French law (cassation dans l'intérêt de la loi – art. 620–621 of the French criminal procedure code). Lodging it is also not limited by any term.

The reference to the example of the French appeal mechanism, just to make a good impression, is totally incomprehensible (see Section 57).

2. Acceleration of proceedings

47. “The excessive length of proceedings is one of the major ills of Poland’s judiciary. To tackle this problem, it is not only necessary to replace court staff with younger and more dynamic personnel, but above all to reform procedures.”

It is not correct that steps are being taken to accelerate proceedings and thanks to the amendment (and not a holistic reform) of civil procedure court proceedings will accelerate significantly. So far no objective measures have been undertaken to shorten the duration of proceedings and the duration of court proceedings is constantly increasing⁵⁰. The analysis of statistical data clearly shows that backlog in courts is growing because, annually, courts resolve fewer cases than they receive. This is caused mainly by the fact that vacant positions

⁵⁰ See the statistics: <https://danepubliczne.gov.pl/dataset/sprawnosc-postepowan-sadowych-sredni-czas-trwania-w-i-instancji-w-latach-2011-i-p-2016>, file:///Users/KATI/Downloads/analiza-za-i-p.-2017---podstawowa-informacja.pdf

of judges are not filled (except for deputy judges) and by the failure by the Ministry of Justice to provide adequate clerical and administrative support staff. As on 30 September 2016, in ordinary courts in Poland there were 517 vacant positions of judges. As of today, the estimated number of judges who do not adjudicate in courts because of the actions or omissions of the Ministry of Justice is 880, of which approx. 540 is the number of positions of judges that remain vacant because of the lack of an official announcement that initiates the appointment procedure (in spite of the fact that deputy judges positions are now filled). This phenomenon is accompanied by the practice to refuse to grant the consent to continue to adjudicate to some judges, even though they submit the relevant medical certificates and are experienced justices. At this point it is impossible not to mention the recent amendment of the Act on the Organisation of the Ordinary Courts and the Act on the Supreme Court. Coming into force of these two acts, in connection with lowering of the retirement age for judges, will result in a situation where at least several hundred judges in Poland will retire in 2018.

It should be beyond dispute that it is necessary to counter the excessive length of court proceedings, however, it is doubtful whether the proposed measures will bring the desired effects. It is impossible to verify whether the proposed amendment of the civil procedure will significantly accelerate court proceedings. It is doubtful whether regulating the matter of court sittings, itself, will lead to achieving this goal. Apart from the described solutions concerning the preliminary hearing whose aim is to plan the course of the trial, which have been transposed directly from foreign systems without considering the specific nature of the Polish procedure, there are no concrete data or studies that would show how the proposed regulations, in the described conglomeration of factual and legal conditions may, systemically, indeed shorten the duration of proceedings. However, it seems that, to the contrary, the introduction of certain mechanisms, such as restoring separate proceedings for commercial cases, may, paradoxically, result in extending the time of proceedings. The procedural system will again be made more complicated because of the need to interpret the overlapping provisions that refer to converging procedures. The decision to introduce separate commercial proceedings brings us back to the times of the soviet civil procedure, where the entrepreneur as a party to the proceedings was treated more severely, (in the current situation, this violation results from restoring the system of preclusion that replaces the system of evidence concentration). For instance, the solutions that raise doubts and that might in fact lead to extending the time of proceedings rather than shortening it, include the proposal to extend the time limit for delivering the judgment up to a month in every case (instead of the two-week limit currently in place), or introducing a possibility to allow evidence in the form of expert's opinion in summary proceedings. It should be emphasized that civil procedure does need to be transferred into the 21st century in many respects, but copying certain solutions from other legal systems in an incidental, imprecise and incomplete manner will not improve the administration of justice. It should also be added that efficiency of procedure is an important value but is not the most important principle, especially compared to ensuring, on the one hand, independence of the judiciary, on the other hand, guaranteeing the rights and freedoms of all citizens in the civil procedure by providing realistically effective, simplified and more accessible procedures. Ill-conceived regulations implemented forcibly, expected to bring immediate, isolated acceleration effect must not compromise citizens' rights.

48. “Work on these reforms is very advanced. In November 2017, the Ministry of Justice proposed significant amendments to the Code of Civil Procedure that would make it obligatory to set sittings at which a plan for every case would be organised, and to fix several dates of hearings at one time, instead of setting them individually every few months.”

The Legislative Council affiliated to the Minister of Justice, in its opinion of 8 February 2018 on the draft amendment to the Code of Civil Procedure and certain other acts indicated that “attention should be drawn to the fact that the Proponent of the amendment overestimates the role of detailed procedural regulation, aiming at expediting case resolution (this applies in particular to the detailed regulation of the organisation of trial proceedings), while it is advisable to focus more on the provisions of organisational, systemic nature”.⁵¹ Such comprehensive proposals have never been presented.

49. “The central principle of the reform is to reduce the time between specific actions in the course of a trial. To that end, both the court and the parties to proceedings are required to undertake such actions at short intervals so as to eliminate unnecessary delay, which is commonplace today at practically every stage of the trial. We are aiming at a situation where the parties know from the very beginning of the trial what the court expects of them, which circumstances are relevant to the case, and what evidence will be heard.”

It is doubtful whether the introduction of preliminary hearings to prepare the trial proceedings, in view of theoretical doubts as to its nature, will indeed significantly accelerate the hearing of the case, especially without discussion about the different understanding of the subject matter of the proceedings that accompanies this mechanism in other legal systems, with the introduction the pre-trial and discovery hearings into the evidence taking stage or, related to that, extension of the requirement to be represented by a lawyer before the court and extending the scope of legal assistance. The detailed nature of this regulation, devoid of any theoretical background and the value of abstraction makes it closer to a practical instruction for the presiding judge rather than a procedural regulation.

50. “The reform of the Code of Civil Procedure has now reached the stage of public consultations with representatives of courts, the legal professions and social organizations. The legislative process is fully open to all interested parties and the Ministry of Justice has responded to suggestions made by citizens by modifying its own proposals (like the proposal to change court fees).”

It is a misinterpretation to say that the proposed amendment of the civil procedure has been subject to broad public consultation. The draft amendment has been prepared at the Ministry of Justice, without the participation of any recognised Polish experts or practitioners, whereas consultations with the judiciary are limited solely to the judges seconded to the Ministry of Justice. The amendment has not been subjected to a broad public debate nor has it been

⁵¹See more at <http://radalegislacyjna.gov.pl/dokumenty/opinia-z-8-lutego-2018-r-o-projekcie-ustawy-o-zmianie-ustawy-kodeks-postepowania-cywilnego>

preceded with such a debate. There has been no referendum or a wide-ranging public discussion about the proposed procedural legislation (unlike, eg. in France, where the preparation of the reform of the judiciary, including procedural law, involved a great national debate carried out under the auspices of UNESCO on 10 and 11 January 2014). The professional body – the Civil Law Codification Commission was dissolved in 2015 and a new one has not been formed. The solutions have not been consulted with the Public Codification Commission established by the Congress of Polish Lawyers in May 2017. They have not been broadly consulted, either, with the academia or associations of scholars grouping experts in the field. Negative opinions about them have been expressed by professional circles, for instance, by the Polish Bar Council⁵²

3. Extraordinary appeal

51. “The introduction of extraordinary appeal aims to expand the legal protection of citizens. It is intended to ensure appropriate protection of fundamental rights and freedoms guaranteed by the Constitution. The appeal may be lodged in the event that the principles or freedoms and human and civil rights laid down in the Constitution have been violated, in the event of another flagrant violation of law or when an obvious contradiction between significant material findings of the court and the evidence collected in the case.”

The introduction of the extraordinary appeal is not aligned with other legislative solutions as the extraordinary appeal is evidently in conflict with the functions of the cassation appeal. In Poland, for many years there has been a system in place to overturn final and binding judgments in civil cases, namely: an application for declaring a final and binding decision unlawful, a cassation appeal and an application for re-opening of the case. The grounds for the appeal include not only a situation where the judgment violates the principles or civic rights and freedoms enshrined in the Constitution but where the judgment is in gross violation of the law by misinterpretation or inappropriate application of the law (error on a point of law) or where there is an obvious contradiction between significant material findings of the court and the evidence collected in the case (error on points of fact). It is surprising that it is only now that the decision has been taken to introduce a possibility to overturn almost any judgment issued within the last 20 years on the grounds of such judgment being socially unfair (the criterion of social justice) or for the sake of the state interest (the rule of law). Both criteria have the nature of general clauses that are to be interpreted by panels including lay judges.

It is absolutely beyond any standards of statutory law systems for the assessment of an error on a point of law to be made not by a panel composed of professional judges but by a panel where one of the members is a lay judge elected by the Senate, both in civil and in criminal cases. This amounts to abandoning the existing model of the Supreme Court as a court of law and admission that it is also a court of fact.

⁵² opinion available at: http://www.adwokatura.pl/admin/wgrane_pliki/file-opinia-komisji-legislacyjnej-przy-naczelnej-radzie-adwokackiej-21580.pdf

52. “The extraordinary appeal is allowable provided a ruling may not be annulled or changed by other extraordinary means of appeal. Practice shows that final rulings which are flagrantly unjust or based on wrong interpretations of the law do appear in legal relations. By introducing an additional institution for extraordinary review of court rulings to the Polish legal system, citizens will be guaranteed wider access to courts, and will enjoy enhanced protection of their rights.”

An extraordinary appeal may be lodged by the Prosecutor General (who is also the Minister of Justice), the Ombudsman and, within their competence, the President of the General Counsel to the Republic of Poland (protecting the interests of and providing legal representation to the State Treasury), Commissioner for Children’s Rights, Commissioner for Patients’ Rights, Chairman of the Polish Financial Supervision Authority and President of the Office of Competition and Consumer Protection. It should be emphasized that such an appeal may be lodged, for instance, in the interest of the public or in the interest of the state against the individual interest of a citizen (there are no limitations in this respect). Therefore, contrary to the claim quoted above, citizens are not directly given an additional mechanism protecting their rights, but in fact the appeal is yet another instrument inaccessible for citizens which serves some other purposes. It should not be expected that the change will result in improvement and better access to courts for the public. It only raises concern that all the inconvenient judgements from the last 20 years will be removed from the legal system, and in the further perspective of all subsequent judgments in a 5-year perspective. As a consequence, citizens may be affected as their right to court is limited by the removal of the stability of judgments, which is one of the elements of the right to court.

53. “At the same time, the new regulations have been designed to ensure the stability of court rulings, and to maintain legal certainty. The appeal may only be lodged by state institutions (the Ombudsman or the Prosecutor General and several other entities in a much narrower scope) – which ensures that it will only be brought if these bodies find the appeal really necessary.”

A situation where an appeal may be lodged by the Prosecutor General who is, at the same time, the Minister of Justice, does not provide a guarantee, which ensures that it will only be brought if these bodies find the appeal really necessary

54. “The mere act of lodging an appeal will not affect the legal validity and enforceability of the rulings against which it has been brought. The bodies eligible to file an appeal will only include the public authorities specified by statute, and only rulings deemed defective by the Supreme Court will be removed from the legal order.”

Article 89 (2) of the Supreme Court Law

(date of entry into force: 3 April 2018)

§ 2. The extraordinary appeal may be lodged by the Prosecutor General, the Commissioner for Citizens’ Rights and, within the scope of their competence, the President of the General Counsel to the Republic of Poland, the Commissioner for Children’s Rights, the

Commissioner for Patients' Rights, the Chair of the Polish Financial Supervision Authority, the Financial Ombudsman, and the President of the Office of Competition and Consumer Protection.

55. "The interim provision of Article 115 (1) of the Supreme Court Law makes it possible to bring an extraordinary appeal against all final rulings that end proceedings in cases which became final after 17 October 1997 (i.e. after the date of entry into force of the Polish Constitution). Appeals against such rulings may be lodged within 3 years of the entry into force of the new Supreme Court Law. Despite fears, this does not present any threat to the stability of jurisprudence, which is guaranteed by Article 115 (2) of this Law."

Article 115 (2) of the Supreme Court Law

If 5 years have passed since the date on which the ruling which has been appealed against became final, and the ruling has had irreversible legal effects, or the principles or freedoms and human and citizens' rights laid down in the Constitution so warrant, the Supreme Court may limit itself to holding that the ruling which has been appealed against was issued unlawfully and to indicating the circumstances which have prompted it to deliver such a determination.

The two sentences are contradictory. It is obvious that the act of lodging an appeal, alone, cannot overturn the validity of a judgment because this would be inconsistent with Art. 365 and 366 of CCP and with the essence of the concept of valid judgments. However, introduction of the appeal into the legal system directly affects the stability of judgments by adding another extraordinary legal measure that may eliminate legally binding judgments issued over the last 20 years, and later, in a successive manner in a 5-year perspective. It remains unclear whether the ruling that a judgment has been issued in violation of the law and indicating the circumstances that led to such a ruling will entail liability of the State Treasury. It is not clear, either, whether there have been any calculations indicating to what extent potential compensations due in such situations will be charged to the state budget and eventually will have to be borne by the citizens.

56. "As in all other court cases, the decision in this case remains within the exclusive competence of independent judges. Without a Supreme Court ruling no verdict shall be annulled or changed – and will remain binding."

It is a new legal remedy, examined outside the existing due course of instance and outside the existing system of appeal for civil and criminal proceedings, by a new chamber at the Supreme Court level. The composition of the panel of the Supreme Court also raises doubts. An extraordinary appeal is examined by the Supreme Court sitting in the panel of 2 Supreme Court judges adjudicating in the Chamber of Extraordinary Control and Public Affairs and 1 lay judge of the Supreme Court (elected by the Senate). This instrument may be used to overturn not only the judgments of ordinary courts but also those of the Supreme Court. If an extraordinary appeal is lodged against a Supreme Court judgment, then the case is examined by the Supreme Court in a panel of 5 Supreme Court judges adjudicating in the Chamber of Extraordinary Control and Public Affairs and 2 Supreme Court lay judges. These

solutions have not been professionally prepared and are not aligned with the currently binding legislation. The introduction of the lay judges model into the Supreme Court is incomprehensible and anti-judiciary. In statutory law systems at the Supreme Court level it is unprecedented for professional judges to be subject to control of politically appointed lay judges, instead of extending the judicial competence of professional judges.

57. “A similar measure, cassation dans l'intérêt de la loi (appeal in the interests of the good administration of justice) exists in French law - Art. 620 – 621 of the French Code of Criminal Procedure (Code de procédure pénale). It allows to overturn a final court decision which flagrantly violates the law and as such could not be reconciled with the principle of the rule of law.”

In this respect it is totally incomprehensible to invoke the “cassation dans l'intérêt de la loi” from the French criminal procedure. The concept of “interest” in the French law is much more complex than in the Polish law. Nevertheless, the invoked instrument refers only to the interest “in defence of the law” (l'intérêt de la loi”) and it does not mean that it is admissible to lodge a cassation appeal on the grounds of an obvious contradiction between significant material findings of the court and the evidence collected in the case („intérêt à établir des faits”). Therefore, to invoke the instrument of cassation that exists in the French law in criminal proceedings as part of the French system of appeal, which does not, in any way, allow interfering with the facts underlying the judgment, to do that in order to justify the introduction of the extraordinary appeal, an instrument that does allow such interfering over the course of years is a plain example of abuse.

It should be emphasized that in view of the fact that the appeal can also be lodged in civil proceedings, it would be appropriate to indicate what solutions are applied in this respect in the civil procedure. This issue is regulated by Art. 17 of the French Law n ° 67-523 of July 3rd, 1967 relating to the Court of Cassation (Loi n° 67-523 du 3 juillet 1967 relative à la Cour de cassation). It follows from this regulation that the Cassation Court Prosecutor may challenge a judgment at any time, after the lapse of the time limit set for the parties if the parties have not appealed, even if the judgment has already been enforced. There is no final time limit, but if the extraordinary remedy is allowed, the parties may not invoke this judgment and the court only states that the contested judgment was issued in violation of the law and gives the grounds for its decision. This instrument is applied only for the sake of protecting the proper interpretation of a statute and proper interpretation of the law for the sake of the public interest, while the parties cannot benefit from it in any way. It must be emphasized that on the basis of this provision a judgment may never be rendered invalid or removed from legal order. Therefore, the provision of Art. 91 § 1 in connection with Art. 89 § 4 of the Polish Act on the Supreme Court does not match this context at all, since it provides, as a principle in civil procedure, for the so called “cassatorial judgment” [reversing the contested judgment and sending the case for re-examination] with a very narrow exception under Art. 89 § 4 of this Act. A provision equivalent to Art. 91 § 1 does not exist in the French law, and what is more, it would be inadmissible.

58. Moreover, measures allowing to overturn final court rulings have been present in the Polish legislation for a long time. The mechanism of lodging extraordinary appeal very much resembles the procedure of cassation in criminal cases (in force since 1998), which gives the Prosecutor General and the Commissioner for Citizens' Rights (the Ombudsman) the right to challenge every verdict, without any time limitations.

Article 521 of the Code of Criminal Procedure

§ 1. The Minister of Justice – the Prosecutor General and also the Commissioner for Citizens' Rights may bring a cassation appeal against any valid and final judgment concluding court proceedings.

§ 2. The Commissioner for Children's Rights may bring a cassation appeal against any final judgment of the court concluding the proceedings if the child's rights have been violated by issuing the decision.

§ 3. The bodies referred to in § 1 and 2 have the right to demand access to court and prosecution files as well as files of other law enforcement authorities after the conclusion of the proceedings and the passing of the decision.

Article 524 of the Code of Criminal Procedure

§ 1. The time limit for filing cassation by the parties shall be 30 days from the date on which the judgment with reasons was served. The motion requesting the service of the judgment with reasons should be filed with the court which rendered the judgment within the final time-limit of 7 days from the date it is announced, and if the act foresees service of the judgment, from the date it was served. Article 445 § 2 shall apply accordingly.

§ 2. The time limit set forth in § 1 shall not apply to the cassation brought by the Minister of Justice – the Prosecutor General and the Commissioner for Citizens' Rights and the Commissioner for Children's Rights.

As regards retroactivity, two situations should be differentiated: one referring to criminal procedure and the other referring to civil procedure.

With reference to criminal procedure, it is indeed true that the indicated provisions of the criminal procedure do not contain any time limitation for lodging an appeal by the Prosecutor General, the Ombudsman and the Commissioner for Children's Rights, however, an important fact is overlooked here, namely, that the Supreme Court in its current form is a court of law and not the court of fact. In practice, it means two things. First, from the point of view of the criminal procedure, the cassation mechanism with respect to the Prosecutor General is duplicated. Second, the stability is indeed limited because of the introduction of a possibility to overturn a legally binding judgment on factual grounds, specifically, because of "an obvious contradiction between significant material findings of the court and the evidence collected in the case

With respect to the civil procedure, the possibility to retroactively overturn judgments dating back 20 years, is a complete novelty, totally unjustified, distorting the stability of the legal order. In addition, this novelty ravages the system of appeal, duplicating and extending the existing remedies with respect to grounds and changing the status of the Supreme Court from a court of law to a court of fact, by introducing the grounds of an obvious contradiction between significant material findings of the court and the evidence collected in the case.

59. Despite the existence of this provision, cassation appeals are rarely brought under this procedure. In 2013, the Prosecutor General brought 298 of them, in 2014 – 250, in 2015 – 220, in 2016 – 196, and in 2017 – 318. Bearing in mind that in 2016 alone, over 11 million criminal cases were substantively settled, the figures prove that cassation lodged as foreseen in Article 521 of the Code of Criminal Procedure is in fact an extraordinary measure applied solely in exceptional cases.

It is an aberration to invoke a completely different means of appeal, functioning at a different time, in order to justify the introduction of a new instrument with extended grounds for its application. The statistics quoted above are inadequate also because they apply only to the cassation appeals lodged and not those accepted [by the Supreme Court]. In addition, since the data applies to cassation on the grounds of violations listed in Art. 439 of the Code of Criminal Procedure or any other gross violation of law if it may have significantly affected the contents of the judgment – they may not provide the basis for assessment of the number of appeals that might be lodged on the grounds of an obvious contradiction between significant material findings of the court and the evidence collected in the case. It should also be emphasized that the statistics do not cover the change introduced on 15 April 2016, extending the possibility granted to the Minister of Justice - Prosecutor General to lodge a cassation appeal on the grounds of disproportion of penalty in felony cases (Art. 523 § 1 a Code of Criminal Procedure).

60. “It is possible that the extraordinary appeal foreseen in the new law on the Supreme Court will be lodged more often, at least initially (given that it was not possible to make use of such a measure up until now), yet requirements concerning this measure are so strict that there is no risk that it might endanger the stability of court rulings. The hypothesis put forward by the Commission that once extraordinary appeal is introduced verdicts passed in the last 20 years will be overturned on a massive scale is absolutely improbable.”

It is difficult to argue with such a statement. Surely, nobody introduces an extraordinary retroactive remedy, allowing broad possibility to overturn final and binding judgments both on points of law and on points of fact, in order not use it.

VI. National Council of the Judiciary

(Re. White Paper, Chapter V, items 107-138)

Election of judges to NCJ

White Paper premise(s): 15 out of 25 members of the NCJ were nominated by judges themselves in a long, multi-stage procedure, no other branches of power were included in this process.

Response

- All Polish judges engaged in the [election] procedure current until now. Judges of common courts and of voivodship administrative courts (on account of the extensiveness of these groups) chose their representatives who could subsequently elect their representatives in NCJ. Judges of the Supreme Court, the Supreme Administrative Court and of military courts elected their representatives in NCJ directly.
- The procedure was completely open and transparent. Minutes of meetings of relevant bodies can be referred to in order to ascertain who nominated candidates and the support they received. Presently, the Sejm will not even disclose as public information the names of the judges or citizens who granted their support to the candidates elected to NCJ – though this is extremely important as the NCJ members may decide on promotions of the judges who supported them or adjudicate on matters of relevance to the citizens who proposed their candidacy. This latter information is extremely important, as the members of NCJ may decide on promotions of the judges who supported them or adjudicate on matters of relevance to the citizens who proposed their candidacy. Moreover, without disclosure of the data on the persons who supported candidates to NCJ by submitting their signatures, public supervision over the regularity of election of such candidates to NCJ is not possible, if only through checking whether a sufficient number of signatures was collected. This last piece of information is important because media informed that some of those who placed their signatures on specific candidate applications and subsequently wanted to withdraw their support were prevented from doing so by the chancery of the parliament.
- What is more, in the absence of disclosure of documents regarding the NCJ candidate election procedure, a very significant legal problem arose at the stage of submitting the candidate applications to the Speaker of the Sejm. According to the amended law, it is the deputies' clubs that are authorised to nominate candidates, i.e. the collective bodies of the parliament including members of the lower chamber only. Meanwhile, as apparent from a public imprint of the Sejm, the entity that submitted as many as nine candidates on behalf of the "Law and Justice" party was the parliamentary club, i.e. a body that affiliates members of both the lower and the upper houses of the parliament, quite different from a deputies' club. The problem is all the more serious because while the other party that nominated candidates for NCJ ("Kukiz 15") did it correctly, i.e. through its deputies' club, the "Law and Justice" party does not have a deputies' club at all, and only a parliamentary club, and therefore the party's compliance with

the amended law in nominating its candidates to NCJ seems unachievable. In this situation, the First President of the Supreme Court, Małgorzata Gersdorf, seeking to prevent any allegations of incorrect election of a significant part of the new NCJ membership, in a letter of 19 March 2018, called upon the Speaker of the Sejm to disclose as public information the documents which were the bases for nomination of the candidates. Despite the ambiguous legal status of the new NCJ, the First President of the Supreme Court became the subject of media attacks, among others, by one of the deputy ministers of justice and a parliamentarian of the “Law and Justice” party for the alleged failure to convene the first NCJ meeting within a few days of the completion of the procedure for the appointment of its members, which attacks included suggestions of instigating disciplinary proceedings against her. These attacks occurred despite the fact that in the light of the amended law, the First President of the Supreme Court has two months to convene a meeting of the new NCJ.

- According to art. 187.1.3 of the Constitution, the Sejm can elect only four members of NCJ and is to do so “without the involvement of any external agent,” which the Government has not contested. Thus, election of majority of the NCJ members by the Sejm pursuant to provisions of the amended law contravenes the Polish Constitution.

Judges in NCJ

White Paper premise(s): In practice it led to domination of the judges of the higher-level courts in the Council – as well as those who exercised functions of presidents of the court and heads of the divisions.

Response

- The previous manner of electing the NCJ members guaranteed that its composition included all the judges article 187.1.2 of the Constitution referred to: judges of the Supreme Court (2), the common courts (10), the administrative courts (2) and of the military courts (1). Currently, the Sejm has elected to those positions only one judge of a voivodship administrative court and as many as 14 common court judges, most of them being regional court judges.
- The most numerous group of the judges being NCJ members had been judges of regional courts, which hear both the first- and the second-instance cases.
- All of the appellate court and regional court judges who had been NCJ members until now, had been longstanding district court judges prior to their election.
- In its previous composition, NCJ had only two judges who served as court presidents (including one who was a district court judge); presently, the Sejm elected as many as five court presidents to the NCJ composition (appointed by the current Minister of Justice, without the consent or even an opinion of local self-governments of judges, having first terminated the terms of office of the current presidents).
- The Government alleged that the previous NCJ members were not rank-and-file judges who adjudicate on a daily basis and know the problems of the judiciary even though all the judges forming part of NCJ combined the exercise of their mandate with ongoing judicial work. Meanwhile, the governing majority nominated to NCJ judges

who in recent years did not exercise any judicial power at all, because they worked in the Ministry of Justice as officials subordinate to a politician.

Assessment of the method of election to NCJ

White Paper premise(s): Polish judges themselves labelled this system “non-democratic curial elections” and claimed that it is unconstitutional.

Response

- Some judges demanded changes in the distribution of the NCJ membership mandates between some types of courts, and certainly not that judges be deprived of the right to elect own representatives in NCJ.
- In May 2016 the present Minister of Justice proposed that judges elect their representatives directly in nationwide elections (he submitted such a bill for consideration by the Government); this was a real chance to meet the demands voiced by some judges. For some unknown reasons, the Minister withdrew from that project.
- Judges representing the Polish Judges Association “Iustitia” prepared a bill on the general elections among judges of NCJ members, which was supported by all judges’ associations in Poland, and which was tabled before the Sejm by opposition parties. However, the bill was rejected by the ruling majority and consigned to the wastepaper basket, without being debated on by the parliament. The solutions incorporated in that bill were consistent with the Constitution. The parliament of the current term, however, was not interested in a finished bill drafted by the very professional group which a few years earlier voiced the doubts presently cited by the Government.

Rulings on the term of office of NCJ of the Constitutional Court in its new composition

White Paper premise(s): Unconstitutionality of these provisions was ruled by the Constitutional Court, which also pointed out that the practice of individual terms of office of every member of NCJ was inconsistent with the basic law, and that the Constitution provided for a uniform term of office common to all [NCJ members]. 17 out of 25 members of NCJ shall remain independent, irrevocable judges – they continue to wield over two-thirds majority in the Council, as the Constitution provides.

Response

- After the unconstitutional amendments concerning it came into force, the Constitutional Court, with the participation of the judges elected in a flawed manner, whom the media dubbed “the understudies” (due to which the ruling is considered to be non-existent under the consensus doctrine), did not rule the principle of electing NCJ members by judges or by a self-government of judges to be incompatible with the Constitution. What the Constitutional Court rules was that the details of this procedure needed to be clarified (e.g. to ensure material equity between all the judge’s votes, regardless of the level [of the judiciary they represent]). The recently passed law does

not even implement that defective “judgment of the Constitutional Court;” it thus deepens further the ascertained unconstitutionality.

- The individual term of office of NCJ members was adopted as it had a number of positive aspects, including: the diversification of NCJ composition; the minimised risk of one-time replacements of significant parts of NCJ composition, inadvertently causing a temporary paralysis of the work of that body; and the effect of ensuring that each elected NCJ member can remain in office for four years. This was also very important from the perspective of preserving what is referred to as ‘the institutional memory’ of an organ. It was extremely important to ensure the continuity of the work of the body that protects the independence of courts and judges, also during the elections to the organs of the legislative branch.
- The effect of the present adoption of the joint term of office for the NCJ members is that every four years as much as 60% of the NCJ composition will undergo a one-time replacement, which will significantly hinder the work of that body (the new members will need to learn the new tasks independently); also, the persons elected to NCJ in by-elections will not be able to exercise the mandate for four years (but only until the end of the joint term), which violates the constitutional principle of the four-year term of the elected NCJ members.
- The interpretation leading to the acceptance of the individual term of office of the NCJ members has been widely known for at least 13 years (in 2002 the NCJ issued a position on that matter) and was not disputed by the parliaments of respective terms or by the politicians of the different parties (including those of the now ruling party) being members of NCJ by virtue of being ministers, deputies or senators.
- The present statutory provisions interrupt the terms of office of the judges of the current NCJ –the terms of office explicitly defined in the Constitution, which literally indicates that the term of office of an elected member of the Council lasts four years.

Rules of election of new NCJ members

White Paper premise(s): The election of 15 judicial members shall be made by Sejm – only among judges with a support of 25 other judges or a group of 2,000 citizens. The law also provides that no less than 40% of the elected judicial members would be nominated out of candidates presented by the parliamentary opposition.

Response

- The Constitution (art. 187.1.3) allows the Sejm to elect only four NCJ members and then only from among the deputies.
- The fact of obtaining the support of 25 from among more than 10,000 judges does not testify of one being a representative candidate (especially that the same group of 25 judges can support a discretionary number of candidates; as the support lists had been classified, it is not clear whether the elected NCJ members were nominated by different judicial groups or by the same group of 25 judges).
- The citizenry does not wish to participate in this unconstitutional procedure, as evidenced by the small number of merely two candidate nominations submitted by

them in the current elections of NCJ members. One of those candidates did not comply with the statutory requirement, as a retired judge he could not run, while the second candidacy was submitted by the so-called Gazeta Polska Clubs circle, clearly a medium actively supporting the current Government.

- The law ensures that the largest parliamentary club will have a majority in NCJ (it can support nine judges, while the Council already includes two deputies, two senators and the Minister of Justice who are all members of that club), i.e. as many as 14 of the 25 seats in NCJ.
- The law should not allow judges to be bound in a direct way with any party, be it the ruling or the opposition party. That is because through the very act of election they become the judges supported by a particular party, which significantly weakens their apolitical image in public perception. In the course of the election of the new NCJ members, a representative of one of the parliamentary clubs which supported the Government stated outright after the meeting with the candidates that “We have nominated the judges who represent our political views.”

The joint term of office of the members of the new NCJ

White Paper premise(s): There will be one singular 4-year term of office and the members of NCJ shall be irrevocable – thus the parliament shall have no mechanism of exerting any pressure on their decisions after they are elected.

Response

- The Minister of Justice, a representative of the parliamentary majority, who is also the General Prosecutor and the chair of one of the political parties, and who after changes in the law gained a real influence on all criminal proceedings in Poland as he can give every presiding prosecutor binding instructions on a specific case, has gained significant competences regarding the situation of every one of the judges elected into NCJ.
- The law provides for the re-election of an NCJ member elected by the Sejm. A judge wishing to secure their re-election in NCJ will be exposed to risk of choosing conformist behaviour towards politicians, which distorts the constitutional mission of NCJ.
- The current composition of NCJ indicates unequivocally that the majority of Council members have strong ties to the Minister of Justice, while those members who were recently appointed as court presidents are additionally subordinated to the Minister of Justice, who, under Polish law, exercises administrative supervision over common courts.

Politicians’ ability to influence NCJ and judges

White Paper premise(s): As politicians have no mechanism of influence on the Council, none of its decisions – especially those regarding judicial nominations or promotions to the

common courts or Supreme Court – will be subject to such pressure, all the more on any verdicts issued by particular judges.

Response

- The law ensures that the largest parliamentary club will have a majority in NCJ (it can support nine judges, while the Council already includes two deputies, two senators and the Minister of Justice who are all members of that club), i.e. as many as 14 of the 25 seats in NCJ. No “mechanism of influence” is therefore unnecessary, since no NCJ resolution will be issued without the consent of its members representing the parliamentary majority.
- The composition of the currently elected NCJ demonstrates that the Council is now composed of persons lacking authority in their professional circles and that most of them have close ties to the Minister of Justice.

Judicial Councils in other European countries

White Paper premise(s): National Judiciary Council has its counterparts in many EU-member states – but there are also countries without such council (Germany, Austria, Czech Republic), where judicial nominations are decided by commissions composed solely or overwhelmingly by politicians (as is the case with Germany on federal level and most of the Länder).

Response

- NCJ was established as the first phase in the process of “de-communisation” of the Polish judiciary, a result of the Round Table Agreements. One of the initiators of establishing that body was Jarosław Kaczyński, who participated in the work of the team which came out with the initiative of forming this body. Among other things, Jarosław Kaczyński demanded that the majority of the NCJ composition would be decided on by the judges’ self-government.
- It is unreasonable to compare Poland to legal systems in which do not include judicial councils; in the case of Poland, the existence of NCJ is guaranteed by the Constitution. If the Government invokes countries in which NCJ does not exist, then apparently the new regulations are intended to shape the work of NCJ in such a way as to make it practically meaningless, as if the body did not exist.

Composition of Judicial Councils in Europe

White Paper premise(s): The composition of the judiciary council varies among European countries – in some of them there is a majority of judges (Spain, Poland, Italy, Great Britain), in some – not (Denmark, France, Netherlands, Portugal). In some countries the judges are elected by their peers (Belgium), in some – by the parliament (Spain) or by the executive out of the candidates presented by the judiciary (the Netherlands).

Response

- The Constitution of the Republic of Poland determines the composition of NCJ: 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, 15 judges chosen from judges of all courts, four deputies elected by the Sejm and two senators elected by the Senate. Nobody questions the validity or purposefulness of such an NCJ composition.
- The Polish Constitution clearly defines the competences of the parliament in the scope of the NCJ composition: the Sejm may elect only four deputies, and the Senate may elect only two senators in NCJ (in practice, the Minister of Justice is also a representative of the parliamentary majority). Furthermore, the presidents of the Supreme Court and the Supreme Administrative Court are elected from among the candidates presented by the President of the Republic of Poland, i.e. a representative of the executive branch.
- In none of the European countries referred to by the Government does the parliamentary majority decide on casting as much as 84% of the seats in the Council; this is so under the new rules in Poland, where the Sejm and the Senate elect as many as 21 out of the 25 NCJ members. A judicial council dominated by the ruling majority has no real capability to defend the independence of the courts and the independence of judges against the designs of politicians. NCJ constituted in such a manner loses credibility, and yet its mission includes, among others, the tasks of recommending [NCJ] candidates to the President of Poland from amongst judges of all levels of the Polish judiciary and of defending judiciary independence, which often takes the form of receiving from judges information about attempts to exert pressure on judges, e.g. by politicians. Lack of trust in the Council that is politicized and politically dependent will cause judges to cease providing such information.

The influence of judges as assessed by international organisations

White Paper premise(s): The Venice Commission and other international organizations safeguarding rule of law have repeatedly pointed out that too extensive influence of judges on the judiciary council may affect the justice system negatively – as it poses a risk of cronyism, self-interest, illegitimate self-protection and the public perception of judicial corporatism. However, in the opinion of the Venice Commission on the Polish reforms (widely quoted by the European Commission, too) these arguments were overlooked.

Response

- The Venice Commission indicates hazards where they occur. In systems where the composition of the judiciary council led to pathologies, the Venice Commission called for changes. In the case of Poland, the Venice Commission recognised the model in which 15 out of the 25 NCJ members are chosen by judges themselves as optimal. This is why the Venice Commission criticised the solutions that completely deprive judges of the right to choose their representatives in NCJ. Unfortunately, the

recommendations of the Venice Commission towards Poland continue to be ignored. The previous solutions regarding the election of judges to NCJ by judges were entirely consistent with the recommendations of the Council of Europe and with the Polish Constitution. Current solutions are contradictory to these provisions.

Comparison between Poland and Spain

White Paper premise(s): Polish legislation is most similar to Spanish – there is also a majority of judges in the Council (13 – 8, in Poland 17 – 8), also elected by the parliament on a joint term, with a $\frac{3}{5}$ majority.

Response

- In Spain, the parliament elects judiciary council members on the basis of binding recommendations from the electoral commission composed of the most senior president of the Supreme Court chamber, the most senior and the youngest judge of the Supreme Court and the secretary of the Supreme Court. In Poland, the final composition of the judiciary council is decided by the parliamentary majority at a Sejm committee meeting, and subsequently at the sitting of the Sejm. An absolute majority of votes is sufficient to elect NCJ members. The law forces the Spanish parliament to elect judges of various courts to the judiciary council.

Term of office of the current NCJ members

White Paper premise(s): Previous, individual terms of office of 11 out of 15 NCJ Judicial members (that were deemed unconstitutional) would anyway expire during the next two weeks (until 24 March), further two – in May and June 2018. Terminating them now is justified by the fact that they were unconstitutional, and also – due to the fact that there is such a short time until their lapse, the termination should not affect the Council in any significant way.

Response

- It is not true that the “previous terms of office” of NCJ members were incompatible with the Constitution. Acting in the legally challenged composition, the Constitutional Court deemed only that their mutual relations are unconstitutional: that they should have been counted jointly rather than separately.
- The term of office of two NCJ members should continue until 2020 while term of office of the remaining 11 should last exactly four years. The Constitution is an absolutely binding act of law and the Government cannot freely choose from amongst its provisions those it is willing to apply.
- A one-off termination of as many as 60% of the NCJ members and their replacement with new and inexperienced persons leads in practice to paralysis of NCJ's work.

Alleged consequences of leaving the current solutions unchanged

White Paper premise(s): To the contrary, have they not been terminated, the Council would be effectively paralyzed until February and March 2020 (only then last two of the individual terms would lapse) – out of 25 seats in the NCJ 13 would be vacant.

Response

- In the course of the relevant legislative work, numerous proposals were made regarding the ways of harmonising the NCJ members' term of office in a manner consistent with the Constitution.
- What would have sufficed was to elect now NCJ members in the number equivalent to the number of those whose term of office lapses on 21 March 2018 (for the term of office commencing on 22 March 2018), and then hold by-elections for a joint term commencing on 22 March 2018; this would have been enough to remove this obvious unconstitutionality of the new provisions that cause the termination of constitutionally established terms of office.

The tasks of NCJ

White Paper premise(s): The National Council of the Judiciary is responsible for safeguarding the independence of judges and courts. One of its main tasks is to recommend candidates for judicial positions to the Polish President, and to recommend judges for promotion to higher-level courts.

Response

- It is precisely in view of such important competences that the independence of NCJ from politicians is indispensable.
- In the years 2014-2018, the current NCJ recommended 21 candidates for the positions of judges of the Supreme Court to the President of the Republic of Poland while the new NCJ will be able to fill 60 seats in the Supreme Court in this year (2018) alone (with further nominations in subsequent years). Judges of the Supreme Court are elected for an indefinite period; the new NCJ will have a fundamental say in the election of judges who will make up the majority of the Supreme Court judges for decades to come.
- The current Minister of Justice refrained from recruiting for the vacant judge positions in the common courts starting from the year 2016, which resulted in more than 800 vacancies and the failure to settlement about one million cases per year over that period; in the very week in which the new NCJ was elected the Minister of Justice commenced recruitment for 145 [of the aforementioned] vacancies. The minister prevented the previous NCJ from electing judges and enabled the new politically elected NCJ to immediately elect such a large number of judges.

Composition of NJC and the rules of their election

White Paper premise(s): Under the Polish Constitution, the National Council of the Judiciary is composed of the Minister of Justice, six parliamentarians, one representative of the President of the Republic, and 17 judges, who thus have more than 2/3 of votes in the Council. Of the last group, 2 representatives sit on the Council ex officio (First President of the Supreme Court and President of the Supreme Administrative Court), and 15 are elected. The Polish Constitution does not specify who elects them; it only says that the 15 judges must be chosen from amongst judges, for a common term of 4 years. The independence of elected members of the National Council of the Judiciary rests on the irrevocability of their mandate.

Response

- The Constitution clearly defines how many of the NCJ members can be elected by the Sejm and sets that number at four rather than 19, as the governing majority decided.
- Currently, judges no longer elect their representatives to NCJ as all the judges currently elected to NCJ represent the governing majority rather than judges.
- NCJ was established so that judges could have their representatives in the body that safeguards the independence of courts. This is what was established through the Round Table Agreements, what the Polish Constitution states, and what the case-law of the Constitutional Court recommended before the present changes, and no one challenged that status for several dozen years.
- The Government has caused that 92% of the membership of the body mandated to safeguard the independence of courts and judges is now elected by politicians, when that very body is expected to guard the courts and judges from the influence of political power.

The method of election of the previous NCJ members

White Paper premise(s): Previously, judicial members of the National Council of the Judiciary were elected in a complex process comprising many stages. In stage one, general assemblies of judges of circuit courts would chose representatives from amongst their members, who went on to form another assembly, and it was only from amongst its members that 8 members of the National Council of the Judiciary were elected. At the same time, delegates would be chosen by specific courts of appeal, and the assembly of such delegates would elect another two Council members. Delegates selected by the judges of the Provincial Administrative Courts would form a single assembly with the judges of the Supreme Administrative Court, and such assembly chose another two Council members. The General Assembly of Judges of the Supreme Court would elect the last two members of the National Council of the Judiciary.

Response

- As the Government was able to describe the process in four sentences, it apparently was not that complicated.
- The complex process alluded to here guaranteed that the judges entering NCJ would remain independent of politicians and would come from different backgrounds.

- The previous method of electing the NCJ members also guaranteed that representatives of all types of courts would be included in NCJ.
- These represent indirect elections; In the USA, it is the electors who elect the president.

Participation of the district court judges in elections to NCJ

White Paper premise(s): *A point worth making is that his process did not in fact involve a significant number of judges, especially district court judges, who represent the largest group in the Polish judiciary. As a result, judges of high-instance courts have dominated the National Council of the Judiciary in recent years. Despite the fact that the Constitution provides that the Council should comprise of judges of all types of courts, there is only one district court judge sitting on the Council today – even though district court judges account for over 2/3 of all Polish judges. For almost 30 years of its history only 4 members of the Council were judges of these courts (district courts resolve almost 95% cases in Poland).*

Response:

- It is false that Council members have been elected by “general assemblies of judges of circuit courts”. In fact, such bodies do not exist. Members have been elected by an assembly of representatives of court districts composed of 50% district court judges and 50% regional court judges. Therefore, district court judges both participated in the selection of members, and became members of the NCJ.
- The government also neglected to mention that one member of the NCJ was elected by the Assembly of Military Court Judges. This court is not represented in the new NCJ.
- District court judges elected members of the NCJ, as they constitute 50% of the assembly of representatives of court districts’ members. It is not true that this group of judges was excluded from elections to the NCJ. District court judges usually supported judges from higher instance courts due to the experience and authority of the latter as well as responsibilities of the NCJ, e.g. electing Supreme Court judges.
- All the common court judges who took part in the elections to the NCJ, and all the judges elected by them had worked in district courts for many years, becoming well acquainted with the challenges faced by these courts. At present, the most pressing challenge faced by the courts is staff shortages caused by the Minister of Justice who has been stalling appointments, waiting for NCJ to take a shape that would ensure the selection of judges in line with the Minister’s political views.
- The Constitution does not require district judges to be part of the Council. District courts have been established by ordinary law, and the Constitution does not stipulate their existence. According to the Constitution, the NCJ should be composed of judges chosen from among “judges of the Supreme Court, common court, administrative court and military court.” Previously, judges of all the abovementioned courts had been members of the NCJ. In its current shape, the NCJ consists of representatives of common courts (13 district courts, 1 regional court) and 1 judge of the Provincial Administrative Court. Supreme Court judges, National Administrative Court and military courts have been entirely left out of the Council.

- In 2010, the current ruling party called for members of the NCJ to be "judges distinguished by at least 10 years of professional experience in adjudication in the appeal court" – candidates that fulfil this stipulation are at least regional court judges.

Reservations held by some judges toward existing regulations:

White Paper premise(s): *In 2014, the problem was raised by district and regional court judges themselves. In a resolution adopted at the time, they accused the election mechanism of being inconsistent with democratic standards and demanded that the mechanism's constitutionality be reviewed.*

Response:

- The issue raised by some judges concerned the disproportionate distribution of seats in the NCJ with relation to the actual number of judges in particular courts. Polish judges have NEVER demanded that they be stripped of their own representation in the NCJ, and NEVER asked that the membership of the NCJ be decided by parliamentary majority.

Assessment of the actions of the existing NCJ regarding the Council election system.

White Paper premise(s): *The National Council of the Judiciary did not take any steps in reaction to this resolution and did not make application to the Constitutional Tribunal as suggested by the judges. The Prosecutor General did, however. After examining this application, the Constitutional Tribunal ruled that the provisions under scrutiny violated the Constitution inasmuch as district and regional court judges were not treated equally with court of appeal judges, and district court judges were not treated equally with regional court judges.*

Response:

- Politicians interpreted this ruling so that, instead of giving all judges equal influence on the choice of members to the NCJ, they took away the right to elect NCJ judges from all judges, awarding this competence to themselves instead.
- The Prosecutor General (i.e. the Minister of Justice) has submitted this motion in parallel with the submission of a draft amendment to the Act on the National Council of the Judiciary; the Constitutional Court consisting of judges appointed by the party in power issued a ruling favourable to the Minister's motion.

Subjective assessment of the existing NCJ.

White Paper premise(s): *In the previous model, most judges had no real impact on the composition of the National Council of the Judiciary, while the Council would take actions that were unacceptable to the judicial community.*

Response:

- District court judges used to be able to influence the choice of NCJ members, as they constituted 50% of the body that elected representatives of court districts. It was simply the case of these judges putting their trust in more experienced colleagues whose practice was broader and more diverse. It is not true that the judges did not accept the actions of the NCJ. This is clearly evidenced by the actions of all Polish courts at all levels, which yielded their clear support to the Council and its efforts to defend the independence of courts and the tripartition of power.

Examples of the alleged lack of acceptance towards the actions of the existing NCJ.

White Paper premise(s): A case in point is a recommendation for a vacancy at the Przemyśl District Court which was issued by the National Council of the Judiciary. The Council endorsed a candidate who was supported by only one of 39 judges making up the General Assembly of judges from the local circuit. In their subsequent resolution, the judges expressed their strong opposition to the Council's reasons to believe they were "inherently biased" and that they manifested "a total ignoring of the judicial community's opinion, and a profanation of the ideal of self-governance of this profession".

Response:

- According to the Polish Constitution, the judges are appointed by the President of the Republic of Poland at the request of the National Council of the Judiciary, while the judiciary self-government issues opinions on the candidates. The Council takes into account the voice of the judiciary, but it is not considered binding. In this case, the Council explicitly stated the reasons behind the decision to request appointment for a different candidate than the one proposed by the judiciary. The Council's resolutions can be challenged in the Supreme Court, and any candidate who lost a competition can appeal the decision. This individual example demonstrates that if the opinion of the Council and the local courts are not in agreement, the Council chooses the candidate they considered the most suitable rather than the one supported by the community.
- The new regulations eliminate judges' self-government, depriving the judges of the right to give opinions on candidates for court presidents and dismantling bodies representing judges at the national level. What is more, the new procedure for selecting judges of the Supreme Court strips the judiciary self-government of the right to evaluate candidates.

Example of the appointment of a judge who is related to a member of the NCJ.

White Paper premise(s): A similar situation occurred at the Warsaw-Mokotów District Court, where the National Council of the Judiciary recommended Joanna Raczkowska, the wife of Piotr Raczkowski, the Council's Vice-Chairman. Despite 93 other candidates and the fact that the General Assembly of Judges of the Warsaw Regional Court objected to her candidacy, the National Council of the Judiciary unanimously backed Ms Raczkowska.

Response:

- The information above is manipulated. The recruitment procedures were in that case simultaneously held for 12 vacancies in Warsaw district courts. 150 candidates applied for the vacancies; therefore, the number of candidates per vacancy was 12.5 rather than 93.
- The chosen candidate was an experienced prosecutor capable of applying for office in in any higher instance court (regional court) due to her seniority and evaluation results. Nevertheless, the candidate chose to apply to a district court of the first instance that had the highest caseload. In fact, the caseload was significantly higher than that of her former workplace.
- The candidacy was unanimously approved by the committee, which included a member of the NCJ who had been chosen by the Sejm from among the deputies of the current parliamentary majority.
- The candidacy was approved by the board of the court.
- To state that the General Assembly was against the candidate was manipulative. In the Warsaw district, it is very rare for a candidate to receive more than 50% of supporting votes, which is considered approval. Other candidates in the discussed competition also did not receive support at this rate.
- The person related to the candidate has recused himself from the entirety of the Council's operation for the period in which the candidate applied to fill the vacancy.

Undesirable phenomena in the justice system

White Paper premise(s): *Although the National Council of the Judiciary is mostly composed of judges, who have so far been chosen by judges themselves, a number of undesirable phenomena emerged in the Council (and indirectly across the whole system of justice as well): nepotism, putting private interest above the interest of citizens, and illegitimate protection of members of one's own group. This resulted in the public image of a closed, stand-alone professional corporation that does not serve society but puts itself above it.*

Response:

- Having spent 3 years working on changes to the judiciary, the government was able to pinpoint only the 2 abovementioned cases as instances where it is possible to accuse the NCJ of making an incorrect decision. During the last 4 years of operation, the NCJ has submitted no less than 1472 requests for appointment of judges to the President of the Republic of Poland.
- The negative image of the judiciary is the result of a long-term political effort, including the recent smear campaign partially financed from the State Treasury companies of the "Polish National Foundation". This shameful media campaign was against the statute of the Foundation, which was originally established to promote Poland abroad. Instead, several million zlotys of public funding have been pumped into a smear campaign against courts and judges.
- This fragment of the White Paper is a haphazard patchwork of allegations impossible to address.

Assessment of the position of the Venice Commission

White Paper premise(s): *It should not be overlooked that in its opinion on Polish reforms the Venice Commission adopted significantly different position, omitting its own arguments made previously in favour of balancing the judiciary councils. The Commission has actually quoted parts of the abovementioned opinions on Ukraine and Former Yugoslav Republic of Macedonia – but skipped the elements which pointed to certain risks resulting from lack of balancing judicial influence on the system with different mechanisms. In the opinion on Poland there is also no mention of the Romanian system assessment – where it was directly recommended that the regulations should prevent judges elected by their peers from dominating the judiciary council. In Poland's view this is a manifestation of double standards – a selective application of guidelines which should be homogenous for all European countries.*

Response:

- The Venice Commission identifies threats as and when they occur. The Venice Commission called for changes in systems where the structure of the Council led to pathologies. When it comes to Poland, the Venice Commission considered the model in which 15 out of 25 NCJ members are elected by the judges themselves an optimum solution. This is why the Commission levelled criticism on systems that completely deprive judges of the right to choose their own representatives in the NCJ. In different countries with different legal culture similar actions may lead to different results.
- The Venice Commission came to Poland at the invitation of the Polish Minister of Foreign Affairs, and met with all parties to the dispute on upholding the rule of law in Poland. After the Commission's position failed to fulfil the government's expectations, representatives of the government and the parliamentary majority attacked and disparaged the work of the Commission against all norms of civil behaviour. This narrative was supported by the politicised national media, which at this point were public only in name. Members of the NCJ who met with the representatives of the Venice Commission at the request of the Ministry of Foreign Affairs have been publicly accused of treason by a prominent deputy from the ruling party who also is a member of the NCJ appointed by the majority of the Sejm.

Historical aspects of the establishment of the NCJ

White Paper premise(s): *In the Polish system a historical aspect is also worth pointing out. First National Council of the Judiciary was created in 1989 – and it was composed of the judges of common courts appointed by the communist State Council. Further activity of the NCJ was based on a corporate, inner-circle model of nominating its members – and that led not to favouring to hold accountable those involved in communism, but rather was itself an obstacle; it also stood in the way of any serious reform of the judiciary.*

Response:

- The NCJ was established as a result of the Round Table Agreements, with the idea spearheaded by, inter alia, Jarosław Kaczyński as well as many scientific authorities and members of the opposition, including prof. Adam Strzembosz, a legend of Polish independent judiciary. Prof. Strzembosz had been removed from the judiciary following the introduction of martial law in Poland.
- At that point, having better knowledge of the contemporary situation, it was decided that the majority of the members of the NCJ should be chosen by the self government bodies of the judiciary to separate the tasks of the Council from political influence.
- At that time, many Polish judges were members of the “Solidarity” movement and openly supported the systemic changes in Poland. It was widely known that the judges had been appointed by the communist authorities, which was unavoidable.
- The NCJ does not have the power to “stand in the way” when it comes to holding accountable those involved in communism, nor does it have the power to block “any serious reform of the judiciary”. These tasks belong to the parliament, which can make appropriate decisions insofar as they fall within the limits of the Constitution of the Republic of Poland. In 1990, the Supreme Court has been created anew. The NCJ conducted individual reviews of the actions of judges prior to 1990. In several dozen instances, judges who were found to have acted against ethical principles were stripped of the right to their retirement pensions. However, consequences were drawn individually rather than on the basis of collective responsibility, as legal consequences were drawn from everyone who was proven to have broken the law. A system of democracy guaranteed every citizen the right to a fair trial and the right to a defence.
- The notices and positions issued by the NCJ have always been guided by the need to ensure that every citizen is able to efficiently exercise their right to court.

Tasks of the NCJ

White Paper premise(s): The Council’s task is to protect the independence of courts and judges, but that cannot be equated with the protection of their corporatist interest alone, a point of criticism that has been long raised against the NCJ by almost all political forces. The need to reform was also seen among legal scholars. Professor Andrzej Rzepliński, President of the Constitutional Tribunal until 2016, now an ardent critic of amending the laws that regulate the organisation of the judiciary, proposed much deeper reforms in 2004.

Response:

- Neither the representatives of legal sciences, nor the law community in Poland have EVER postulated that the Sejm of the Republic of Poland should be granted the right to choose 19 out of 25 members of the NCJ.
- The basic function of the legal community is to analyse existing legal regulations and propose new solutions. The changes to the act on NCJ adopted by the current Sejm are broadly criticised, regarded unconstitutional and irrational by all the major scientific communities and professional self-government bodies of attorneys and solicitors.
- While nobody questions the need to review and change the justice system, these changes should not consist in subordinating the courts to politicians.

New procedure for the election of NCJ members

White Paper premise(s): *That is why Polish Sejm decided to change only the way judicial members of the NCJ are nominated. From now on they are to be elected from among the representatives of all levels of the judiciary—and not by judges alone but by the Polish Sejm. In order to secure proper representation for opposition candidates, the election would be held by a three-fifths majority, with each parliamentary grouping guaranteed the election of at least one candidate it endorses. In the current composition of Sejm, it means that the opposition groups would have six candidates with their endorsement elected – should they decide to endorse anyone.*

Response:

- Contrary to the government's criticism, prior to the discussed changes NCJ members had been elected from among all judges. Currently, they are chosen from among political associates.
- Contrary to the government's assertions, an absolute majority of votes is sufficient to elect members of the NCJ. The parliament majority (the government) always holds an absolute majority.
- The Act on the NCJ ensures that the largest parliamentary club will have a majority in the Council (it can support 9 judges, and the Council already consists of 2 deputies and 2 senators, as well as the Minister of Justice who belongs to the same parliamentary club). That is, the largest parliamentary club controls as many as 14 out of 25 seats in the NCJ. "The mechanism of exerting pressure" is therefore unnecessary, since the NCJ will not be able to issue any resolutions without the consent of its members representing the parliamentary majority.

Influence of judges over the NCJ

White Paper premise(s): *Judges at the NCJ command the same majority as they did before, and this is provided directly in the Constitution. As mentioned above, the Constitution does not stipulate who the NCJ judges will be elected by, leaving that to the legislator's discretion. It only provides that they are appointed for a joint four-year term.*

Response:

- The Constitution specifies how many members of the NCJ can be elected by the Sejm of the Republic of Poland. This number is 4, not 19 as regulated by the parliament in the amended Act.
- A body that protects the independence of courts from other authorities cannot perform its duties if its composition is solely determined by these "other authorities".
- The election procedure used prior to the changes allowed all judges to take part in the elections of the NCJ members, either directly or indirectly.
- The Constitution specifies that any elected member of the Council serves a four year term of office. It does not say, as is the case with other bodies, that the term of office of the entire body is limited to e.g. 4 years. The language of the Constitution is

unambiguous, and had informed practice for many years. It is astonishing that the new Constitutional Court attempts to challenge the straightforward, clear and obvious wording of the Constitution.

Influence of the judiciary community over the elections to the new NCJ

White Paper premise(s): The judicial community continues to play a major role in the procedure— the choice is made only from among the candidates who earlier won the backing of at least 25 other judges or 2,000 citizens. Compared with the previous multistage representative procedure, that gives ordinary judges (particularly of lower instances) a genuine possibility of influencing the Council's composition unlike before, when it was actually illusory.

Response:

- The current procedure allows a single group of 25 judges to propose all candidacies (for instance judges on the so-called permanent delegations to the Ministry of Justice who are not actively adjudicating and are subordinated to the Minister); politicians subsequently choose NCJ members from this pool.
- Judges are exposed to the influence of politicians who can offer support in elections in exchange for undisclosed benefits.
- Citizens refuse to participate in this unconstitutional practice.
- During the elections, the Sejm made the letters of support confidential, therefore it is impossible to determine what kind of support and by whom was given to the candidates to the new NCJ. Even the deputies who elected the candidates were denied access to the attachments that candidates submitted along with their applications. This situation is absolutely unacceptable.
- Most of the elected candidates has clear ties to the Minister of Justice and cannot be considered representative of the judiciary, a fact that is confirmed by multiple resolutions of courts issued on this matter.

EXAMPLES FROM OTHER COUNTRIES

- If the government believes that the manner in which members of the NCJ are elected does not affect the independence of courts then why does it justify the introduced changes with examples of legal orders in countries, where politicians have been formally granted greater influence on the procedure of appointing judges?
- The new Act on the NCJ introduces changes into the election of NCJ members that strip away the judges' right to choose their own representatives.
- Following the changes, membership of the NCJ consists of representatives of the Sejm (19 members), Senate (2 members), the government (one member) and the president (1 member) + 2 court presidents appointed by the president from among candidates indicated by the judges of these courts.

Safeguards of independence

White Paper premise(s): *All the safeguards of independence remain in place, and the election of NCJ members by the Sejm will not lead to the politicisation of the Council. It will continue to be composed of independent judges—once elected, they will be irremovable. Neither the government nor the parliament will have any say in decisions taken by the Council after it is constituted. Much in a similar way, the Sejm elects the Ombudsman (Civil Rights Commissioner), the president of the Supreme Audit Office, or members of the Monetary Policy Council—and no one accuses those bodies of being dependent on the parliament's will.*

Response:

- Judges running for the NCJ are exposed to the influence of politicians who can offer support in elections in exchange for undisclosed benefits. It has already been revealed that politicians met with candidates for NCJ members and demanded that they declare support for the program of the politicians' political party.
- NCJ members are eligible for re-election. Therefore, they are at risk of being pressured by politicians not to criticise the activities of the parliament unless they want to jeopardise their chances of re-election.
- Drawing comparisons between the NCJ and the Ombudsman or the NIK Chairman testifies to the ignorance of Poland's legal and political system. The positions of Ombudsman and Chairman of NIK have been established as an "extension" of the controlling functions of the parliament. These bodies monitor the activities of state administration (the Ombudsman in terms of human rights, and the NIK chairman in terms of economy, legality, expediency, etc.). The NCJ safeguards the independence of the courts and judges from other authorities – including the authority exercised by the parliament.

Objections to the EC's assessment of the NCJ

White Paper premise(s): *The Commission criticises Poland for allegedly unconstitutional termination of the current NCJ's term. This allegation is unfounded: the previous election procedure was in conflict with the Constitution (lowest level judges were effectively excluded from the process, while the terms were individual, not joint, contrary to the Basic Law).*

Response:

- The new regulations do not remove the alleged incompatibility with the Constitution ruled by the new Constitutional Court whose members include incorrectly elected judges.
- The Constitutional Court did not decide that the election of members of the NCJ by the judiciary self-government is inconsistent with the Constitution - it questioned parts of the old procedure.
- The Constitutional Court did not decide that the election procedures effectively excluded lower-level judges from the process. That is because it is not true.

- To execute the Constitutional Court’s ruling within the limits of the Constitution, all judges should be granted an equal right to (directly or indirectly) vote in the election of members of the NCJ. Executing the ruling should not entirely deprive the judges of the right to choose candidates to the NCJ.
- Judges from regional courts have a real and direct influence over the choice of candidates to the NCJ, but they usually select experienced candidates, who are frequently district court judges.

Constitutional Court’s ruling that allows shortening of the term of office

White Paper premise(s): The Constitutional Tribunal has repeatedly found that in exceptional circumstances a term may be shortened if warranted by the need to protect public interest. If the most important body tasked with safeguarding judicial independence has been elected in violation of the Constitution, the situation calls for urgent reform.

Response:

- The Constitutional Court has never issued such a ruling.
- The Constitutional Court stated that when someone is elected for a specific term, the law might provide for situations in which the person ceases to perform that function before the end of the term (e.g. if during the term of office he or she is convicted of a crime). The Constitutional Court has never given permission for shortening the constitutional term of office through an ordinary law.
- The new Constitutional Court did not rule the NCJ was chosen in a manner contrary to the Constitution. In fact, the CC clearly indicated that its ruling does not concern the legality of the election of NCJ members.

Terms of office of the old NCJ members

White Paper premise(s): Among the 15 elected members-judges of the current NCJ, individual terms have already expired for two of them. A further 11 would have expired between February and June 2018. The Council would have had two judges elected in February and March 2016 whose terms would have run until early 2020. The legislature thus had two options: either wait for the expiry of all individual terms of all Council members (which would have created 13 vacant seats over the following two years) or terminate the terms of all its members and proceed with electing the entire NCJ, based on the principles enshrined in the Constitution.

Response:

- In order to introduce changes into the election procedure, a legislator who respected the Constitution could have selected enough NCJ members to replace those whose term of office ends on 21/03/2018 or earlier (for the term beginning 22/03/2018), and subsequently call supplementary elections for members with a term of office starting on 22/03/2018. The adopted amendments to the NCJ Act provide for a supplementary

member selection procedure, so it is particularly clear how little action was required to change the obviously and repeatedly unconstitutional nature of the new regulations.

Influence of the NCJ on the new CC

White Paper premise(s): One of the consequences of the National Council of the Judiciary's full independence is that the independence of the Supreme Court or of its judges is not at any risk, either. This also applies to the judges adjudicating in the newly-established Chambers of Extraordinary Review and Public Matters and in the Disciplinary Chamber. They will all need to obtain a positive opinion from the National Council of the Judiciary which will guarantee that the judges as a group will retain complete control over this process.

Response:

- The ruling party obtained a majority in the Council. It supported 9 judges, while the Council already consists of two deputies, two senators and the Minister of Justice belonging to the same parliamentary club. Consequently, they control as many as 14 out of 25 seats in the NCJ. Without the support of these persons, no candidate will become a judge.
- The new Act on the Supreme Court deprived the judges of the right to give opinion and evaluate candidates for the judges of the Supreme Court. Regulations do not give any powers to assemblies of chambers, or the general assembly of judges of the Supreme Court.
- The new, politicised NCJ will directly influence the new chambers of the Supreme Court, such as the Disciplinary Chamber that could remove from office judges who have independent views and rule independently. On the other hand, following a so-called extraordinary complaint, the Chambers of Extraordinary Review and Public Matters will have the power to retroactively change legal rulings from many years prior, causing chaos in the legal order; it also influences the approval of the legality of general elections, approval of the expenditure of public funding by political parties and licensing of important services. The members of these chambers are chosen by the Senate, which in practice means the ruling political party.

Influence of the Sejm over the NCJ

White Paper premise(s): The National Council of the Judiciary needs to be made more democratic so that the public – through the Sejm – could have a say on how judicial staff is formed. However, any influence ends once a judge is appointed and guaranteed full judicial independence, safeguarded in the Constitution and statutes.

Response:

- Even when the NCJ was not controlled by the parliament, society held a massive influence over the formation of the judiciary staff.
- No candidate can become a judge without consent of the President, who is elected in general elections.

- The parliament votes on laws that establish who is eligible to become a judge.
- The parliament regulates access to judiciary professions, currently controlled by the National School of Judiciary and Public Prosecution overseen by the Ministry of Justice.
- The parliament votes on laws that regulate court proceedings – regulations that are responsible for the excessive length of court proceedings criticised by the public.
- Courtrooms are equipped with cameras and proceedings are open to the public.
- Disciplinary procedures against judges are not confidential; judges found to have breached ethical principles are removed from the profession in front of the media, thus seen by the whole society.

VII. The Constitutional Court (chapter VI and items 139-165 of the White Paper)

The Constitutional Tribunal is the body which, in a final and universally binding manner, decides on the compliance with the Constitution of laws and other normative acts. The decision on the unconstitutionality of the law, after its publication in the Journal of Laws, deprives the law of its binding force and gives citizens the opportunity to resume proceedings in cases decided on the basis of the law. It is no coincidence, therefore, that the entire so-called "reform of the justice system" began with the Constitutional Court, which in December 2016 was fully subordinated to the current rulers and has been fully controlled by them to this day. The paralysis of the activities of a body that could independently establish the unconstitutionality of the laws reforming the judiciary and of other laws restricting the freedoms and rights of citizens has enabled a parliamentary majority to adopt these laws, which are clearly unconstitutional.

The White Paper misrepresents the issues relating to: the refusal to take the oath from properly elected justices, the recognition of the ineffectiveness of their selection, the subsequent selection of judges for the seats already occupied, and the assessment of the Court's judgments of December 2015 and 2016, the current composition of the Court, the correctness of the appointment of the President of the Tribunal in December 2016, the refusal of the Prime Minister to pronounce three rulings of the Court and the removal of these rulings from the official set of rulings, as well as the assessment of the effectiveness, independence and political impartiality of the functioning of the Court in the current personal and legal state. The White Paper concealed the fact that, at present, the Constitutional Court is not carrying out its tasks properly, is not a barrier to the adoption of numerous laws that are inconsistent with the Constitution, and does not have the authority it enjoyed until 2016 at home and abroad.

1. Composition of the CC featuring persons who are not justices of the CC

Re. 139

It is not true that the *Sejm* (Lower House of the Polish Parliament) passed the Constitutional Court Law on June 25th 2015 and elected five Constitutional Court judges on October 8th 2015, "*not yet knowing when their term of office would end*". The final date of the *Sejm*'s term is duly stipulated under the Constitution: the term of office of the *Sejm* closes as of the date preceding that of the *Sejm* of the subsequent term convening (Article 98 clause 1), which ought to take place within a term of 30 days as of the election day (Article 109 clause 2 of the Constitution), the election day set for a non-business day within a term of 30 days prior to the expiry of the term of 4 years as of the first day of the term of the current *Sejm* (Article 98 clause 1). **The term of office of Constitutional Court judges does not tie in with the *Sejm*'s term, and cannot depend on the same.** Should that be the case, the current *Sejm* could not elect Constitutional Court judges to replace those whose term of office expired during the *Sejm*'s previous term, as under such circumstances one would have to conclude that

only the most recent *Sejm* was authorised to elect said justices. It is self-evident that the *Sejm* cannot elect Constitutional Court judges for the future; nonetheless, such election should be handled over a period not in breach of the continuity of Constitutional Court operations. Consequently, since it was recognised that the term of office of three Constitutional Court justices expires as of November 6th 2015, the *Sejm* should elect their successors within a period allowing them to assume office as of November 6th 2015. It cannot therefore be concluded that the election of three Constitutional Court judges by the *Sejm* of the previous term had been accelerated or incorrect. Moreover, the Constitutional Court confirmed the correctness of said election in their decision (Ref. No. K 34/15), final and proclaimed in the *Journal of Law*.

The three judges were to take office as of November 6th 2015, whereas their present term began somewhat later, as of November 12th 2015. Accordingly, these judges were properly elected prior to the expiry of the *Sejm*'s previous term. Hypothetical White Paper deliberations concerning justice election scenarios which had not actually taken place are of no consequence. Such is the explicit conclusion of the Venice Commission (opinion of March 11th-12th 2016, item 122).

Regardless of speculations concerning the hypothetical knowledge (or lack thereof) of the *Sejm* of the previous (7th) term as to the specific final date of term – it being common knowledge that any speculations concerning collective entity awareness are extremely risky – the single thing NOT subject to any speculation and fully obvious is that as of the day of the *Sejm* of the present (8th) term passing its (unknown to the Constitution) resolution concerning the invalidity of the election of five judges – i.e. as of November 25th 2015 – it was common knowledge that the new term opened on November 12th, i.e. 6 days after the expiry of the term of office of the three justices replaced with newly elected once. Therefore, it was obvious as of the date of the resolution that the election of the three aforementioned judges did not involve any “*overlap*”, but rather occurred during the term of related vacancies. This is an objective fact, in light of which any speculations concerning the knowledge (or lack thereof) of the previous *Sejm* become largely unsubstantiated.

Re. 140

The position presented in the White Paper arises from a lack of comprehension of the very essence of election law shortly before election time.

In earlier case law, the Constitutional Court pointed to the necessity (evolving from the principle of democratic rule of law, Article 2 of the Constitution) of preserving a minimum term of six months as of the enactment of major amendments to the election law before any action is taken under the election schedule pending. Notwithstanding the above, the rule had only applied to general elections, as confirmed by two Constitutional Court decisions referenced in footnote 60 of the White Paper (cases K 31/06 and Kp 3/09 concerned local government and presidential elections, respectively). **The aforementioned principle had never been applied – in the**

Constitutional Court's case law or legal science – to the election of one authority's members by another authority, as in case of Constitutional Court justices elected by the *Sejm*. One would also be hard-pressed to conclude that it could apply to Article 137 of the Constitutional Court Law of 2015, since the regulation had not introduced any “*essential change*” to the procedure of electing Constitutional Court judges, being no more than a so-called transitional measure. The procedure, consisting in the *Sejm* electing Constitutional Court judges, is regulated under Article 194 clause 1 of the Constitution, not having been amended within said scope by virtue of Article 137 of the Constitutional Court Law of 2015.

Notably, the charge of the missing 6-month *vacatio legis* was raised by Law and Justice Deputies in their motion to the Constitutional Court to examine the constitutionality of i.a. the aforementioned Article 137 of the Constitutional Court Law of 2015. Said motion, filed with the Constitutional Court on October 23rd 2015, was subsequently withdrawn on November 10th 2015, resulting in the termination of proceedings. Motion withdrawal and its repeated filing upon commencement of the new term of the *Sejm* (wherein said deputies were a majority) prove that they saw no need for the issue to be examined by the Constitutional Court. Ultimately, the Constitutional Court referenced the matter in their decision of December 3rd 2015 (Ref. No. K 34/15), issued in the wake of a motion filed by the opposition's deputies, practically identical to that submitted by the Law and Justice group. In the course of proceedings, the charge of the missing 6-month *vacatio legis* for changes introduced was supported neither by the *Sejm* majority nor the government. Albeit as party to the proceedings, the *Sejm* was obliged to submit their position on the case, they failed to act accordingly. Consequently, the Constitutional Court dismissed all related proceedings, concluding that the unconstitutionality of the regulation concerning the missing 6-month *vacatio legis* had not been duly proven by the movers.

Re. 141

The vague appeal by the President-elect – person waiting to take office – was of no legal consequence: this was a political petition. As the authority “*ensuring constitutional compliance*” (Article 126 clause 2 of the Constitution), he was legally obliged to submit the 2015 Constitutional Court Law to the Constitutional Court in case of any reasonable doubt as to its constitutionality. Yet neither before nor after the election of justices by the previous *Sejm*, i.e. prior to October 8th 2018, did the President exercise his competence to challenge the Law, although such action could have nipped the constitutional dispute in the bud. Subsequently, for nearly another two months (October 8th 2015 until December 2nd 2015), the President did not accept the oath from any Constitutional Court justices properly elected by the *Sejm*, despite having been obliged to do so under Article 21 clause 1 of the 2015 Constitutional Court Law. In the middle of the night (at 01:30 a.m.)⁵³ On December 3rd 2015, however, the President did accept the oath from persons elected by the *Sejm* to replace previously elected Constitutional Court justices. This event took place several hours

⁵³ As notified by the Venice Commission in their opinion of March 11th-12th 2016, point 25.

after the *Sejm* had passed unconstitutional laws, and – significantly – several hours before the trial concerning case No. K 34/15 and the related decision, wherein the Constitutional Court confirmed the constitutionality of the legal basis of the previous *Sejm* having elected three justices.

Re. 142-147

Deliberations comprised in these items and concerning the parliamentary term are of no consequence to Constitutional Court circumstances – the term of office of the Court bears no relevance to the term of the Polish Parliament, as clarified above.

Re. 148-152

White Paper authors themselves admit that the term of office of the three Constitutional Court judges elected by the previous *Sejm* (in its 7th term) coincided with said *Sejm* term. Consequently, their election process had been correct – i.e. lay within the competencies of the *Sejm* in its previous term of office (see item 139 above).

As all further White Paper deliberations under item 149 are hypothetical and speculative in nature, they offer no contribution to matters considered hereunder. They comprise scenarios which had never come to pass. In their ruling of December 3rd 2015 (Ref. No. K 34/15), the Constitutional Court confirmed the constitutionality of the legal basis for electing three Constitutional Court justices.

Re. 153

The Constitution does not award the *Sejm* any competencies to rule to the effect of legal invalidity of any resolution passed by any *Sejm* of previous terms. In a simile to any other state authority, the *Sejm* is obliged to act upon the law and within its boundaries (Article 7 of the Constitution). Consequently, it cannot credit itself with any competencies. Resolutions concluding to the effect of the invalidity of previous *Sejm*'s resolutions concerning the process of electing Constitutional Court justices were therefore legally void and thus could not yield any legal consequences.

Furthermore, the *Sejm* could not have elected another five Constitutional Court justices as of December 2nd 2015 in light of its competence to fill fifteen judiciary posts only, said competence having been exercised as of October 8th 2015. Any further Constitutional Court judges could only have been elected in case of a judge's term of office expiring early, and then by the General Assembly of Constitutional Court Judges or the President of the Court, or in case of imminent expiry of a judge's term of office. As neither of the aforementioned circumstances had arisen as of December 2nd 2015, on that day the *Sejm* was not competent to elect Constitutional Court justices.

Further, the constitutionality of the process of the previous *Sejm* having elected all five judges had been presumed at the time – as the decision in case Ref. No. K 34/15 to the effect of the unconstitutionality of Article 137 of the Constitutional Court Law of 2015 with regard to justices elected to replace judges whose term of office was expiring as

of December 2nd and 8th 2015, respectively, was only proclaimed on December 3rd 2015. In reference to the consequences of said election process, the Constitutional Court duly emphasised as follows: *“Constitutional doubt did not arise (...) with regard to the legal basis for electing three Constitutional Court judges to replace justices whose term of office expired as of November 6th 2015. Scope-related derogation comprised in Article 137 of the Constitutional Court Law did not affect the effectiveness of the procedure of electing said judges. In light of the rule that a Constitutional Court justice is elected by the Sejm of the term comprising the date of his/her post becoming vacant, the respective election process was fully legal in this case, and there are no obstacles to the procedure becoming final once persons elected as Constitutional Court justices take the oath before the President”*.

Re. 154-155

The Constitutional Court did not rule with regard to the *Sejm* resolution of November 25th 2015 to the effect of the ineffectiveness of the Constitutional Court judge election process of October 8th 2015, or *Sejm* resolution of December 2nd 2015 to the effect of electing further judges to replace sitting justices, having concluded that neither resolution was a normative act lying within the Court's competencies. Proceedings were terminated with regard to both *Sejm* resolutions. This, however, does not mean that the Court did not express a related opinion, or *a fortiori* that either resolution was recognised as constitutional. On the contrary: in a decision of January 7th 2016 (Ref. No. U 8/15) to terminate proceedings, the Constitutional Court emphasised in point 5 of the justification: *“In analysing documents tying in with the process of electing judges of October 8th 2015, the Constitutional Court did not, however, find said process to have breached requirements duly described in applicable legal regulations; therefore, any thesis to the effect of an obvious, undisputable, and flagrant defect of the conventional action considered, allowing said action to be rendered non-existent, cannot be recognised as correct.”*

Already earlier, in their decision of December 3rd 2015 (Ref. No. K 34/15), the Court ruled that the legal basis for electing three justices in October 2015 was constitutional, and that the President should consequently accept the oath from all three.

Cf. also comments Re. 153 and 156 with regard to the unconstitutionality of *Sejm* resolutions under scrutiny.

Re. 156

It is not true that the current Constitutional Court comprises 15 properly elected judges: justices M. Muszyński, L. Morawski, and H. Cioch were elected to replace three justices effectively elected by the *Sejm* of the previous term on basis of a legal provision recognised (case K 34/15) as constitutional with regard to the election of said three justices. The General Assembly of the Constitutional Court had never decided to the effect of the expiry of the terms of office of Constitutional Court judges elected by the *Sejm* of the previous term. These judges cannot rule, as the President had not allowed them to take the oath; such development, however, in no way alters

the fact that the failure to take the oath does not deprive them of their due Constitutional Court justice status. Under Article 194 clause 1 of the Constitution, they assumed said status as of the date of having been elected by the *Sejm* as Constitutional Court judges, i.e. as of October 8th 2015. Notably, in a decision of December 3rd 2015 in case K 34/15, the Constitutional Court recognised the statutory provision concerning Constitutional Court judges taking the oath before the President as unconstitutional *“whenever interpreted otherwise than as an obligation of the President of the Republic of Poland to accept without delay the oath taken by a Constitutional Court justice duly elected by the Sejm”*. Assigning office space at the seat of the Constitutional Court or paying remuneration to persons not recognised as Constitutional Court judges does not – in contrast to any White Paper suggestions – result in such persons acquiring Constitutional Court justice status.

As concluded by the Legal Expert Team operating under the auspices of the Batory Foundation in a report published in February 2018⁵⁴: *“Of the three persons elected by the Sejm in breach of Article 194 clause 1 of the Constitution, two are deceased (Lech Morawski and Henryk Cioch), and the remaining one (Mariusz Muszyński) was subsequently appointed Vice-President of the Constitutional Court by the President of the Republic of Poland. Said appointment bears no legal consequences – under Article 194 clause 2 of the Constitution, only a Constitutional Court justice may be appointed Vice-President of the Constitutional Court. The two deceased persons were replaced by two further persons unauthorised to rule (Justyn Piskorski and Jarosław Wyrembak), as in a simile to the two deceased, they have been elected above and beyond the number of fifteen Constitutional Court judges the Sejm is eligible to elect under Article 194 clause 1 of the Constitution. The three justices properly elected under the Constitution by the Sejm of the previous term (Roman Hauser, Krzysztof Ślęzak, Andrzej Jakubecki) have until this day been disallowed by the President to take their oath; they have not been authorised to rule”*.

Re. 157

Charges concerning Constitutional Court activities raised under this point of the White Paper are groundless as basing on stipulations of the Law of December 22nd 2015 amending the Constitutional Court Law. The amending Law was recognised as unconstitutional in its entirety in decision K 47/15 of March 9th 2016. This decision has until this day not been proclaimed in the *Journal of Law*, in contrast to the specific obligation as expressed under Article 190 clause 2 of the Constitution. Yet it remains legally valid and universally binding as duly announced by the chairman of the adjudicating panel following public trial, and published in the Official Case Law Collection of the Constitutional Court.

2. Election of the President of the CC as an unconstitutional and not legally proper act

Re. 158

It is not true that Julia Przyłębska's election as President of the Constitutional Court was legally proper; furthermore, it is not true that it was recognised as legally proper by Vice-President of the Constitutional Court Stanisław Biernat⁵⁵. Irregularities of the election process were described in the aforementioned report by the Legal Expert Team operating under the auspices of the Batory Foundation, said report in part reading as follows: *"The procedure of electing Julia Przyłębska as President of the Constitutional Court was regulated under the Law of December 13th 2016 – Provisions implementing the Law on Organising and Proceeding before the Constitutional Court, and the Constitutional Court Justice Status Law. Said Law was proclaimed in the Journal of Law as of the date of expiry of the term of office of the previous President of the Constitutional Court, Justice Andrzej Rzepliński, i.e. as of December 19th 2016, and enacted as of the day following its proclamation. It introduced the position of a 'justice – acting President of the Constitutional Court', unknown to the Constitution, the President appointed Julia Przyłębska for. The statutory provision regulating the procedure is in breach of Article 194 clause 2 of the Constitution, which does not provide for an option of appointing an acting President of the Constitutional Court, or a fortiori of assigning competencies of a constitutional body to the person occupying that position, the Vice-President of the Constitutional Court recognised as said body. Furthermore, the provision is in breach of Article 173 of the Constitution, which establishes the principle of the Court's separateness and independence of other authorities. The President of the Council of Ministers had to approve Julia Przyłębska's appointment as President of the Constitutional Court, as the President's aforementioned official deed carried a requirement of securing a counter-signature – yet the Constitution provides for no governmental impact on the procedure of electing the President of the Constitutional Court whatsoever (see Article 144 clause 3 item 21 of the Constitution). The General Assembly of Constitutional Court Judges convened for December 20th 2016 by Julia Przyłębska was invalid not only for reason of its having been convened by a person other than authorised under the Constitution (Vice-President of the Constitutional Court), but also because it was attended by persons unauthorised to attend under the Constitution as non-Constitutional Court justices, i.e. M. Muszyński, L. Morawski, and H. Cioch, and also because Constitutional Court justice Stanisław Rymar was prevented from attending the Assembly: on leave that day, he moved for the date of the Assembly to be changed. Since the assembly was not attended by all 'Constitutional Court judges who took an oath before the President of the Republic of Poland', it ought to be concluded that this was not a "General Assembly session to present the President of the Republic of*

⁵⁵ Cf. justice Stanisław Biernat: *Trwam, to mój obowiązek (I Persist, Such is My Duty)*, Gazeta Wyborcza daily of January 20th 2017, <http://wyborcza.pl/magazyn/7,124059,21271694,sedzia-stanislaw-biernat-trwam-to-moj-obowiazek.html>

Poland with Constitutional Court presidential candidates” as defined under Article 21 clause 2 of the Law of December 13th 2016. It should further be noted that the majority of the General Assembly of Constitutional Court Judges did not support J. Przylebska as candidate (six out of fourteen Assembly attendants – including three non-Constitutional Court justices – voted in favour of the candidate). Furthermore, no resolution was passed to present her to the President as candidate. It should also be clarified that the aforementioned law establishing the episodic procedure to elect the President of the Constitutional Court unequivocally required – in as many as three clauses of Article 21 (see clauses 7, 9, and 10) – the General Assembly of Constitutional Court Judges to resolve to the effect of presenting the President of the Republic of Poland with Constitutional Court presidential candidates. While not actually passed, the resolution was drafted and signed by J. Przylebska, and subsequently presented to the President as a resolution of the General Assembly of Constitutional Court Judges. Consequently, J. Przylebska was unlawfully appointed President of the Constitutional Court under said resolution”.

It is further notable that legal provisions recognised as the basis for electing J. Przylebska as President of the Constitutional Court were unconstitutional. In their decision (Ref. No. K 39/16), the Constitutional Court outlined the scope of the legislator’s autonomy on the matter, concluding that the *Sejm* cannot arbitrarily decide as to the form or essence of the procedure to elect the President; in particular, it cannot deprive the General Assembly of Constitutional Court Judges of their right to put forward Constitutional Court presidential candidates, by assigning such authority to single justices only. Such mechanism would erode the competence of the General Assembly of Constitutional Court Judges as defined under Article 194 clause 2 of the Constitution – in light of said Article, the General Assembly is charged with the task of presenting the President with candidates for the position of President of the Constitutional Court.

3. Non-constitutional refusal of the Prime Minister to publish Constitutional Court rulings and removal of such rulings from the set of rulings

Re. 159

It is not true that “*the single legal consequence of the Constitutional Court’s ruling is the removal of provisions questioned therein from the area of their legal application*” – the proclamation of a decision to the effect of a legal provision’s unconstitutionality (including non-binding provisions; it is noteworthy that such provisions may be audited by the Constitutional Court as well) yields the possibility of revoking any issued on the basis of a provision deemed unconstitutional (Article 190 clause 4 of the Constitution). In addition, any such White Paper statement is also untruthful for the reason of expressing ahistorical beliefs. At the time of the Constitutional Court issuing decisions concerning the organisation and course of its activities, they had direct impact on the operational foundations of the constitutional tribunal – and the effects of its rulings. A failure to proclaim related decisions in the *Journal of Law* was a deed

actually altering (in breach of the Constitution) the systemic order of the Constitutional Court, as well as the legal status of its justices. Through such practice, the Constitutional Court was paralysed and unable to fulfil its competencies as the state's constitutional tribunal.

It should further be pointed out that regardless of whether a Constitutional Court decision yields a repealing effect or not, the President of the Council of Ministers is obliged to proclaim it: Article 190 clause 2 of the Constitution is unequivocal and unconditional in stipulating that Constitutional Court decisions “*shall be subject to immediate proclamation*” in a relevant promulgation document (gazette). Refusal to proclaim a Constitutional Court ruling does therefore constitute a constitutional transgression. Furthermore, all three decisions announced by the Constitutional Court in the courtroom and in its Official Case Law Collection (today published in electronic format only and available on the Court's website) were removed from the collection upon personal changes to Constitutional Court authorities, and Julia Przyłębska unlawfully assuming the position of President of the Constitutional Court. **Never before has any court or the Constitutional Court removed their ruling from an official case law collection, thus obliterating any traces of such decision having been made and announced.**

4. Inefficiency of the Constitutional Court and its complete dependence on the current ruling camp

Re. 160

It is not true that Constitutional Court judges elected by the present parliamentary majority had not been pressured by their electing politicians: it is common knowledge that Law and Justice politicians paid visits to the seat of the Constitutional Court throughout the year 2017, and that Constitutional Court judges elected by said politicians as well as persons elected to replace sitting justices met with Law and Justice politicians at the Parliament. In addition, J. Przyłębska is the wife of the Polish ambassador to the Federal Republic of Germany appointed by the current government; in the past, he had signed a declaration to co-operate with the Secret Service of the Polish People's Republic. M. Muszyński – as reported by the media and never denied by the party concerned – was an Office for State Protection officer in the 1990s, a fact he had concealed during the procedure of the *Sejm* electing him as Constitutional Court justice. Additionally, it is accurate that cases filed by the parliamentary majority were granted trial priority throughout the year 2017 and resolved in favour of said majority – as proven by the rapid processing of the recurrent gatherings decision issued shortly before the Smoleńsk air crash anniversary, said decision offering preference to gatherings organised by the parliamentary majority (the so-called Smoleńsk monthlies). The ruling to the effect of judiciary non-authorisation to examine Julia Przyłębska's legitimacy to represent the Constitutional Court's interests was processed with similar swiftness, having been announced one day before the

Supreme Court trial to examine the charge of J. Przyłębska having been unlawfully appointed President of the Constitutional Court.

Re. 161-162

In conformity to the currently binding Law on Organising and Proceeding before the Constitutional Court of November 30th 2016, the President of the Constitutional Court shall appoint Constitutional Court adjudication panel justices in alphabetical order, in recognition of the type, number, and sequence of cases filed with the Constitutional Court (Article 38 clause 1). The President of the Constitutional Court shall have the right of abstaining from the aforementioned criteria in justified cases only, in particular in recognition of the subject of the case tried. In 2017, **J. Przyłębska repeatedly appointed adjudication panels with unjustified disregard for the alphabetical order, and altered adjudication panels to the effect of the Judge-Rapporteur position in cases of importance to the government and parliamentary majority to be held by a person elected by the Sejm of the present term, and to the effect of such persons constituting adjudication panel majority.** The number of cases involving changes to the adjudication panel remains unknown, as the Constitutional Court refuses to disclose related information. Yet it goes without saying that there were dozens.

Information concerning Constitutional Court panels in the time of the “*previous president*” is untruthful. In 2016, only two Constitutional Court justices elected during the current term of the *Sejm* were authorised to rule. Consequently, they could not have (for arithmetical reasons) formed the adjudication panel majority, once it is recognised that the Constitutional Court principally rules in panels of five or with full Court judiciary attendance. Three other persons were not admitted as ruling judges for reasons of not having Constitutional Court justice status, as previously clarified.

White Paper information suggesting that the majority of Constitutional Court decisions announced in 2017 was passed by judges elected by the *Sejm* in its previous term stems from the fact that some judges elected by the present *Sejm* are marginally active in their ruling activities. Suffice to mention J. Przyłębska, who during the period of January 2016 until the date of this response had issued a mere two rulings as Judge-Rapporteur.

Re. 163

It is not true that the Constitutional Court operates currently in an effective manner. If one were to compare its current activity with the year immediately preceding the constitutional crisis, it should be stated that in 2017 55% fewer cases were received by the Constitutional Court, and significantly fewer cases were referred back for substantive examination (in 2016, there were 54% cases fewer than in 2015; in 2017, 32% of cases fewer than in 2016). The number of rulings also significantly decreased (in 2015, the Constitutional Court issued 173 rulings, including 63 sentences, and in 2017 - 88 rulings, including 36 sentences).

The fact that the number of new cases brought to the Tribunal has decreased is significant. Due to changes in the law concerning the Court and the practical aspects of its operation, it is common belief that the Court ceased to be an independent body. The loss of public trust in the Court means that significantly fewer citizens file constitutional complaints, fewer courts present their legal questions and fewer authorized entities direct applications to the Court. There are cases of withdrawal of requests from the Court by the Commissioner for Citizens' Rights, if the panel is composed of persons elected to the already taken seats of judges.

Re. 164

It is not true that the Constitutional Court is a quasi-political body, since according to the Constitution it is a part of the judiciary that is a separate authority, independent of other authorities. Judges of the Constitutional Court possess the feature of autonomy and guarantees that aim at maintaining this feature. The White Paper states that "It is reasonable (...) not to allow too much supremacy in the Court of justices elected by the votes of one political force". Meanwhile, in the current Constitutional Court, there are 9 justices chosen by the current parliamentary majority and the President and Vice President appointed by the President of Poland who comes from the same political camp as the current parliamentary majority. Never before have the range of justices of the Constitutional Court and the authorities of the Constitutional Court been monopolised by one political option to such extent. Further, the White Book states that if there is a prevalence of justices chosen by the votes of one political force in the Court, it must be ensured "that the <<minority>> justices may have an impact on case law". Meanwhile, the justices elected by the Sejm of the previous term are removed from adjudication by their exclusion from adjudication panels, including from cases in which they had been rapporteurs. **They are also not assigned to panels on issues important to the government and in which the rulers expect specific rulings. If the justices elected before 2015 do appear in panels ruling on such sensitive matters, they always appear individually so that they can be outvoted by the justices elected by the Sejm of the current term.** J. Przyłębska has prevented Vice-President S. Biernat from adjudicating for more than half a year, sending him on vacation; and three other justices (P. Tuleja, M. Zubik and S. Rymar) are excluded from considering important issues as a result of the application contesting the procedure of their election to the office of judge in 2010 - which application was submitted to the Constitutional Court over a year ago by the Prosecutor General and has not been recognized by the Constitutional Court until today. Although the Constitutional Tribunal has no competence to determine the validity of the choice of the justices of the Constitutional Court (which is emphasized in the White Paper), and therefore the proceedings regarding the application from the PG should be discontinued, this case has remained unresolved for 14 months. It is used by the PG to motion for exclusion of these justices from adjudication panels in other matters⁵⁶.

⁵⁶ At the hearing of 5 October 2015, in case no. Kp 4/15, the Justice of the Constitutional Court Professor M. Pyziak-Szafnicka asked the representative of the Prosecutor General about the reasons why the motion to

Re. 165

According to Art. 194(1) of the Constitution, the term of office of the justices of the Court lasts 9 years. The intention of the creators of the constitution was for this term to "overlap" three parliamentary terms. Until 2015, the apolitical character and impartiality of the justices of the Court in adjudicating was not questioned. It was only starting from the end of 2015 that the government propaganda began to divide the justices into "theirs" and "ours" or to mark their silhouettes with different colours during television broadcasts, etc. This behaviour was criticized by the Venice Commission in its opinion of 11-12 March 2016 (paragraphs 117-120).

The treatment of the Court along the lines of division of "spoils" is expressed through the proposal for the parity of the justices of the parliamentary majority and minority, mentioned in the discussed point of the White Paper. This proposal is irreconcilable with the principle of independence of the judiciary and its separateness from other authorities (Article 173 of the Constitution).

One of the most offensive manifestations of the constitutional crisis that started in November 2015 was the treatment of the Constitutional Court as an obstacle to the parliamentary majority introducing changes to the then applicable law, which changes were raising constitutional doubts or were blatantly unconstitutional. With the aim of removing this obstacle, justices rightly appointed by the Sejm of the previous term were prevented from adjudicating, persons who were not justices of the Constitutional Court and who were chosen in violation of the Constitution were allowed to adjudicate, and a new, non-transparent and act-violating way of managing the Court was introduced. The result is a change in the political system of Poland by means of laws, without a formal amendment to the Constitution; in particular the subordination of the judiciary by legislative and executive powers, and limitation of civil liberties and rights, specially the freedom of assembly and the right to access to court.

The Constitutional Court, which had enjoyed great authority in Poland and abroad, has now lost this authority. In general reception is not taken seriously as a body able to effectively control the compliance of the law with the Constitution, especially in politically and socially sensitive matters.

exclude these three justices is filed in some cases - and in other cases not. The representative of the Prosecutor General was not able to answer this question regarding the selectivity of submitting the request. This only confirms the fact that the motives for submitting such applications are purely political. The Prosecutor General in this way excludes justices from the Court who may decide unfavorably for the ruling party.

VIII. The rule of law as a foundation of common European values

1. General remarks - the method (Re. items 166-200 of the White Paper)

- A. Theses included in chapter VIII of the White Paper, concerning the rule of law as a cornerstone of European values include:- **true and obvious statements about EU rules and law** (166-168, 169 - 172, 184 - 189) or the laws and practices of individual states. **Individual claims, even if completely or partially true, are subject to the *non sequitur* fallacy:** (theses 172-176, 181-182, 196-200). This non sequitur fallacy is discussed below.
- The White Paper is to serve as an explanation and defense of changes concerning Polish judiciary introduced between 2015 and 2018. It treats them as one, unified "package". The aim of that is to create an impression that each of the detailed changes made is justified by the rule of law treated as a foundation of common European values. **It is an eristic technique** (*fallacia non causae ut causae*), suggesting an untrue conclusion, as it has been comprehensively explained in the response to the previous chapters of the Paper
 - The paper refers only to the concept of the rule of law and to the constitutionalism of texts of law. For example, it indicates that some "legal solution" exists also in another EU country. **However, it fails to mention that in European terms, the rule of law and constitutionalism refer to the standard of law and well-established practice of its application.** This omission causes a gap in the argumentation that is supposed to explain and legitimize reforms. This was demonstrated, i.a, in the discussion on the guarantee of ensuring proper representativeness of the election of judges to the NCJ.
- B. The reforms to which the White Paper is devoted, although they have led to a change in the system of justice and the erosion of guarantees for the independence of the judiciary, have made this change without changing the letter of the Constitution. This fact alone is a violation of the Constitution.
- a) Between 2015 and 2018, the phenomenon of hostile interpretation of the constitution (*interpretatio constitutionis hostilis*) was observed. It is a political strategy where the will to abide by the constitution is demonstrably declared, or even the obligation to abide by it, but at the same time the constitution itself is endowed with epithets, such as "an internally contradictory and conflicting constitution", "a post-communist constitution", "a constitution for the elites, not for the people". It is therefore a strategy hidden behind facade slogans, which is an example of the instrumentalisation of interpretation for the purposes of current policy. This is a particularly reprehensible example of the recognition of the primacy of politics over the law, at the level of the fundamental law.
 - b) As an example, there were series of amendments to the law on the Constitutional Court, the National Council of the Judiciary and the Supreme Court, covering a whole range of acts, drafts, opinions, expert opinions, parliamentary speeches

and even media statements illustrating the syndrome of interpretation hostile to the constitution. A similar example is the restriction of the law on meetings, through the introduction of the so-called privileged category of cyclical meetings into the law. It is a political instrumentalisation, because this regulation was intended to create the privilege of a specific celebration as a flagship propaganda project for a political group. This is an example of an interpretation that is hostile to the Constitution because it implies a departure from the *in dubio pro libertate* principle of Article 31 of the Constitution and, in particular, from the principle of proportionality of restrictions on liberty, as set out in its third paragraph.

- c) The interpretation hostile to the constitution is a hidden strategy, albeit conscious and deliberately implemented; it is based on acting in bad faith. It is of legislative nature. It consciously introduces into the legal system normative acts, which from the very beginning are known to contradict, and sometimes even grossly, the fundamental law.
- d) Moreover, the statutory changes also concerned the constitutional standard (e.g. by limiting the effectiveness of the constitutionality control by the Constitutional Court).
- e) The reforms consisted in the systematic construction of a "technological sequence". This involved extensive legislative changes carried out within two years. **This legislation constrained the sphere of individual freedom and at the same time prepared the ground for increasing the arbitrary and non-transparent activity of the executive power, not subjected to effective judicial control; while at the same time weakening the effectiveness of judicial review of the constitutionality of changes.** Thus, it changed the standard of protection of constitutionality and the rule of law, deviating from the EU standard. **The Paper is silent with regard to this phenomenon and its assessment against the background of other Polish reforms.**
- f) In order to weaken the constitutional protection standard and the rule of law standard, the judiciary and courts were subjected to the control of political powers (reforms of the National Council of the Judiciary, the Supreme Court and common courts, discussed elsewhere). Other, numerous practical measures aimed at production of a certain *chilling effect* regarding the judges. Self-censorship of the judges in line with the expectations of the rulers has been introduced owing to:
 - the propaganda directed at courts, present in the media and among politicians. The information they provide is often true, but coming from different periods, selected, juxtaposed, and often exaggerated. At the same time, the judges are accused of lusting for power, corruption, prioritising personal gain, supporting the caste system and acting undemocratically. This is a certain type of "institutionalized hate speech", in which the rulers participate contrary

to the constitutional obligation of cooperation of the authorities (Article 10 of the Constitution)⁵⁷.

- **initiating disciplinary proceedings against judges.** The Minister of Justice and the Public Prosecutor General (in one person) readily uses this path, informing the public and the courts about it, also via electronic and social media and with the help of public media - currently under the influence of the ruling party. Widely publicized preferences and suggestions for tightening up punishments or choosing justice policy goals are a conscious instrument leading to producing the *chilling effect* on the judiciary. The creation of a separate Disciplinary Chamber in the Supreme Court will make it possible to intensify such activities.
- **Change in the composition of the National Council of the Judiciary** , the authority deciding on personnel policy, as well as obtaining in this respect a greater influence of the Minister of Justice on personnel policy decisions in the judiciary (acts on the National Council of the Judiciary and the Supreme Court, changes to the law on the common courts system and their transitional provisions).

2. Constitutional pluralism and the rule of law (Re. 169-183 of the White Paper)

- A.** The White Paper devotes a lot of space to defending the very principle of constitutional pluralism of the EU countries. The existence of this (obvious) principle is not the same as the conclusion that reforms in Poland remain within the limits of autonomy resulting from constitutional pluralism, protected by EU law. **The autonomy of constitutional identity presupposes that the Member State respects the *patere legem quam ipse fecisti* principle, especially towards its own constitution.** Therefore, breaking a state's constitutional rules by the parliamentary majority cannot be justified by the principle of constitutional autonomy. The reforms referred to in the White Paper are in fact an expression of a breach of one's own constitutional rules, whether through the operation of ordinary laws, through an interpretation that is hostile to the Constitution, or through a change in the constitutional standard. These three phenomena go beyond the margin of regulatory freedom resulting from constitutional pluralism.
- B.** Pluralism of constitutional identities has strict limits within the EU system. They are, among others, the common values of the Union and all Member States, as expressed in Article 2. The constitutional identity, protected by the Treaty, may only refer to the forms of realizing these values, but it does not include negating any of these values.
- C.** The change in the system of the judiciary made in 2015 -2018 has in its scope, depth and manner become a constitutional issue. Making these changes by ordinary acts, due to the participation in the EU means also a violation of the principle of

⁵⁷ <http://www.rp.pl/Sedziowie-i-sady/312099989-Morawiecki-wymiar-sprawiedliwosci-to-stajnia-Augiasza-ktora-nalezy-oczyszcic.html>

constitutional autonomy. Theses 169-181 are examples of the *non sequitur* fallacy from the point of view of the argumentation they are to serve.

Re. 183

- A. The observation that the existence of tensions between the executive and legislative branches and the judiciary is normal and as a rule does not pose a threat to the rule of law - is a trivial obviousness. However, the subordination (to a large extent) of the judicial power to two other branches of power is not simply "tension", just as there is no "tension" in the institutional self-defense on the part of the judiciary. These euphemisms are intended to trivialize and minimize the scale of subordination of the judiciary to the legislative and executive power, which in the specific conditions of the years 2015-2018 in Poland means the power of the leader of the ruling party.
- B. **It is wrong to say that** *"nothing threatens the tripartite system, as long as the judges are guaranteed irremovability and independence; and in Poland the latter as a result of the described changes has even been strengthened (due to random allocation of cases and the ban on transferring judges between departments). Certainly, it is not threatened by the change in the mode of election of justices to the National Council of the Judiciary in the spirit of the opinions of the Venice Commission cited in this document, with the decisive advantage of judges in the Council and the very important influence of the judges' environment on its composition."*
- First and foremost, **irremovability is not permanently guaranteed** if with an ordinary act one may change or break the constitutionally guaranteed term of office of a body (the President of the Supreme Court); what is more, elimination of a certain type of courts will also terminate the mandate of the judges appointed to them
 - Second, **the independence of the judges is influenced by the above-mentioned chilling effect** to which the judges are exposed. One of the influencing factors is the dependence of judiciary personal policies on political influence. Here, the manner of appointing justices to the National Council of the Judiciary - the selection of candidates through several political 'sieves' - does matter, contrary to the item 183
 - Third, **it is wrong to reduce the issue of the division of powers and the role of the courts in it - only to the independence of the judge. A more important problem is, for example, another unmentioned matter - the independence of the courts, which has suffered a permanent decline, as referred to in the previous chapters of the response to the White Paper.**
 - Fourth, as practice shows (elections to the National Council of the Judiciary in early March 2018 and the campaign preceding them), **the choice of the judges**

of the Council made not by judges (which is a European norm) but by the Sejm in practice means the decision of the ruling party's politicians (and to a small extent, the opposition party) as to the composition of the Council. All fears expressed by the critics of the new model of the National Council of the Judiciary were more than confirmed by the fact that the majority of the judges of the Council (about 80 percent) are judges mostly unknown to the public or even in the judiciary, either persons officially dependent on the Minister of Justice (as so-called judges-delegates to the Ministry) or direct beneficiaries of the Minister of Justice (as presidents or vice-presidents of courts, recently appointed by the Minister following the purges made possible by amendments to the law on the common courts system).

C. The Minister of Justice has a far-reaching, in many cases discretionary, competence to interfere with the composition of common court bodies, as well as indirectly influence the work of the judges of these courts, shaping their professional career.

- This applies to: the training of judges at the National School of Judiciary and Prosecution Service and the appointment of court assessors;
- wide-ranging and arbitrary - performed without the participation of the judges' self-government - competence in appointing presidents, vice-presidents and directors of courts;
- arbitrary decisions regarding the consent to continue to perform the function after the judge reaches the retirement age;
- full control over the creation of bodies responsible for conducting disciplinary proceedings against judges, accusation in these proceedings and the possibility of a direct impact on each disciplinary case. The Minister of Justice has obtained influence on the judiciary as a whole that is grossly disproportionate to the legitimate needs. The created mechanisms create real danger of abuse and attempts to informally apply pressure to judges or to create a chilling effect - following the sole awareness among judges of the potential power of the Minister of Justice. This pertains for example to disciplinary judiciary which in the current legal situation can easily be used as a mechanism of repression towards judges who do not meet the expectations of representatives of political power.

D. **The Paper omits** the unconstitutional and described in the documents of the Venice Commission **destruction of checks and balances** of the years 2015-2018, regarding the system and rules of functioning of the Constitutional Court, the Supreme Court, and the National Council of the Judiciary). The claim of the Minister of Justice⁵⁸ that "the division of powers has been restored in Poland" does not communicate that in fact the *checks and balances* principle (Article 10 of the Constitution) has been given the meaning of "a uniform state power". It is the current, political parliamentary majority recognizing itself as a hegemon - a

⁵⁸ <https://wiadomosci.onet.pl/kraj/ziobro-o-zmianach-w-krs-koniec-z-nadzwyczajna-kasta/688lbec>

sovereign able to change the meaning of constitutional principles without changing the constitution⁵⁹.

E. The constitutional **division and balancing of the authorities** (*checks and balances*) is a mechanism that establishes mutual control between equal authorities. **It requires a guarantee of independence of judicature against political influence (focusing in the legislative and executive authorities). The interference of political power** (in 2015-2018) with the composition and conditions of the functioning of the judiciary occurred through:

- a. **through amendments to the law that are unconstitutional** (laws on the Constitutional Court, the National Council of the Judiciary, the Supreme Court, the act on the System of Common Courts⁶⁰)
- b. by approving unconstitutional law by the Constitutional Court which is staffed incorrectly and clearly susceptible to political pressure;
- c. through **encouraging judges to interpret the law and its application in a way that is positive towards the political power**. Direct pressure is not even necessary then. The following are enough:
 - **the "chilling effect"** (threat of disciplinary proceedings, public (through billboards) and foreign discreditation of the judiciary by the Prime Minister and Minister of Justice⁶¹,
 - **clientelism** - for example: the elections to the National Council of the Judiciary, the influence of the Minister of Justice on the selection of court presidents - in six months, 149 people were exchanged out of a total of about 700 posts), a specific promotion policy.

F. The disproportionate influence of the executive on the judiciary is systemic in nature, as it is visible at every stage of the judge's career (starting with their appointment to an assessor's post, through them working as judges, possibly functioning in a common court, and ending with the matter of adjudicating despite reaching the retirement age). This overall picture can not be reconciled with the foundations of a democratic rule of law in the form of principles of power division and separation of the judiciary, as well as the principles of judicial independence and freedom.

3. Settlement with the past (Re. 184-200 of the White Paper)

⁵⁹ <https://www.tvn24.pl/wiadomosci-ze-swiata,2/mateusz-morawiecki-w-deutsche-welle-prawo-nie-jest-najwazniejsze,716015.html>

⁶⁰ EC Recommendations of 20/12/2017, <http://eur-lex.europa.eu/legal-content/PL/TXT/?uri=CELEX:32018H0103>

⁶¹ <http://iustitia.pl/informacje/2073-the-arguments-of-polish-judges-association-iustitia-related-to-the-pm-mateusz-morawiecki-statements>

- A. **Theses 184-189** regarding the need for settlements with the past contain obvious statements. Examples of unscrupulous historical adjudication, however, suggest untruthfully that they concern the current composition of the Supreme Court; the generalization regarding the lack of verification of the judiciary is false as well.
- B. Suppression of civil liberties and violation of human rights" by the courts pertains to the Stalinist period (1940s - 1950s) and adjudication under martial law (1981-1983). Judges from the first period are gone from the judiciary, due to the passage of time. The examples given in the White Paper are a testimony to history, not related to the jurisprudence of current SC justices, but serving the impression that such a relationship exists. In particular, it is outrageous to refer to heroic figures such as Captain Pilecki (in the initial fragments of the White Paper, in one of the "frames") in the context of justifying the need to crack down on justice about 70 years after his court murder. The implication that there is continuity between murderers in judicial gowns and today's judges of democratic Poland is particularly reprehensible and is a manifestation of instrumental, propaganda-oriented use of the figures of Polish national heroes for the current political game.

Re. 190-191

A. These matters were already discussed in chapter I of this response to the White Paper

- a) **Currently**, the Supreme Court numbers 93 judges, including 6 persons who adjudicated in various court instances during martial law. Let us not turn to the question whether these people are actually "unworthy" due to the judgments they issued (the White Paper examples on judgments passed during martial law are not strict, as already mentioned). One could have expected either criminal or disciplinary proceedings against these 6 people. In fact, the Supreme Court was disposed of in its current form and the 40% of judges were dismissed⁶².
- b) When it comes to the number of judges in common courts "involved in communism in various ways" and the belief that "they still have a significant impact on the judicature", the provided thesis escapes rationalization. The average age of a judge in common courts is: in appellate courts 55.2 years, in district courts - 51.29, and in regional courts - 44.4 years. The average age of all

⁶² Links to statements of judges of the Criminal Chamber, adjudicating under martial law

<http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/NewForm/2018.02.06%20O%swiadczenie%20SSN%20w.st.sp.%20Jacek%20Sobczak.pdf>

<http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/NewForm/2018.01.30%20O%swiadczenie%20SSN%20Waldemar%20P%l%o%t%k%iennik.pdf>

<http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/NewForm/2018.01.26%20O%swiadczenie%20SSN%20Andrzeja%20Siuchni%nskiego.pdf>

<http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/NewForm/2018.01.29%20O%swiadczenie%20SSN%20Doroty%20Rysi%nskiej.pdf>

judges is 46.83 years. When analysing time correlations (the Stalinism of 1940s and 1950s, and the martial law of 1981-1983), there is little proof for "significant influence" of communism on the adjudication.

The verification of judiciary personnel was conducted in several manners. In the years 1990-2000, the National Council of the Judiciary did not allow 511 judges to adjudicate after reaching the retirement age; pursuant to the lustration regulations (of 1997), 42 judges and 21 members of families of deceased judges (who had adjudicated in the courts and bodies recognized as repressive) were deprived of their retirement status or additional financial benefits.

- c) The Supreme Court was reformed in 1990, by dissolution and exchange of 81% of its composition. At the same time, the judges were individually verified. Three judges from the former composition were left in the Criminal Chamber. It was acknowledged (following the recommendation of the new First President of the Supreme Court, Adam Strzembosz) that their behaviour and adjudication were decent. Two of these judges have passed away, and the third is 87 years old and long retired. Over the next 28 years, new justices came to the Supreme Court. Sometimes they were judges from lower courts who had been adjudicating under martial law. Their attitude in the field of adjudication was assessed individually. The judges were also subject to lustration, in accordance with the statutory regulations. One of the judges of the Military Chamber was accused of "involvement with secret services", despite the fact that the Institute of National Remembrance considered his negative lustration declaration to be true, and the examination of his files was carried out by the well-known meticulous judge Bogusław Nizieński when he acted as the Public Interest Ombudsman. Below is a link to the statement of this judge⁶³.

Disciplinary courts (Resolution of the Supreme Court of 20.12.2007, I KZP 37/07) acknowledged that the mere fact of applying the applicable law does not give grounds to conclude that the issuance of judgments was a political order, and in such cases one should not punish a judge. The resolution of the Supreme Court with such a claim was met with multilateral criticism⁶⁴. The idea is indeed controversial, but it is not evidence of a massive presence in the judicature of persons involved in adjudicating in line with the expectations of the totalitarian power.

- B. In **thesis 191** the scope of the verification was considered proof of "the scale of involvement in a totalitarian system of the judges of the People's Republic of Poland". If this scale is considered to be large, it may indicate that the verification was carried out proportionally.

⁶³ <http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/NewForm/2018.01.30%20O%swiadczenie%20SSN%20Eugeniusza%20Wildowicza.pdf>

⁶⁴ J. Zajadło Gdańskie Studia Prawnicze – Przegląd Orzecznictwa Nr 1/2008, p. 161

- C. In turn, **theses 196-99** quote an example of late settlements with the de-communization of the judiciary in Germany, where the settlement with the past was made in the 1990s. This reference is intended to motivate present systemic changes in the Polish judiciary. However, in Germany, the delay in the judicial review was caused by the then absorption of the GDR with its legal system and the judiciary. Such an extraordinary event was local in nature, concerning only the country where it happened. Hence, this is a bad argument for conducting the systemic reform of the Supreme Court and for the exchange of almost half of the personnel as "contaminated by the influence" of 6 people adjudicating under martial law.
- D. The Constitutional Court expressed its opinion in ruling no. K 2/07 of May 11, 2007. "By eliminating the legacy of totalitarian communist systems, a democratic state based on the rule of law must apply formal and legal measures of such a state. It may not use any other means, because then it would not be better than the totalitarian regime - which is to be completely abolished. A democratic state based on the rule of law has sufficient resources to ensure that justice is done, and the guilty will be punished. However, it cannot and should not satisfy the lust for revenge instead of serving justice. It must, however, respect such human rights and basic freedoms as the right to due process, the right to hear and the right to defense, and apply it also to those persons who had not used them themselves when they were in power".
- E. **In conclusion**, in the light of the ECHR jurisprudence, **the sole unverified statement that unspecified judges were "unworthy" cannot constitute grounds for unprecedented shortening of their term as justices of the Supreme Court, as well as shortening the term of office of the first President of the Supreme Court - as a violation the principle of irremovability or the quintessence of independence** (see the ruling in the Baka v. Hungary case (judgment of 27 May 2014, Chamber (III), complaint no. 20261/12).

Conclusions

- A. The intention behind the White Paper has been to report on the reform of the justice system legislation and practice launched in 2015 and continued to date, to share the assessment of the situation and to review measures that are believed to fulfill the stated intentions, i.e. to improve the quality of the justice system in Poland, restore the balance of power between branches of government, strengthen democracy, enhance the role of line judges, develop mechanisms that prevent known dysfunctions, improve procedures and ensure a better access to justice;
- B. The initiative of the White Paper is linked to concerns about the rule of law in Poland raised at the European Union level and the launch of the procedure under Article 7 of the Treaty on the European Union against Poland;
- C. The response to the White Paper set out in this document does not intend to encourage European institutions to step up the said procedure, which we accept with genuine sadness and embarrassment;
- D. Our response has corroborated facts, revealed eristic abuse, corrected errors, filled gaps, and documented change synergy outcomes;
- E. We do not share the optimism expressed in the White Paper about the positive impact of the reform on the health of the justice system in Poland. The diagnosis, albeit right at times, has led to a wrong therapy that has undermined the independence of the judiciary.
- F. We have no doubt that the verification of facts and their linkages will lead to well grounded and prudent decisions that are based on true, full and exhaustive data that are not to be found in the White Paper.