

WHITE PAPER

on the Reform of the Polish Judiciary

EXECUTIVE SUMMARY

I. WHY DOES POLAND NEED TO REFORM ITS JUDICIARY?

- (1) **Low public trust in the judiciary.** Only 24% of Poles believe that the courts and judges are independent “always” or “in the overwhelming majority of rulings. The judges themselves see the flaws – only over 1/3 of them believed that judicial promotions were based solely on merit and not on other factors.
- (2) **Inefficiency of proceedings.** It takes 11 months on average to resolve a civil case before a district court, and 14 months for commercial cases. Almost half of such cases that are currently pending lasts already over a year. These numbers (as well as data collected by World Justice Project, World Bank, CEPEJ, Eurostat) places Poland in lower average for developed countries. Criminal cases are excessively lengthy as well – in 2015, the European Court of Human Rights pointed out that excessive length of proceedings is a systemic problem in Poland.
- (3) **The courts are well-staffed and funded.** Only Germany has more judges than Poland, the relative level of public spending on the judiciary is also very high. It is evident that it is neither staff shortages nor underfunding that cause the delays.
- (4) **Communist past.** Polish judiciary has never accounted for its communist past. Only some most compromised judges of the Supreme Court were expelled in 1990 – the **majority in common courts remained unaffected**. Gradually, judges of these courts – including those involved in persecution of human rights – made progress and were promoted, **achieving in some cases the highest court of the country**. Such judges – that sentenced people to years in prison for distributing anti-communist leaflets, organizing strikes, and marching in street demonstrations are sitting there even today.
- (5) **Influence on the system.** Post-communism had its toll on the way polish judiciary functioned (and still functions). Even years after the transition to

democracy almost none of the totalitarian officials were judged for their crimes. In 2007 – almost three decades since the martial war – Supreme Court issued a ruling that absolved virtually all judges for their demeanour at that time.

- (6) **Accountability for totalitarian past at the core of European values.** EU was created in response to fascist and communist totalitarianism, and the rule of law is at the heart of its values. **Judges – especially those serving in the highest court of the country – play a vital role of its guardians, and the judge’s prestige is the foundation of the rule of law.** If this function is exercised by people who were entangled in a dishonorable service to totalitarian or authoritarian systems and did not guard the law but abused it to persecute human rights and civil liberties, it negatively affects the public trust in the judiciary – and thus, the rule of law itself. This issue cannot be left unattended, even after many years.
- (7) **Imbalance between powers.** Modern democracy is based on the principle of checks and balances between the legislative, the executive and the judiciary. In Poland it has been distorted for years – judges enjoy wide immunity (which is right and it will fully remain in place), but there was no real accountability if they were in breach of conduct. Too often disciplinary cases ended with little or no punishment at all – and much for the reason of statute of limitations. This needs to be addressed so that the judicial independence is preserved (or even enhanced) but also the balance is restored.
- (8) **Cult of formalism.** There is a peculiar bureaucratic corporate culture which has emerged in the Polish administration of justice – leading to a common perception that for some judges the verdicts should be in the first place justified on formal grounds, even if they are not actually fair. This culture stems not only from intricate procedural provisions, but also from the imbalance between powers – namely lack of external incentives to adjudicate in a different way.
- (9) **Safeguarding independence, restoring equilibrium.** It would be completely wrong to subordinate the judiciary to other branches of government – and our reforms do not provide such subordination. The main purpose of the reform is redressing the balance, while safeguarding and even enhancing all guarantees of independence, and to create mechanisms that would prevent the ills which the judges have not been able to fix on their own.

II. WHY ARE THE REFORMS PROPORTIONATE AND JUSTIFIED.

- (10) **European standards are met.** It is widely overlooked that the Venice Commission and other international bodies that were critical of Polish reform did not take into account certain arguments that justify it. The Venice Commission repeatedly urged various countries in the past to assure that the judiciary councils would not be overly dominated by judges – as it may lead to **cronyism, self-interest, illegitimate self-protection and the public perception of judicial corporatism.** Polish reform of the National Council of the Judiciary (NCJ) is carried out in the spirit of these suggestions.
- (11) **Many Polish judges also demanded the reform for years.** In 2014, a general assembly representing lower-level court judges (around 90% of all Polish judges) stated that the NCJ is nominated in “**non-democratic curial elections**” and claimed that the system is unconstitutional. Previous presidents of the Constitutional Tribunal (CT) also criticized the judiciary, claiming that there was no verification after communism and that the NCJ has become “*a sort of state labour union preserving the interests that do a disservice to Poland’s judiciary*”.
- (12) **The National Council of the Judiciary will be more balanced.** Polish Constitution provides that there should be no less than 17 judges in a 25-strong council (i.e. over 2/3 majority) – and it remains so after the reform. Election is made by the Parliament – but only out of candidates put forth by at least 25 other judges or 2.000 citizens. They are nominated for a fixed, joint 4-year term and cannot be revoked – thus, **there is no risk that anybody would exert pressure on the members of the Council after they are elected:** there is no means to do it. It can be compared to other public offices appointed by the Parliament, e.g. the Ombudsman: nobody claims that he is a political tool of parliamentary majority, as there are sufficient guarantees for his independence – and that is exactly the case with NCJ members.
- (13) **The reform is inspired by good practices of other Member States.** All significant changes introduced in the last few months have its equivalents in the legal systems of other European countries, and they are perfectly in line with the rule of law.
- National Council of the Judiciary is elected in a manner **very similar to the one in Spain. In Germany there is no such council at all** – the judges are nominated solely or overwhelmingly by politicians. In various other countries judges do not have majority in their

respective councils – yet their judiciaries are perceived most independent in Europe (such is the case with **Denmark** or **the Netherlands**). It proves that the Venice Commission was right when indicating on many occasions that there should not be an excessive dominance of judges in such councils.

- Prolongation of judicial retirement age with participation of external bodies functions **in the UK and in France**. There is no threat to independence – **judges at the peak of their careers are rarely prone to any pressure**, they also already enjoy full retirement seniority bonuses anyway.
- A remedy similar to a newly introduced extraordinary appeal also functions **in France**, and it can be lodged “in the interest of the law” **without any time-frame**. This recourse is necessary and welcome – as it **widens the scope of civil rights protection**.
- In disciplinary proceedings there is a participation of members of society in adjudicating – as **there is such participation in England and Wales**, where disciplinary panels are composed in half of non-lawyers. It assures that a breach of judicial conduct is assessed not solely among the colleagues who might tend to turn the blind eye at some cases. It is also worth stressing that the Minister of Justice might only have influence on the preliminary proceedings – final verdict will always be decided by the judiciary (in a panel composed solely or with the majority of judges).
- **Judges on probation adjudicate in Germany**; their independence is even lower than the one of their Polish counterparts (as they may be revoked from their posts, which is inadmissible in Poland) – but **it was deemed enough by the European Commission of Human Rights**.

(14) **And there is more to the reform**. The Commission—while accusing Poland of arbitrarily picking features of diverse legal systems and putting them together into one—itsself 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. **Thus, 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.

- (15) **A complex view of the system is necessary.** In Poland there already is a very broad judicial immunity, the judges are appointed solely from candidates put forward by the judicial community, and the status of a judge is life-long. New provisions are introduced now: random allocation of cases, banning transfers of judges between court divisions against their will, or greater influence of rank-and-file judges on the composition of the National Council of the Judiciary.
- (16) **Random allocation of cases.** So far it were the judges serving as heads of court divisions who wielded power over the allocation of cases. This led to a potential pressure mechanism and to possibility of manipulating who should adjudicate in certain "sensitive" cases. The reform changes that – it is now the computerized system that allocates the cases, taking into account judicial specialization and workload of every judge.
- (17) **Prohibition of transfers.** Presidents of the courts could arbitrarily move judges between court divisions, if only they stated that the court needs require it. It was expressly prohibited with the latest reform. Now the judges may be transferred against their will only in extraordinary circumstances, and they always have the right to appeal.
- (18) **Stronger independence of individual judges.** The Venice Commission always pointed that judicial independence has two dimensions – external (towards different branches of power) and internal (within the judiciary itself). Polish reforms enhance them both: a judge is now under less potential pressure by the court president or head of division, as there is no longer a threat that he or she will be transferred against their will, or affected by uneven allocation of cases.
- (19) **External independence – also reinforced.** Since the heads of court divisions is appointed by the presidents of the court, and they in turn – by the Minister of Justice, strengthening independence of judges against undue pressure from court administration leads indirectly to strengthening it as well towards the executive. **Such changes would have no sense if a goal of the reform would be to affect how cases are adjudicated.**
- (20) **Presidents of the courts do not affect independence.** For the above reasons it is groundless to believe that the Minister of Justice' power to appoint and dismiss court presidents – thus acting solely within the scope of administrative supervision, leaving the adjudication of cases unaffected – is a threat to rule of law. The Minister had such power for the first 8 years

of Poland's membership in the EU – and it was never contested. In fact, currently every dismissal may be objected by the National Council of the Judiciary (solely with the votes of judges sitting therein).

- (21) **Proportionate measures.** The tool of appointing and dismissing court presidents is necessary to assure proper functioning of courts. During previous six months the Minister **used this tool to revoke only around 18% of the presidents and deputy presidents** – it was never a “purge” as some claimed, but adequate course of action in order to deal with ineffectiveness and other irregularities in some courts.
- (22) **Constitutional control works well.** Despite many claims, all the Constitutional Tribunal judges were duly and lawfully elected – and the Tribunal itself works properly. There is no political control – the law provides no means for it (guarantees of independence for CT judges remain virtually unchanged). In fact, during the tenure of current CT President the judges nominated before December 2015 were granted majority in adjudicating panels in over 40% cases. That is a significant improvement compared to the situation under previous CT President, who never allowed for a majority of judges nominated by the current Sejm.
- (23) **The issue of non-publication does not exist anymore.** Almost all of CT judgments that were issued with breach of procedure were published despite that fact – as the parliament acknowledged that it might serve the stability of legal system. Only three of such verdicts were not – since they pertained to the statutes that were already non-binding at that time. The only effect of CT judgments is a removal of unconstitutional provisions from the law; in this case these provisions were already removed, hence the publication would not change anything and was not necessary.
- (24) **The procedures change, too.** Important reform of the civil proceedings code is currently underway. It proposes a significant acceleration of proceedings, and makes it mandatory to have the cases organized at their commencement so that the parties would not have to wait for months between every hearing. The reform 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 (as was with the proposal to change court fees).

- (25) **We are open to developments.** Current reforms are different than those proposed in 2017 – after hearing the critical arguments the President vetoed two controversial statutes and proposed new ones. These provide for wider guarantees for the judges (e.g. only other judges or a group of 2.000 citizens may now put forward their candidates to the NCJ – political institutions were deprived of such competence). The role of the Minister of Justice was also decreased.

III. **RULE OF LAW AS THE FOUNDATION OF COMMON EUROPEAN VALUES.**

- (26) **Constitutional pluralism.** All Member States have specific constitutional solutions that are rooted in their history and legal traditions. These differences are protected by the Treaties: Article 4 of the Treaty on European Union declares that **the Union respects national identity which is inherent in the fundamental political and constitutional structures of the Member States.**
- (27) **The importance of mutual understanding.** The EU is based on shared, common values – including the rule of law. European legal system is special – as it is comprised both of national systems AND *acquis communautaire*. That is why in order to function both the Union and Member States must mutually respect themselves and remain open to withdraw some of their actions if they would too much interfere in the areas reserved for the other party – even if both parties would believe that there are some legal grounds for action (the principle of self-restraint).
- (28) **Certain tension between powers are inherent in democracy.** In fact, there is no effective separation of powers without some tensions between them every now and then. Intensive debate over the direction of the reforms proves that Polish democratic system works well and functions properly. Debates as such took place before and will continue to take place, in other EU Member States as well.
- (29) **Article 7 may sometimes be justified – but not in this case.** European legal orders differ significantly, and every member state has the right to organize its justice system in line with national values and traditions, which define their constitutional identities. It seems that one of the boundaries of constitutional identity is judicial independence, which is at the core of European values – and a real threat to it might obviously warrant EU remedies. However, since Polish judges enjoy very strong guarantees of said independence (one of the

strongest in Europe), and all the Polish reforms resemble greatly regulations functioning for years in other stable democracies (and assessed positively e.g. in the opinions of the Venice Commission), its use is in this case unfounded.

- (30) **Risk of abuse.** It must be emphasized that allowing the Article 7 procedure to continue might create a dangerous precedent from the point of view of the rule of “checks and balances” between the competences of member states and European institutions. **Declaring that there is a risk of breaching the rule of law by Poland, whereas the Polish law is significantly similar to other Member States’ legal systems could lead to unjustified use** of the procedure – and to groundless repetition of it in the future against other Member States.
- (31) **Preserving European unity.** It can also be risky for one more reason: **possible strengthening anti-European sentiment** that has been more and more apparent for the last years. It can further lead to growth of populist political forces, seeking to dismantle or weaken one of the biggest successes in post-war Europe that is the European Union. The purpose of European institutions should always be shaping the common policy so that these tendencies do not increase – and if some of the EU Citizens would deem there is a risk of their rights being infringed by these institutions could lead to such a growth.
- (32) **Further dialogue.** That is also why we invite you to read our arguments thoroughly, to analyse and verify them, and if need be, to address our government with any comments, questions or requests that you might consider relevant. We also urge the European Commission, the Parliament and all the Member States to do so. We shall do our best to address your doubts properly, and we remain assured that further dialogue will lead to have all controversies explained without resorting to resolutions that could weaken the European Union.

Notice: this executive summary has been corrected on 10 March 2018 for spelling errors and wording. Full text of the White Paper on the Reform of the Polish Judiciary remains unchanged.