



EAJ Working Group on the Situation of Member Associations
Meeting of the EAJ in Santiago de Chile
12th to 16th November 2017

Progress Report (May to November 2017)

1 Introduction

Since the May meeting of the EAJ in Chisinau an enquiry has been addressed to the Working Group (WG) by the Bulgarian Association of Judges. Moreover the WG was involved in the legislative struggle of the Polish Association of Judges “Iustitia” concerning three Laws on the Judiciary, one of which has already come into force by president Duda . Last but not least the WG took up contacts with CoE bodies to initiate the process of preparing a ECHR-Protocol / Convention on Judicial Independence (on the basis of a draft protocol worked out by the WG).

2 The request of the Bulgarian Judges’ Association (BJA)

2.1 Situation and action taken

In July of this year Members of the Bulgarian Parliament (3 of them from the ruling party, including the chairman of the Parliamentary Committee of Legal Affairs) filed a legislative draft for amendments of the Bulgarian *Judiciary System Act*. One of the proposed amendments provides for a one month period (after the changes become effective) in which each judge and prosecutor is obliged to declare before the *Supreme Judicial Council* whether he or she is a member of a magistrates' organisation.

Such a proposal was adopted last year but only for those who are new-entries in the judiciary or are promoted to a new position. Now if the new proposal will be approved the BJA supposes that many of its members will leave the BJA. This legislative proposal by the way demonstrates «full disregard of the statements issued last year by by EAJ and by MEDEL on this issue“ (letter of the BJA to the WG and the president of the EAJ).

Moreover, the draft provides that professional organisations of judges and prosecutors are obliged to finance their activities only by contribution of its members, by fees or donations also made only by their members. According to the draft’s commentary, this regulation would guarantee that the judges’s’ organizations are not influenced by foreign factors. In fact, this amendment would have forbidden recent projects of the BAJ such as those with the Dutch Ministry of Foreign Affairs or with the European Commission. The BAJ lives on subscriptions of its members revenues but they are not sufficient to meet the expenditures of its activities. As it is with all other Bulgarian judge’s/magistrate’s organizations there is no financial support by the state.

And last but not least, the draft provides for another prohibition for judges and prosecutors: they are not allowed to receive any fees for participation as lecturers or experts if the activities are financed by "a foreign country or person".

Besides all these restrictions and prohibitions for ordinary judges and prosecutors and their organizations, the draft contains a reward to the members of the current *Supreme Judicial Council* providing that they may return in the judiciary at a higher court or prosecution office to those from which they have been elected.

The BAJ wanted to organise a response together with the other professional organisations and NGO's in the country. There are also many reactions from the media – supporting the BJA.. But these insane people from the Parliament can do whatever they want. The board of BJA decided, to inform also both international organizations – MEDEL and EAJ and asked for a declaration or a statement from EAJ and MEDEL which would be helpful in the BAJ's "ongoing fight against the attempts of the politicians to make ... [the BAJ] obedient."

In the course of September parliament adopted on first reading the amendments of the Judiciary System Act, which is supposed to guarantee that the judges' / magistrates' organizations are not "influenced by foreign factors". Professional associations of judges and prosecutors, as well as some 20 NGOs made public statements and requested the draft to be withdrawn as unconstitutional.

However, it was hastily approved on first reading by a majority of the members of parliament. Even with applause for the MP who proposed the draft – compared as the Bulgarian Victor Orban. The second reading will be next week, so any support from EAJ could be very important.

As the BAJ needed support and an urgent response from the EAJ was asked for (before the second reading in Parliament) the chairman of the WG together with the president of the EAJ decided to draft and send a letter to the competent Bulgarian authorities (the president of Parliament, the President of the Legal committee and the Minister of Justice (see appendix I). The BJA made the letter known to the public (press conference, press release).

2.2 Results

On 27. July 2017 Nelly Kutzkova, of the board of the BJA, informed the EAJ:

I would like to inform you that yesterday, after strong pressure from many different Bulgarian NGO-s and from abroad, the parliamentarians from the ruling party who proposed the amendments declared, that they withdraw partly the draft. They will withdraw provided restrictions for financing magistrates' organizations and magistrates' expert activities and for participations in association with other jurists.

However, the obligation for declaring membership in professional organizations remains and we will continue to fight against it. Your letter was widely quoted by media, during the press-conference organized by BJA we also remembered on it. On behalf of our colleagues I want to express our big gratitude for your support!...

The BAJ will possibly seek for further support at this EAJ meeting

3 Polish Association Iustitia

The WG was also involved in the appalling judicial “reform” politics in Poland. (c.f. report of the EAJ president). In appendix II there is a very informative report on the on-going “judicial reform” steps of Government and Parliament of Poland. In October 2016 (victory in the parliamentary elections) the *Law and Justice Party* formed a new government in Poland. One of the main targets of the governing party was from the beginning to “take total control over the judiciary”. Though previous governments have also occasionally tried to limit the independence of the judiciary, there was nevertheless a solid system of safeguards implemented in the legal system, especially with the primary position held by the Constitutional Court. The whole process of abolishing the independence of the judiciary in Poland may be divided to 4 stages, namely to paralyze/disable the Constitutional Court in Poland; to take control of the Judicial Council; to change the system of the education of future judges; introducing judge’s assessors; to change the judicial system in Poland, eliminating judicial self – government. The Minister of Justice openly stated, that the precondition of the “reforms” of the judiciary system in Poland is to “bring down” the Constitutional Court first.

The Polish association “Iustitia” informed the EAJ about the actual situation and also welcomed activities of any support. Among others the question arose, whether the amendments to 3 laws on the judiciary would – apart from being at least partially unconstitutional – contradict also international standards of judicial independence. The WG offered technical assessment of those laws and their conformity to European Standards. It asked the Polish association for more information about the 3 new Law Amendments, namely

- The **amendments to the Law on the National Judicial Council**, adopted by the Sejm on July 12, 2017 (which provides inter alia the expiration of the term of office of the current members of the Council and the election of new members by the Sejm. Possibility of blocking the decision of the Council by its political minority and also provide the President of the Republic of Poland the right to elect and appoint a judge).
- The **amendments of the Law on the common courts**, adopted by the Sejm on July 12, 2017. (it subordinates courts to the Minister of Justice. Among others, it deprives judges of any form of influence of who will become the President of the Court and grants the Minister of Justice the arbitrary right to appoint and dismiss the presidents of the courts. The law provides the possibility of canceling all existing function judges (presidents, vice presidents, department chairs, etc.) within 6 months without any justification.
- The **draft amendment to the Supreme Court**, submitted to the Sejm, and being adopted by the Sejm also in July (handed in by the group of the ruling party members of Parliament. This amendment gives the Minister of Justice the right to remove all current Supreme Court judges and retire them. It also gives the Minister of Justice the right to point the Supreme Court Judges and to let some of them to stay active as the judges. The Minister of Justice will have the exclusive right to propose the candidates for the offices of the Supreme Court Judges.

All those changes may breach not only the Constitution of the Republic of Poland, **but also the European standards** of the rule of law and will result in seriously damaging democracy and the rule of law and the independence of the Judiciary. The EAJ WG would have liked to examine whether these amendments contradict European Standards of Judicial Independence.

The WG didn’t get the information from the Polish association so far, obviously due the events which happened and followed in rapid succession in the country in July and August (veto of the President, putting into force of one of the amended laws, public protests, international protests etc.). Therefore, no work could be done on this issue by the WG. Probably *Iustitia* will inform the EAJ about the current situation at its meeting in Chile.

4 Draft ECHR-Protocol on Judicial Independence

The idea of a “European Convention on Judicial Independence” goes back to the «High-Level Conference of Ministers of Justice and representatives of the Judiciary, organized by the Council of Europe in Sofia/Bulgaria (21 - 22 April 2016)”. The Conference dealt with, developed and decided on a “Council of Europe Action- Plan on strengthening the independence and impartiality of the judiciary”. In this document, all the relevant standards and rules which are decisive in fostering and developing independence/impartiality are mentioned. And it enumerates all the relevant actors and activities which can support the member states to achieve those objectives. Though the action plan is a very important and useful document, it is not sufficient, because the key issue is not a want of appropriate standards but lies in the fact that those international standards consist of *soft law*. Therefore they cannot be enforced (like the articles of the European Convention on Human Rights which are international law). There are no mechanisms to make sure that the member states are applying the international standards. At the Conference therefore the idea was brought forth to transform the commonly accepted international standards from non-binding soft law- norms to mandatory rules, e.g. in form of an European Convention on the Independence and Impartiality of the Judiciary.

In May 2016 the Jerusalem assembly of the EAJ gave a mandate to the WG to work out a project on this project though it was clear that there would be hard work ahead “because governments hesitate to adopt binding commitments for their countries regarding judiciary.” As to the form of international law the assembly preferred an “additional protocol to the Convention” because it could be considered a sort of by-law to article 6 and each State would put it into force step by step.

The WG put up a draft protocol to the ECHR and the draft was approved by the EAJ at the meeting of Chisinau. Moreover, the WG was given the mandate to «implement» the draft protocol *On Judicial Independence* at the Chisinau meeting.

The WG then, represented by its chairman and its member Peter Schneiderhahn, met with officials of the Council of Europe (CoE) in Strasbourg (October 17th 2017).¹ The aim of the meeting was to discuss several questions concerning the procedure of having the CoE draft a Protocol (or a Convention) on judicial independence.

In the discussion on the question *Convention vs. Protocol* it was said that a convention would not open the way to go to the ECtHR (which we favoured), but it would be— as to the content - more flexible. If the «convention» is made in the form of an additional protocol to the ECHR, it is at least doubtful whether the Court can be opened for «non-citizens»/legal persons (e.g. judicial associations) who can claim the rights out of the protocol, How would this fit into the structure of the convention?

It was furthermore held that the EAJ would have **no political success** at all with the project of a protocol on judiciary independence. The draft - if we would stay with it- would have to be revised **only to enable a victim to claim the rights of an independent judiciary before the court**. In this respect art. 6 and (to a lesser degree art 12) are regarded within the council **as a sufficient legal basis for the Court** to look into judicial independence. The ECHR is regarded as the best level possible of a legal protection agreed upon by all member states. A new legal instrument would stand no chance. The Member states would not be ready to go ahead with new standards/rules which could be enforced by the Court. Even if some member states would be prepared to sign the protocol (the “progressive ones”), most member states (the “bad” ones) would not. It would split the Council even more (which might be one of the reasons the Secretariat-general will not support us).

¹ On behalf of the CoE participated: David Milner¹, Deputy to the Head of the Secretariat, **Committee on Legal Affairs and Human Rights, Parliamentary Assembly**, Alfonso de Salas, secretary of the **Steering Committee for Human Rights**, Klaudiusz Ryngielewicz, **Court Registry**, Hanna Juncher, **member of the secretariat general**, Simon Tonelli, secretary of the **European Committee on Legal Co-operation (CDCJ)**.

Instead, most of the experts present, advised the EAJ to think about a convention, based on resolution 12/2010 as a better legal instrument. The actually ongoing process to create a Lawyers Convention could be a signal if we stand a chance for such an instrument. As a Conclusion one can say that

- There is hardly any chance to get the CoE to adopt a protocol to the ECHR. We will get no support from the Secretariat-general of the CoE and therefore also the political way will hardly be successful.
- It seems however possible to go ahead with a convention based on recommendation 12/2010. And therefore, chose the way the CCBE (Lawyer's Organisation) has taken.
- If the EAJ follows the project of a CoE Convention there is a chance to be backed by the CoE's Gen. Secretariat, and the EAJ would be invited by the Gen.Sec. to bring in a EAJ draft for a Convention.

The WG will, after a preliminary meeting in Santiago, most probably make the following recommendations to the delegates of the EAJ at its meeting:

- The EAJ should follow the project of a convention on judicial independence and, accordingly, redraft the actual text (of a protocol) in the form of a convention.
- EAJ, by its WG, should take up the general-secretariat's offer to help us for passing a convention on judicial independence by the CoE (to initiate this process within the CoE).

5. Diversa

No further remarks are to be made.

Basel/Liestal (Switzerland), 30th October 2017

Stephan Gass,
Chair, EAJ- Working Group On the Situation of member associations

Appendix I

Letter to Bulgarian authorities
Rome, 21st June [recte July] 2017

To the hon. President of the 44th National Assembly of the Republic of Bulgaria,
Mr DIMITAR GLAVCHEV
E-mail: dimitar.glavchev@parliament.bg

To the hon. Chairperson of the Committee on Legal Affairs of the 44th National Assembly of the Republic of Bulgaria
Mr DANAIL KIRILOV
E-mail: danail.kirilov@parliament.bg

Dear Mr President

Dear Mr Chairman

At its meeting in October 2016, the European Association of Judges has had drawn to its attention the implementation of Article 195 A of the Judiciary System Act and the requirement of this Act for a judge to make a declaration to the Supreme Judicial Council of all activities including membership of a professional organization. The EAJ - Assembly unanimously decided to write to the Bulgarian authorities (government, parliament) and to ask them to take steps to amend this law by excluding professional judicial associations from its ambit. We add this letter in the appendix.

As noted in the previous letter of the European Association of Judges, the right of judges to join professional associations is an important one, that is designed to support the independence of the judges and is recognized by international legal principles including Article 25 of CCM/Rec 2012/12 Council of Europe and similar recommendations of the UN.

The requirement to register membership in professional organizations with the Superior Council of the Judiciary responsible for recommending the promotion and career development of judges has a chilling effect deterring the exercise of this right.

Moreover there is no apparent purpose in including membership of a judicial association within this law. Such membership is confined to judges, and involves no conflict with the judicial function in an individual case. There is independent of this law a general requirement for a judge to declare any interests relevant to a case he or she is deciding.

The introduction of such an obligation – to register membership – serves no legitimate aim, undermines the right of association and is inconsistent with the policy agreed in Sofia of strengthening judicial associations rather than undermining them. Following that «Sofia policy» is a matter of principle, not least because of the declaration, adopted by the Ministers of Justice of all Member States of the Council of Europe, along with the Action Plan for Independence of the Judiciary, at the meeting held on 21 April 2016 in Sofia.

The implementation of the *Judiciary System Act* adopted on first reading of the Bulgarian Parliament will be prone to impede the free association of magistrates in professional organisations while at the same time might prohibit them from sitting on the governing boards of organisations jointly established with representatives of other legal professions.

Moreover the *Judiciary Act* the Bill introduces a ban on the work of professional organizations of magistrates being financially supported on a project basis. It should be noted that the involvement of professional organisations in donor-financed projects is a necessity in so far that they allow organising relevant and timely professional discussions, training events, meetings of fellow magistrates, presentations by international guest speakers, exchange of experience with fellow magistrates from other countries, publishing manuals, compendiums and other legal literature.

The arguments put forth in the explanatory notes accompanying the Act, notably that the restrictions and prohibitions are being put in place to preclude „foreign influences» and dependencies in the judiciary, are rather far fetched and resemble an argument often used in undemocratic societies. The European Association of Judges therefore once again asks the Bulgarian Parliament and Government to exclude professional judicial associations from this amendment to the Judiciary System Act.

José Igreja Matos

President of the European Association of Judges (EAJ)

Appendix II

REPORT ON THE CURRENT SITUATION IN POLAND

Following the victory in parliamentary elections in October 2016 the Law and Justice Party took over the government in Poland. One of the main targets of the governing party is to take total control over the judiciary system. It's important to mention that previous governments have also occasionally tried to limit the independence of judiciary in our country. However, there was a solid system of the safeguards implemented in the legal system, with the primary position held by the Constitutional Court. The whole process of demolishing independence of judiciary in Poland can be divided to 4 stages :

1. to paralyze/disable the Constitutional Court in Poland ;
 2. to take control of the Judicial Council ;
 3. to change the system of the education of future judges; introducing judge's assessors
 4. to change the judicial system in Poland, eliminating judicial self – government
- It is very intentional the order of these actions. The Minister of Justice openly stated, that the precondition of the “reforms” of the judiciary system in Poland is to “bring down” the Constitutional Court first.

1.THE CONSTITUTIONAL COURT

First it is important to give a short description of the Constitutional Court in Poland. According to Polish Constitution the Constitutional Court reviews the constitutionality of laws, international agreements, regulations, as well as the goals and activity of political parties. Constitutional Tribunal's judgements are binding and final (Article 190 (1) of the Constitution). The Constitutional Tribunal is composed of 15 judges elected for a single 9 year term. In the exercise of their office, judges of the Constitutional Tribunal are independent and subject only to the Constitution (Article 195 (1) of the Constitution).

The Constitutional Tribunal crisis had two aspects.

The first aspect concerned the elections of new judges of the Constitutional Court, the second

- successive acts adopted since November 2015 amending the Act on the Constitutional Court, which aimed at paralysing the Tribunal's work.

1.1 ELECTION OF THE NEW JUDGES

The constitutional crisis has its origins in one of the intertemporal provisions of the Act on the Constitutional Tribunal of June 2015. The provision allowed the previous governing majority to choose five new judges of the Constitutional Tribunal. Whereas in 2015, three judges ended their tenure during the Sejm's 7th term and two during the term of the new Sejm (lower chamber of the Parliament), which was elected in October 2015 and had its first session on 12 November 2015. Two days before parliamentary elections, a group of MPs from the Law and Justice Party (PIS) filed a motion with the Constitutional Tribunal to verify the constitutionality of, among others, the transitional provision which formed basis for the election of five constitutional judges. The case was to be considered at two hearings. On 25 November 2015, the Constitutional Tribunal was to assess the provisions which served as a ground for the election of judges to replace the posts which would be released in November and December.

On 21 December 2015, the Tribunal was to consider other charges. However, in the middle of November (when the results of parliamentary elections were known) the motion was withdrawn. Although five judges were already elected, none of them was appointed by the President (Andrzej Duda, who as the candidate of Law and Justice Party won presidential elections in May 2015). On 25 November 2015, the new Sejm adopted five resolutions which invalidated the resolutions of October 2015 appointing five constitutional judges. This was an unprecedented move. Never before had the Sejm (Polish Parliament) adopted resolutions voiding resolutions adopted by the previous Sejm. The new resolutions were published in the Polish Monitor even though there was no basis in law for such publication.

On 2 December 2015, the new Sejm chose five new judges of the Constitutional Tribunal. The Sejm chose the judges based on the provisions which were not yet in force at that time. The President took the oath from all of them immediately (late midnight) (all new judges were related to Law and Justice party, one of them was the MP in the Sejm of the 8th term).

On 3 December 2015, the Constitutional Tribunal considered the motion filed by the Civic Platform. The Constitutional Tribunal ruled that the transitional provision of the Act of June 2015 which allowed for the election of all five judges at once was partially unconstitutional. In so far as it allowed for appointment of three judges whose tenures expired in November 2015, the provision was constitutional. As a result of this decision the President of the Constitutional Tribunal Andrzej Rzepliński assigned judges Piotr Pszczółkowski and Julia Przyłębska, chosen to replace those judges whose terms of office expired in

December 2015, to adjudicate cases. From then on, there have been 12 adjudicating judges in the Tribunal. President Andrzej Duda ignored the verdict of the Constitutional Court and did not take on oath from the three properly elected judges by the previous Sejm.

In April 2016 the tenure of prof. Mirosław Granat has expired. He was replaced by the new judge elected by actual Sejm. In December 2016 the tenure of President Andrzej Rzepliński has expired. President Andrzej Duda in December 2016 appointed Julia Przyłębska for the new President of the Constitutional Court (Julia Przyłębska is one of new judges elected by the new Sejm in December 2015). The nomination was concluded according to the new Act of the Constitutional Court on the basis of provisions, which were not yet in force and against the internal regulations of the Constitutional Court (without required majority voting). She immediately assigned three judges elected by the new Sejm in 2015 to adjudicate cases. In January 2017 prof. Andrzej Wróbel resigned. He was replaced by another new judge elected by the actual (new) parliament. In January 2017 the Minister of Justice filed a motion with the Constitutional Court to review the election of three constitutional judges: Stanisław Rymar, Andrzej Zubik and Piotr Tuleja, (who were elected 2010). There are no legal basis on this motion, but President Julia Przyłębska immediately suspended these three judges till the Constitutional Court considers the charge. President Julia Przyłębska appointed for Vice President of The Constitutional Court Mr Mariusz Muszyński (whose appointment due to the Constitutional Court verdict was void), although this position was already occupied by prof. Stanisław Biernat. She decided to lay prof. Biernat off. She stated, that he has not used up holiday entitlement, so she forced him to do so, not appointing him to any case till the end of his tenure (which expires in June 2016). In conclusion, there are 11 adjudicating judges in Tribunal now, four judges are illegally suspended by President Przyłębska. Eight of these adjudicating judges are elected by the current Sejm. There are still three judges elected by the previous Sejm, which according to the Constitutional Court verdict should be appointed by President Andrzej Duda, but Polish President has ignored this verdict. Thus within a year, the ruling party, supported by the President of Poland, President of Constitutional Court effectively replaced or eliminated from Constitutional Court majority of judges elected by previous governments.

1.2 THE AMENDMENTS OF THE ACT ON THE CONSTITUTIONAL COURT

One of the first legislative initiatives taken by the new governing majority concerned the Act on the Constitutional Tribunal adopted in June 2015. The draft Act amending the Act on the Constitutional Tribunal foresaw changes in the procedure of electing the President and Vice President of the Constitutional Tribunal, introduced a three year tenure of offices for the President and Vice President of the Constitutional Tribunal, terminated the tenures of the incumbent President and Vice President of the Constitutional Tribunal within three months of the act's entry into force and contained a new transitional provision regulating the elections of constitutional judges in 2015. The whole legislative process lasted only seven days. On 20 November 2015, the act was passed to the President who signed it on the same day. The amending act entered into force 14 days after its publication in the Journal of Laws. However on 15 December 2015, the Law and Justice Party's MPs submitted to the Sejm another draft Act amending the Act on the Constitutional Tribunal. These are the most important changes introduced by this act:

- the minimum number of judges composing the full bench was increased
- previously the law required 9 and the act changed it to at least 11 decisions have to be made by a two thirds majority,
- cases have to be considered in the sequence in which they were filed, without exception,
- a hearing can be organised no earlier than after three or six (in cases considered by the full bench) months after the notification of the parties,
- a judge can be removed from office "in particularly serious cases" by the Sejm in a resolution adopted upon a motion of the General Assembly of Judges of the Constitutional Tribunal,
- disciplinary proceedings can be initiated against a Tribunal's judge upon a motion of the Minister of Justice or the President of Poland,
- lack of vacation legis –the act entered into force on the day of its publication.

The intention of the last point above was to make sure (in the opinion of the ruling party) that the Constitutional Court (due to "no vacation legis") cannot control this particular act as e.g. hearing could not be organized immediately in this case (where new act introduced 6 months waiting time and sequential processing of cases) It is important to emphasize, that the previous President of the Constitutional Court prof. Rzepliński fought for independence of the Tribunal. At the hearing on 8 March 2016, the Constitutional Tribunal examined the motions filed by the Ombudsmen and Civic Platform party. On 9 March 2016 the Tribunal delivered its judgement in which it pronounced the Act amending the Act on the Constitutional Tribunal as unconstitutional. The representatives of the government and the governing majority did not accept this judgement. It has not been published in the Journal of Laws. That is Minister's

of Justice Zbigniew Ziobro comment to this verdict : “In this particular case, fortunately, we do not have to do with a judgement, with a ruling and a lawful action. This meeting of judges in the Constitutional Tribunal was not a meeting of the constitutional court, but a meeting of judges who inaptly tried to deliver a ruling which they could not have passed, since they acted in violation of the Act on the Constitutional Tribunal, which governs the functioning of the Tribunal, and in violation of the Constitution.” Furthermore, the subsequent investigation launched by the public prosecutor upon the request of Helsinki Foundation of Human Rights (regarding non - publishing the legal act in Journal of Laws) has been twice discontinued since “non-publishing was done to protect the legal order. All actions described above are accompanied by intensive propaganda campaign in public media, defaming “old” judges from the Constitutional Court, especially prof. Andrzej Rzepliński or Stanisław Biernat. In result of all these actions described above, Polish legal system is deprived of the Constitutional Court. The current one is only a parody of the constitutional court, has no credibility and respect among Polish authorities.

Following the overtaking of the Constitutional Court (thus considering its unconstitutional nature) the motions which were filed before December 2016r, have been systematically withdrawn by Ombudsman, the Judicial Council, local governments etc., to prevent more confusion in our legal system. On the contrary, representatives of the current government file willingly motions to the Constitutional Court, to fossilize the legal acts forced by the government and governing majority in the Parliament. For now it is up to common court judges to review the compatibility of the legal acts with the Constitution. However, the verdict of the common court doesn't have it's abstract scope. What's more, there were threats from the Ministry of Justice, that a judge who will not apply the verdicts of the current Constitutional Court may challenge disciplinary proceedings.

2. THE JUDICIAL COUNCIL

According to Article 186 of the Polish Constitution, the National Council of the Judiciary «shall safeguard the independence of courts and judges». Pursuant to Article 187 of the Constitution, the National Council of the Judiciary is composed of 25 members as follows:

- 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 amongst the judges of the Supreme Court, common courts, administrative courts and military courts - 4 members chosen by the Sejm from amongst its Deputies and 2 members chosen by the Senate from amongst its members.

The main competences of the Judicial Council are :

- review and assessment of candidates for the post of judges of the Supreme Court and common courts, administrative and military courts and the appointment of trainee judges;
- presenting to the President of the Republic motions for appointment of judges to the same courts;
- resolving on a set of principles of professional ethics of judges and trainee judges and ensuring their observance passing opinions on the condition of the judiciary and trainee judges ;
- expressing opinions on matters concerning the judiciary, judges and trainee judges ;
- giving opinions on draft legislation concerning the judiciary, judges and trainee judges, and presenting proposals in this regard.

Since 5 March 2017 the draft act amending the Polish National Council of the Judiciary has been proceeded in Sejm. According to the Draft Act, the whole system of appointing judges to the Council is going to be changed. The most important changes in the appointment include :

- the candidates for the judges are presented to the Speaker of the Sejm by the Presidium of the Sejm or by 50 deputies or by the judges' associations. The number of candidates is not limited in any way.
- the Speaker of the Sejm has (in his discretion) the power to select from proposed candidates, based on arbitrary criteria, a subset of the candidates to be presented to Sejm's consideration
- finally the Sejm votes on the candidates with simple majority. This way, having the majority in Sejm, the seat of the Speaker, the ruling party can freely select the judges
- candidates to the Council. In fact, the deciding role is in the hands of the Speaker, who creates the list of candidates to be proceeded by Sejm, without any defined criteria.

The Draft Act provides for (unconstitutional) division of the Judicial Council into two Assemblies. According to the Draft Act the First Assembly shall be composed of ten members ;the Minister of Justice, the First President of the Supreme Court, the President of the Supreme Administrative Court, a person appointed by the President of the Republic of Poland, four members of the Sejm and two members of

the Senate. The Second Assembly shall be composed of fifteen judges. The Assemblies work independently to consider and evaluate the candidates for the posts of Supreme Court judges, the posts of common court judges, administrative court judges and military court judges as well as the posts of trainee judges. If the Assemblies of the Council have disagree on the candidate, the Assembly of the Council, which issued a positive assessment, may adopt a resolution to refer the application for the examination and evaluation by the full composition of the Council. In this case, issuing a positive evaluation of a candidate requires votes of 17 members of the Council: First President of the Supreme Court, President of the Supreme Administrative Court and the Council members elected from among the judges. The new procedure of electing judges to the Council will increase the influence of the legislative power over the judiciary and infringe the principle that judicial members of a Council for the Judiciary should be chosen by their peers. What's more, the legislative and executive powers forming the majority of the First Assembly, will have a decisive role in the procedure for appointing judges and trainee judges, and thereby the proposed new procedures may infringe the independence of the judiciary. The transitional provisions of the Draft Act provide for the termination of the mandate of the 15 judges who are currently members of the Judicial Council thirty days after the entry into force of the Draft Act i.e., 14 days after its publication: The appointment of their successors should occur within 30 days from the termination of their mandate, and be carried out in accordance with the new procedure and modalities laid out in the Draft Act. The draft eliminates the most representative, self government judicial body in Poland with the widest representation of Polish judiciary

- General Assembly on the national level. The main task of this body was to elect judges to the Council and to debate over problems of the judiciary in Poland. The Draft Act is still proceeded, but as the majority of Parliament is Law and Justice party, the President has never opposed any of Law and Justice's legislation and there is no real Constitutional Court in Poland, it probably will enter into force in May 2017. It's important to add, that following the patterns observed in past legislations (where with the "reform" of Constitutional Court there was a media campaign against its President Andrzej Rzepliński, when opposition movement "Movement to Protect Democracy" emerged with mass protest, the public media launched campaign against its leader) the government launched aggressive media campaign against the members of the Judicial Council, this time the most attacked person is the spokesman of the Council – judge Waldemar Zurek. It is not only media, also the secret services are actively involved launching various, intensive sorts of checks and verification activities regarding judge Zurek.

3.THE EDUCATION OF JUDGES AND INTRODUCTION OF ASSESSORS (trainee judges)

Another building block in the "reform" of the judiciary includes the Draft Act amending the Act on National School of Judiciary and Public Prosecution, proceeded currently in Sejm. The Draft assumes immediate dismissal of members of Programme Board appointed by the representatives of legal professions such as legal advisors, notaries and attorneys. It also reduces the number of members of Programme Board appointed by National Council of the Judiciary of Poland in relation to those appointed by the representative of the Executive Power.

The most significant change is reintroducing the institution of a "assessor judge" who can be appointed by Minister for Justice despite the Judicial Council's objection. The judge's assessor is a judge "in a trial period", who shall be appointed for the indefinite period. The assessor is going to adjudicate like the regular judge with the only difference that he/she does not have the independence rights as other judges, and his position, earnings and career are dependent of the Ministry of Justice. It's important to mention, that the institution of assessor had been reintroduced by the previous Parliament, but it implemented all guidelines from the Constitutional Court's verdict (The Constitutional Court in 2007 ruled that assessor dependent to the Minister of Justice is not constitutional (because is not independent), hence this institution was eliminated from Polish system till reform in 2015). The proceeded draft act contravenes all the Constitutional Court's recommendations. The draft was introduced by **Lukasz Piebiak** (Deputy Minister of Justice, former judge)

4.THE AMENDMENT OF THE JUDICIAL SYSTEM ACT

Just recently – 12 April – the Draft Act amending the Act on the Common Courts was introduced by Law and Justice to the proceedings in Sejm. The draft assumes:

- allowing the Minister of Justice to remove with no justification all presidents and vicepresidents of all common courts in Poland within 6 months from entering Act into force ;

- giving the Minister of Justice the exclusive right to nominate new presidents or vicepresidents of any court (currently the Ministry must act in concordance with the judicial self government and the Judicial Council) ;
- the president of a court can be dismissed by the Minister of Justice in case of “low efficiency” of his/her supervision over judges ;
- the Minister of Justice can reprimand the president of a court in case of not sufficient surveillance over judges and it can be combined with reducing president’s responsibility bonus ;
- in case of positive Minister’s of Justice opinion over a president’s surveillance, he/she can be awarded with extra responsibility bonus ;
- the Minister of Justice can order supervision over judges of a particular court to the “Service of Supervision” (new body to be established within the Ministry of Justice, consisting of judges delegated to the Ministry, and loyal to the Minister of Justice);
- the draft also enables the construction of unconstitutional, “delivery chain” supporting Ministry of Justice in spectacular police actions ending in arrest warrants. Having the total control of the presidents of courts and (in particular) removing the requirement for random assignment of judges to cases over weekends, the Ministry, acting together with special police forces and prosecutors, knows in advance, which judge will consider particular case of arrest and may plan action accordingly. In the past, such actions only failed due to independent position of the judges who did not approve arrest due to weak evidence. Now we may expect to observe the spectacular arrests again. The draft act provides for extreme reduction of professional qualifications requirements regarding the new presidents of courts and judges of higher courts :
- to become a Court’s of Appeal judge it is enough to adjudicate as a common judge for 10 years.
- a regional judge can be appointed for the president of the Court of Appeal ;
 - a district judge can be appointed for the president of the Regional Court (Courts in Poland from lowest rank : district court, regional court, court of appeal).

The Law and Justice party is expecting that the Act will enter into force on 1st July 2017. To give the whole spectrum of current situation of Polish judiciary it is important to emphasize that for months the Minister of Justice is blocking the vacant posts of judges

- he has not published vacancy notifications for judges to be appointed (as required by law). The appointment of new judges may happen only after publishing vacancies. In result there are over 500 vacancies in Polish courts (there are 10.000 judges in Poland in general). Obviously the Minister of Justice postpones publishing notifications till new legal acts enter into force.

5. CONCLUSIONS

The new legislation already implemented and legislation being forced by governing party is focused only on widening control over judiciary in Poland. It actually destroys any judicial self-government and its influence on any decision-making process.

The constitutional principle of separation of powers will soon not exist

. The executive and legislative branches of government have are in the process of changing the entire system of the state without changing the Constitution. The governing party ignores opinions, recommendations, suggestions submitted by Polish legal community (judges associations, the Supreme Court, National Bar Council, National Council of the Judiciary of Poland, The Helsinki Foundation for Human Rights, even Parliamentary Legislative Bureau, etc.) and by international community (The Venice Commission, OSCE, the Council of Europe, the European Commission, UN, ENCJ, Medel, etc.).

Polish judges seem to be united in protecting legal order in Poland, however we can observe the following

- some judges may be attracted by possibility of promotion and financial benefits and may pledge their loyalty to the Ministry of Justice, taking the posts of presidents and vice presidents of courts and positions in the higher rank courts.
- vast majority of judges are against new laws, but only part of them acts openly against it.
- there are about 150 judges (those delegated from actual judging to office work in the Ministry of Justice) cooperating with the Minister of Justice within the Ministry. They will (according to the new law, which is presumably written with their support) form the core of the surveillance unit. Following the recommendation of the last General Assembly of Judges (probably the last one in the history, as the new act will shut down this institution) on April 20th, 2017, 12:00 a.m. Polish judges concluded 30 min Local Assemblies in all courts. The Assemblies elected delegates to newly established self-government body of judges. The break at

noon also served to raise the awareness of the society of the dangers facing Polish judiciary system. Many citizens and the press attended such initiatives in Courts.

Source: Forwarded message

From: **Bogdan Jedrys** <bjedrys@gmail.com>

Date: 2017-07-17 8:05 GMT+01:00

Subject: Re: PD: Re: The situation of judiciary in Poland

To: José Igreja Matos <igrejamatos@gmail.com>