Opinion of the Polish Judges' Association 'Iustitia' on the Act of 20 December 2019 amending the Act- the Law on the System of Common Courts, the Act on the Supreme Court and Certain Other Acts.

It is the official position of the Board of the Polish Judges' Association 'Iustitia' that the real purpose of this legislation (here also referred to as the New Law) is to ultimately subordinate the judiciary to the political power. The legislation deprives judges of their independence, as under a threat of expulsion from the office, they are prohibited from applying the judgment of the Court of Justice of the European Union of November 2019. This constitutes a breach of Poland's commitments to the EU, by disregarding the doctrine of primacy of EU law over national law, arising from the Treaty on the European Union and Polish Constitution. The legislation introduces disciplinary liability of judges for rendering judgments that are contrary to the expectations of the political power. Moreover, the legislation violates Polish Constitution, by prohibiting judges from exercising decentralised control over compliance of secondary legislation with the constitution. It curtails the right to free speech and privacy of judges and introduces a mechanism of invigilation, obliging judges to disclose membership in associations and functions they perform in foundations. Finally, the proposed legislation abolishes judicial self-governance by transferring all decision-making about courts to their presidents, who have been nominated the Minister of Justice, and by prohibiting judges from adopting resolutions that are critical of actions of other state powers. The Board of the Association categorically opposes the adoption of the law that undermines independence of courts and judges and grants the political power the right to control judicial decisions, which is contrary to the Constitution of the Republic of Poland and international treaties. The situation like this has not existed even in the times of the Polish People's Republic and it is not acceptable in the 21c, in the heart of the European Union.

1. Particular Remarks

A. Preamble

The *ratio legis* stated in the preamble is not reflected in its substantive content.

As a rule, a preamble provides a general interpretative direction and specifies intentions of the legislature, thus it may be relevant in interpreting a legal act. The decision to include the preamble and its juridical meaning in itself, indicate priorities of the Polish

legislature. On the one hand, the preamble of the New Law refers to the constitutional values but, on the other hand, (under a guise of constitutional compliance) it emphasizes the role and importance of other state powers and their superior authority over the judiciary, which is to be subjected to the will of the people. This is consistent with the thesis that has appeared in the public debates that adheres to a peculiar understanding of a subordinate role of a judge in his relationship with the state.

Instead of passing good law with a due regard to proper legislative practices, the legislator has declared taking over the responsibility for the judicial system of the Republic of Poland, in reality, aiming to prescribe the courts how the law should be applied, thus ascribing itself the role that has been assigned to courts and tribunals by the Polish Constitution.

The emphasis on the supremacy of the will of the people and the dominance of the legislature over the judiciary resembles the rhetoric of the 1952 Constitution of the Polish People's Republic.

The Constitution of the Republic of Poland, like all legal acts, has to be read in a holistic manner, rather than selectively referring to its specific provisions. In political debates, Art. 4 of the Constitution has been cited as the rationale for the recent changes that have had devastating effects on the judicial system. According to this provision, the people hold the supreme power in the Republic of Poland. It allegedly provides a reason to ignore other provisions in the Constitution, in particular the one stipulating that the political system of the Republic of Poland is based on the separation of powers and equal balances among the legislature, executive and the judiciary (Art. 10) and that courts and tribunals are a power, which is separate and independent of the two other powers of the state (Art. 173). Notwithstanding, it is possible to apply Polish Constitution in a manner that does not lead to a conflict between Art. 4 and other rules[1].

The judiciary has been granted the quality of an independent and separate power by the people, who expressed their will through the National Assembly, and directly through approving the Constitution of the Republic of Poland in a referendum.

An element that represents the people in the exercise of the judicial power is the public participation in the administration of justice. By referring in the preamble to the

[1] https://www.iustitia.pl/informacje/2160-odpowiedz-na-kompedium-bialej-ksiegi-w-sprawie-reform-polskiego-wymiaru-sprawiedliwosci-przedstawione-przez-rzad-rzeczypospolitej-polskiej-dla-komisji-europejskiej

supreme power of the people, the legislator has forgotten about Art. 182 of the Constitution, according to which participation of the people in the administration of justice is determined by secondary legislation. If for the legislator, the concepts of the people and citizens are the same, then the presented understanding of the supreme power of the people cannot be reconciled with the text and the purpose of the aforementioned provision of the Constitution.

The legislator, by referring to the doctrine of separation of powers, the rule of checks and balances, rule of law, independence and apolitical nature of courts, the right of citizens to fair trial and other fundamental rights, has clearly indicated the purpose of the legislation, which is to prohibit judges from engaging in public activities that are incompatible with the principles of the independence of courts and judges.

In the subsequent lines of the preamble, the legislator refers to the need to guarantee legal protection for citizens and the law enacted by the state (an element of the superiority of the legislative power), as well as the need to ensure certainty in the process of judicial appointments by the President of the Republic of Poland (an element of the superiority of the executive).

The next objective stated by the legislature is to guarantee consistency of courts' rulings in Poland, which in accordance to the Constitution is the exclusive competence of the Supreme Court (Art. 183 of the Constitution) and to improve quality of law, when it is both enacted and applied, This is an unequivocal indication that the real purpose of the legislator is to increase the influence of the legislative power on the application of law by the courts.

An important goal of the legislator, which emerges from the subsequent parts of the preamble, is to provide legal protection and a sense of security not to citizens, but to a group of people who have been appointed to judicial office in a manner that raises serious doubts about the constitutionality of the process. This objective lies behind assurances given to all judges appointed by the President that the dignity of the judicial office will be safeguarded, by specifically focusing on ensuring effective procedures that do not permit unjustified questioning of a status of a judge by any organ of the executive, the legislature and the judiciary, as well as any other persons or institutions, including other judges. This, as declared, is intended to provide citizens with a sense of security and stability in relation to the courts' rulings.

Highlighting in the preamble the role of the President in the procedure for judicial appointments could be aimed at exonerating him from a responsibility for violating the

Constitution by appointing to the judicial office persons, whose independence and impartiality cannot be guarantees by the organ, which in accordance with the constitution is supposed to fulfil such a task, namely the new National Council of the Judiciary (neo-KRS). The New Law increases the influence of the President on the functioning of the Supreme Court, through adopting rules governing its operation, and on the selection of the First President of the Supreme Court, who is at the same time the Chairperson of the State Tribunal, a body that decides on the liability of the President for violating the Constitution. The attempt to guarantee irremovaiblity of persons appointed to the Supreme Court by the President may be of vital importance in the context of the expiring terms of office of the First President of the Supreme Court, prof. Małgorzata Gersdorf, which ends in April 2020, and may affect people who are entitled to participate in elections of the new President of the Supreme Court.

B. Judicial self-government

The structure of the judicial self-government adopted in the New Law suggests that the legislator does not understand the nature of this institution.

The judges of ordinary courts have never been guaranteed the appropriate quality of the self-government. The central organ of the judicial self-government has never been created. This has precluded a possibility of improving functioning of the system, by focusing only on increasing the role of administrative supervision, which is by its nature ineffective. This process has been ongoing for many years and it appears that currently the executive power has decided to further subordinate the judiciary, at the expense of the quality of protection of citizens' rights.

In practical application of previous law, the nature and competences of the judicial self-government had been derived from the analysis of provisions of Chapter 4 of the Law on System of Common Courts, in accordance with the functional method of interpretation, which entails taking into account function, role and purpose of a particular legal norm. This method of interpretation of legal provisions requires considering the system of values embedded in the law and norms that are commonly accepted by the society. In the light of Art. 17 of the Constitution, one of such values is the idea of functional self-government for the community of people who are in a profession of public trust, such as judges. The essence of self-governance is the right of a particular community to the decision- making that is not dependent on any organs of the state (also organs of the judiciary as indicated in Art. 21(1) of

the Law on System of Common Courts,). The right is, of course, exercised within the limits of the law, but most importantly, interpedently and with individual responsibility. Competences of the judicial self-government have to be read holistically with taking into account the purpose of this legislation. If the purpose of a self-government is to take a position on matters essential for a particular community, then its competences are derived from rights and duties of people who belong to that group. The rights and duties of judges are not only specified in the Law on the System of Common Courts, but also regulations enacted on the basis of the Law on the National Council of the Judiciary, entitled: 'Rules on Professional Ethics for Judges and Assessors.' § 4 of these rules, which has been unchanged since 19 February 2003, provides that a judge should take care of the authority of the office, the interest of the court in which he/she works, as well as the interest of the judicial system and the position of the judicial power within the governance system. Since judges have an obligation to refrain from expressing their position in public, the forum of self-government is the appropriate place to present, and discuss it, as well as to decide on undertaking any further initiatives. The role of the judicial self-government was interpreted in a similar manner by the Constitutional Tribunal, which stated the following: 'Courts and tribunals must operate within the organisational and decision-making structures that are separate from other state powers, have discrete funds that ensure their effective functioning within the state apparatus, have an internal governance system, a legal possibility to defend their rights and an opportunity of signalling to other state powers their comments and reservations aimed at improving the efficiency of the proceedings" (see: the ruling of the Constitutional Tribunal of 16 April 2008 in case K 40/07).

The functioning in practice of general assemblies of judges of the Court of Appeal demonstrated that the aforementioned goals were being realised, in spite of the legislative changes (for example the removal of requirements, such as: compulsory participation or quorum) aimed at weakening this organ.

Many resolutions had been passed in line with the correct understanding of the judicial self-government. In these resolutions, the assemblies were expressing their concern over the direction of changes introduced by the executive and those with the parliamentary majority. They were also postponing or withholding their recommendations for judicial appointments. These resolutions were dictated by concerns for the rule of law foundations of the state, while awaiting the judgement of the Court of Justice of the European Union (CJEU) in Joined cases C-585/18, C-624/18 and C-625/18. The CJEU's judgment of 19 November

2019 and the subsequent judgment of the Supreme Court of 5 November 2019 in case III PO 7/18, support the validity of decisions of judicial self-governments not to participate in activities aimed at destroying the justice system and the rule of law in Poland.

Changes that have been introduced in the New Law are in line with the idea that judicial self-governance should be marginalised. The statement made in the justification to the legislative proposal that the 'model has failed' has not been not supported by any analysis. Noticing by the legislator that positions taken by the judges of common courts have been decidedly critical of the actions devastating the justice system cannot result in undermining the reason for exitance of general assemblies of judges of courts of appeals.

Such actions lead to further increase of the powers of the executive and the legislature over the judiciary and undermines the constitutional rule of checks and balances (Art 10(1) of the Constitution).

The solutions adopted in the New Law further undermine the role of the self-government, moving the system further away from the idea of judicial self-governance. The previous system had already treated judges as subjects of the decision-making, instead of empowering them within the governance system, which could have had positive effects by encouraging engagement of knowledge and skills of judges and their involvement in the organisation of the functioning of a court. The New Law worsens the existing situation, which no doubt will deepen the organisational problems that the courts have been facing. According to the data published by the Polish Judges' Association 'Iustitia' in 2019, the time of court proceedings has lengthened by 47% in comparison to the data collected in 2015. The number of complaints concerning the delays in proceedings in regional courts have increased by over 16% (https://www.iustitia.pl/3354-spowolnienie-w-sadach).

The potential that lies within the self-governing mechanisms has been rejected. In their daily work, judges display essential abilities to engage in substantive analysis and draw correct conclusions, persuade of their arguments when searching for a rational solution and at the same listen and consider opposing arguments, alleviate conflicts and seek good compromises. The aforementioned skills could be utilised for the public good and especially for the benefit of the citizens, who rightly demand improvements in the functioning of the judicial system. Unfortunately, the proposed changes perpetuate the inefficiencies in the management system of courts.

The legislator has completely ignored recommendations made in the 'Budapest Declaration on the Self-Governance for the Judiciary: Balancing Independence and Accountability' of the European Network of Councils for the Judiciary (ENCJ), dated 21-23 May 2008. The Declaration indicated that judicial self-governance guarantees and contributes to the strengthening of judicial independence and effective administration of justice. It should be realistic, participative and modern. Meanwhile, the changes that have been introduced mean that judicial self-governance in Poland will simply disappear.

In accordance with amended Art 3 of the New Law, the judicial self-government will exist only at the level of a particular court with its higher levels being abolished. The effect of this approach is to diminish the role of the general conference of judges, with changing its name to the 'assembly.'

According to the New Law the 'general assembly of district court judges' can only listen to information concerning the operation of a court as presented by its president and can express its opinion on the matter. It can also elect a delegate to participate in the meetings of a college of a regional court, which are convened to provide opinions about candidates for judicial office to district courts.

Effects of a negative opinion about the functioning of a court, if expressed by the assembly, are not specified in the New Law, which means that in practice such an opinion will be deprived of any meaning. The role of a delegate at the meetings of a college of a regional court is limited to matters pertaining to opinions about candidates to judicial office in district courts.

The implemented changes clearly aim to hinder integration among judges from regional courts and Court of Appeal and, as a consequence, aim to prevent them from adopting common positions on matters relating to the functioning of the judicial system.

The objective behind abolishing the duty to participate in an assembly is to marginalise the role of the judicial self-government. In the light of recent experience, the solution that allows presidents of courts to decide on whether participation in an assembly is compulsory raises concerns that the presidents will use these new powers in an instrumental manner, especially when low participation will be beneficial to them.

The implementation of an open ballot system at the level of regional courts and the Court of Appeal, together with the requirement to attach a list of names of the participants to

all resolutions should be given a negative evaluation. These changes aim to reduce freedom of members of the assembly and to indirectly block the functioning of assemblies, which are critically assessed by the political power.

The amendment to Art 37 of the Law on the System of Common Courts (annual report of the president of a court about functioning of a court that operates as an appellate jurisdiction, within the scope of its competences, and a framework of an internal administrative supervision) is another example of a measure that eliminates judicial self-government from participating in matters concerning functioning of a court. Pursuant to Art 34 §1(3) of the Law on the System of Common Courts the general assembly of judges of the Court of Appeal can only express an opinion about the report and cannot decide on its adoption.

Even without detailed knowledge of the legislation and nature of annual reports it is immediately apparent that competences of the Minister of Justice have been increased and the judicial organs have been completely made dependent upon his will. A refusal to adopt an annual report by the Minister of Justice has been equated to a flagrant failure to fulfil the official duties on the part of a president of a court and may lead to a removal of the president using a simplified procedure during term in office. The National Council of the Judiciary, as it is currently formed, creates a completely illusory possibility of lodging an objection. In the ruling dated 7 November 20013 (K 31/12) the Constitutional Tribunal found that Art 37h the Law on Common Courts is noncompliant with Art 10(1) and Art 173 of the Constitution due to a lack of a possibility for the president of the Court of Appeal to lodge an objection to a refusal by the Minister of Justice to adopt an annual report.

C. Colleges of regional courts and the Court of Appeal

College of a court is an administrative body that functions at the level of regional court and the Court of Appeal since 1990[2]. As a general rule, it performs an ancillary role in managing functioning of courts. The doctrine correctly indicates, that it is supposed to be a forum, where interests of judges' self-government may be realised.[3]

[2] See: The Law of 17 July 1990 creating Courts of Appeal amending The Law – Law on Common Courts, the Civil Code, the Criminal Code, the Law on Supreme Court, the Law on the Supreme Administrative Court and on the National Council of the Judiciary, Dz. U. Nr 53, poz. 306 z późn. Zm.

[3] See: Tadeusz Ereciński, Jacek Gudowski (red.), Józef Iwulski, *Prawo o ustroju sądów powszechnych. Ustawa o Krajowej Radzie Sądownictwa. Komentarz*, (Warszawa 2010).

The election of members of colleges by conferences of judges created an opportunity of selecting judges that were respected within the legal community, had adequate professional experience, including heads of departments and auditors, who know not only particular unit, but are also aware of available human resources and the effectiveness of the proceedings in the Court of Appeal or a regional court.

According to the authors of the New Law, a college that consists only of presidents of courts guarantees that 'its opinions are trustworthy, rational and relate to the organisation of the workings of a court, as well as individual and ethical cases which are considered during the college meetings.' In the view of the authors of the legislation, the solution is consistent with the overall governance model, since all management functions have been vested in a president of a court.

The changes adopted in the New Law mean that the composition of a college will be *de facto* decided by the Minister of Justice, as he is responsible for appointing courts' presidents. Colleges will also become organs that are completely under the minister's control.

The most important aspect is, however, the complete exclusion of representatives of judicial community from cases which directly concern the community. The new formation of the body effectively disregards the voice of judges, since the only authorised persons are courts' presidents.

The representatives of the judicial community have also lost their influence in decision on matters concerning the distribution of judges, assessors and court referendaries in departments and balanced distribution of their duties and activities to guarantee efficiency of court proceedings.

The aforementioned changes are aimed at depriving judges at all levels a possibility to participate- even in an advisory capacity- in organs of a court with significant competences.

Opinions on judicial appointment to the Court of Appeal by the college of judges of the Court of Appeal and candidates for regional and district courts by the college of a regional court will become a mere façade.

Pursuant to the enacted legislation the term in office of members of colleges has been shortened. In a short time, this is another interference by the legislature in the composition and the functioning of these organs, which were supposed to balance the influence of the presidents on the operation of courts. The New Law grants full power and authority over the

governance of courts to their presidents, who are nominated by the Minister of Justice, a politician, who is, at the same time, the Prosecutor General. At this point it is important to emphasise that with regards to their appointment or dismissal, the presidents are completely dependent on the Minister of Justice. This means that the entire administrative supervision over courts (internal as well as external) has been put into the hands of a representative of the executive power. Colleges, which have been subordinated to the Minister, have influence over initiating disciplinary proceedings against other judges, which strengthens the mechanism of control and supervision imposed on the judges.

D. Contests for judicial positions

Amendments to Art. 58 Law on the System of Common Courts directly exclude the judicial self-government from the opinion procedure with regard to candidates. These changes have to be read together with other provisions (Art. 9c, Art. 28, Art. 29 § 1(1a), Art. 30, Art. 31 § 1(1a), Art. 57ae the Law on the System of Common Courts). The assessment of these proposals can only be critical, as they destroy the model that was designed to strengthen the role of the judicial self-government. Delegates of the assembly will have no real chances to outvote the members of colleges (presidents of courts).

It is a complete misunderstanding on the part of the authors of the justification for the bill, that 'courts' management staff' possesses the best knowledge about the needs of courts, thus are capable to evaluate candidates on their merits. This is a clear return to the time when the will of a president of a particular court was the sole factor in determining judicial appointments and promotions. of courts could solely decide on judicial appointments and promotions. Thus, the community of judges permanently loses the possibility of having any real influence over decisions to nominate persons, who undoubtedly do not deserve such nominations.

It has to be strongly emphasised that, in recent years, the political power has indicated the need to ensure transparency in nomination procedures, also in relation to the opinion procedure regarding candidates. However, granting, as a matter of fact, the right to express opinions on candidates solely to colleges that consist of presidents, does not make this process more democratic and transparent, thus goes the opposite direction. This creates a real danger for citizens, as it does not provide guarantees that candidates for judicial office will be assessed in a comprehensive manner, which carries the risk of undermining equal access to the profession.

As a consequence of the implemented changes, a politician (the Minister of Justice) will announce the contest for a judicial position, next, the opinion about the candidates will be expressed by the presidents of courts appointed by the aforementioned politician, the contest will be decided by the Council almost solely elected by politicians, and the nomination will be given by the President, who is also a politician. This means a complete politicisation of the nomination process and, as a result, a lack of independent judiciary, which is contrary to Art. 45 of the Constitution, as well as provisions of international conventions and treaties, which was confirmed by the CJEU in its ruling of 19 November 2019.

E. Possibility to question the designation of a court, constitutional state organs and appointment of a judge. Introduction of an institution of jurisdiction of a judge.

An objective of the legislation is to legitimise judges, whose appointment has been questioned in the ruling of the CJEU of 19 November 2019 and the judgment of the Supreme Court of 5 December 2019. The character of implemented changes, in particular their link to repressive disciplinary measures, should be viewed as precluding in reality the application of the aforementioned judgment of the CJEU.

The process of appointing judges under Art. 179 of the Constitution of the Republic of Poland consist of two stages. The President can use his prerogative only upon a motion of the National Council of the Judiciary. Irregularities at any stage of the process result in a judicial appointment that is defective, and the prerogative of the President cannot be used to correct defects arising at the procedural stage before the National Council of the Judiciary, or to remedy any faults in the appointment of the Council itself.

A condition precedent for proper execution of the aforementioned prerogative by the President is the fulfilment by the National Council of the Judiciary of the task assigned to it by the Constitution, which is to safeguard independence of judges and courts. The organ currently operating as the National Council of the Judiciary, which status, position and composition have been formed on the basis of the Law dated 8 December 2017 on the amendment to the Law on the National Council of the Judiciary and some other legal acts, is not an impartial body that is independent of the legislative and the executive powers.

In the light of the EU Charter of Fundamental Rights and the European Convention on Human Rights, the definition of a ‘court’, as the guarantor of one of the fundamental rights

(human rights) that is the right to a fair trial, encompasses also the appointment on the basis of secondary legislation. This, in turn, means that if in a country there are certain rules that govern the appointment of judges, it is the state's responsibility to respect them. Thus, for accepting that an institution is a court within the meaning of the Conventions (the Charter) not only the final outcome in important which is the appointment of a person to the judicial office by the President and acquisition of a status of a judge, but also compliance with internal rules at each stage. In its conventional meaning, the term 'court' is an autonomous concept that requires recognition in a statute that guarantees independence and impartiality.

Accepting that the President's prerogative can be used to correct all defects leads to an unacceptable conclusion that the entire procedure of judicial appointments is superfluous. This erroneous conclusion would imply that it would merely suffice that the President appoints a person indicated by the aforementioned organ to judicial office without fulfilling the requirements of the nomination procedure, which serves to verify and check the suitability of a candidate for a judge, his or her qualifications for the office, both professional, as well as, moral.

In the light of the ruling of the Court of Justice of 19 November 2019, there are no doubts that organ mentioned above (neo-KRS) does not fulfil the constitutional tasks of the National Council of the Judiciary. Even if a different view is adopted, infringements of the procedure have occurred in practice, with the neo-KRS adopting resolutions, without opinions from colleges of courts and judicial assemblies. This constitutes a significant violation of national law.

At present, the President has been delaying the consideration of many motions submitted by the previous National Council of the Judiciary without stating a reason. A failure to appoint a person to a judicial office, constitutes in fact a refusal to appoint and is not subjected to any judicial control. This issue was particularly pertinent with regards to the refusal to take oaths from three judges of the Constitutional Tribunal, despite their effective election by the Sejm (the Lower House of the Polish Parliament).

The changes to the Law on the System of Common Courts, discussed herein, seek to legalise this practice and grant the President powers to decide on the composition of the judicial body.

The legislator has also introduced an element that is not envisaged in Arts. 173 and 179 of the Constitution and, in the light of these provisions, is not relevant for ensuring the

effectiveness of judicial appointments. Currently, the appointment is to be accompanied by an act of taking an oath before the President. While the introduction in the New Law of additional conditions in the appointment of a judge does not interfere with the prerogative of the President, it infringes the aforementioned provisions of the Constitution regarding the procedure for appointing judges.

Certain additions have been made to Art. 55 § 4 the Law on the System of Common Courts, which now defines the concept (and creates a legal institution) of a jurisdiction of a judge.

According to Art. 55 § 4 the Law on the System of Common Courts 'a judge can rule on all cases in his/her normal place of professional activity, and in other courts in cases specified in the Law (jurisdiction of a judge). The provisions on the allocation of cases and the designation a court and change to its composition do not limit the jurisdiction of a judge and cannot be the basis for finding that the composition of a court is contrary to the provisions of the law, that the court has been improperly constituted or that a person is not authorised or capable of adjudicating in a case'.

Until now the concept of jurisdiction was associated with a court, not a judge. According to the Constitution only courts constitute the justice system in the Republic of Poland. Therefore, it is clear from the provisions of the Constitution that the concept of jurisdiction of a judge, understood as the right to administer justice, cannot exist. Defined in the legislation jurisdiction of a judge remains connected to the attributes of a court (local, material and functional) to consider cases in a particular category, which constitutes an element of the constitutional right to a fair trial.

The introduction of the institution of jurisdiction of a judge aims to legalise irregularities in the procedure of judicial appointments, without leaving a possibility for the parties to the proceedings to question the composition of a court. Therefore, it strengthens the status of people appointed to the judicial office in a procedure that raises concerns of its constitutionality, which is detrimental to citizens. The provision is supposed to prevent a ruling being overturned on appeal on grounds of irregularities in the procedure that led to an appointment of a judge. In fact, the provision precludes the application of the judgement of the Court of Justice of the European Union of 19 November 2019 and possibly future rulings of the Court of Justice.

The provision gives the presidents of courts wide powers to select judges for adjudication in all areas- without a legal procedure for changing the scope of judicial activity. This means *de facto* and *de iure* that there is a possibility to transfer a judge to adjudicate in another department (with different category of cases) without following a procedure provided in the law and without guaranteeing the right of a judge to appeal. This may allow for a 'disciplinary' transfer of a judge to adjudicate in cases in an area in which he/she does not specialise. On the other hand, the president of a court may assign a particular case or category of cases to a particular judge, including himself.

From citizens' perspective the situations described above are very dangerous and may seriously interfere in exercising the right to a fair trial. The implementation of the latter is supposed to be achieved through, among others, provision on the attributes of a court, broadly understood as encompassing transparent and predictable allocation of cases to a judge for adjudication. The right has been under a threat due to the introduction of the Random Allocation System (hereafter RAS), which prevents parties to a dispute from scrutinising rules on allocation of cases and verifying a judge's caseload, which may impact cases being considered within a reasonable period.[4]

Allocation of cases to a particular judge has a fundamental meaning to a citizen, who has the right to know, in which court his/her case will be heard and what rules govern allocation of cases to a judge. From a citizen's perspective, a judicial appeal process should be a guarantee, that there have been no infractions. Therefore, the adopted rules on jurisdiction of a judge do not meet constitutional and secondary law standards of specificity, transparency, and most importantly legal security, as well as effective legal protection, to the extent that they interfere with provisions on jurisdiction of the courts, which is an element of a right to a court that is designated in accordance with secondary law.

It is important to note that pursuant to Art 8 of the Law, Art. 55 § 4 of the Law on the System of Common Court will apply also to currently pending cases, and even those that were concluded before the entry into force of the Law.

Art 12(1) precludes a possibility of resuming proceedings before the National Council of the Judiciary or questioning a motion appointing a person to judicial office, if the person presented to the President fulfils formal conditions to hold the office, as specified in the

[4] As for the practical effect of the RAS, see Resolution of the Supreme Court of 5 December 2019, III PPO 10/19.

Constitution on the day of the adoption of a resolution by the National Council of the Judiciary. I should be highlighted, that the Constitution does not specify such formal requirements (see: Arts. 144(3) and Art. 179 of the Constitution). This leads to the conclusion that, according to the legislator a judicial appointment by the President upon a recommendation of an organ claiming to be the National Council of the Judiciary fulfils the requirements of Art 12 of the Law. Art 12(2) of the Law provides an answer to doubts concerning the nomination procedure to a post of a Supreme Court Judge and aims to legitimise the appointments made in September 2018, which infringed the national rules, and were made in spite of, the Supreme Administrative Court's decision, in an appeal procedure from the resolution of the National Council of the Judiciary, to issue interim measures. Therefore, the provision 'neutralises' any possible judgement of the CJEU on an infringement of EU law in this sphere.

The provisions discussed above violate EU law and undermining its effectiveness and efficiency and, above all, they may violate the jurisdiction of the CJEU. A failure to comply with a judgement if the CJEU may lead to the European Commission initiating the procedure under Art. 258 TFEU.

Art 12(3) of the New Law provides on the invalidity of any proceedings that question a resolution of the National Council of the Judiciary on individual appointment of a person to the Supreme Court, undertaken in violation of Art 3 of the Law of 26 April 2019 amending the Law on the National Council of the Judiciary and other legal acts - the Law on the System of Administrative Courts. According to the aforementioned provision, proceedings in cases appealing resolutions of the National Council of the Judiciary on individual appointment of a person to the Supreme Court, commenced and completed before the entry into force of the Law (23 May 2019), may be discontinued pursuant to the Law. Art 12(3) of the Law pertains to a situation, when after the entry into force of the Law of 26 April 2019 the Supreme Administrative Court referrers a question in preliminary ruling to the CJEU. The provision directly affects the exercise of judicial power by a national court and the right to refer a question in preliminary ruling pursuant to EU law. The legislator seeks to establish invalidity of such national proceedings, which will enable challenging any unfavourable judgments of the CJEU.

To sum up the remarks concerning the possibility to question a designation of a court, constitutional organs of the state and appointment of judges, it should be pointed out that the

legislator seeks to legalise defective appointments and legitimise in performance of their judicial duties, persons appointed upon a recommendation of the neo-KRS and simultaneously prohibit national courts from verifying these appointments. The intention of the legislator is to deprive courts of a right to question a status of a judge, even in cases of a flagrant violation of procedural rules or, for example, as a result of committing a crime.

This is a clear violation of provisions of the EU Treaty that guarantee a right to access to a court that is constituted by law, the binding nature of the ruling of the CJEU and the national law, including Art 45 of the Constitution on right to a fair trial and procedural rules that compel the verification of the composition of a court (for example, Art 439 § 1(1)(2) of the Code of Criminal, Art 379(4) Code of Civil Procedure).

F. Additional Restrictions on the Public Activity of Judges

Art 88a the Law on the System Common Courts imposes additional duties upon judges to provide information associated with exercising their right to form associations and foundations. New categories of disciplinary misconduct have been added to Art 107 § 1(4) of the Law on the System of Common Courts, which prohibits a judge from undertaking public activities that are incompatible with the principles of independence of courts and independence of judges. Such a vague formulation used to specify the disciplinary liability of a judge creates a huge risk of these provisions being abused.

The are no doubts that these provisions are aimed at silencing the judges defending the rule of law, independence of the judiciary and independence of judges. In the light of the right to free speech and freedom of expression, guaranteed to all citizens, including the judges, the provision that introduce, even indirectly, significant limits on these rights in practice are a manifest violation of the Constitution.

There is a lack of rational justification for the Law, which is solely aimed at repressing judges, who are fighting for preserving the rule of law, and may be used as a tool to question impartiality of a judge.

The basis for imposing upon judges a duty to disclose his/her membership in a political party prior to 1989, can be traced to the statements made publicly by the members of the ruling party, regarding ‘communist judges,’ ‘remnants of the communist regime’ etc. This is a very irresponsible, destructive for the authority of the courts, populist proposition and an element of a large-scale fight against judges and courts. It has nothing to do with, derived

from the constitutional provision on the democratic state that is based the rule of law, requirement to undertake actions aimed at building public trust in the organs of the state, such as courts, which, unfortunately, the current political power chooses to ignore.

Also, the requirement to disclose membership in associations of judges that are fighting to restore the constitutional order is aimed at limiting activity of judges in these organisations. This will allow for excluding judges who are inconvenient for the political power.

Since restrictions contained in the Law are not directly related to the adjudicative activity of a judge, they may also infringe upon the constitutional right to privacy.

The discussed provisions violate Art. 51 of the Constitution, which stipulates that public authorities may not obtain, gather and make available information about citizens other than necessary in a democratic state that is based on the rule of law. It should be emphasised that the New Law not only imposes on judges a duty to disclose their public activity, but also envisages publishing of this information in the Public Information Bulletin, which means *de facto* making it available on the internet. The judges have been treated as member of a criminal group, whose activities should be closely monitored.

The legislative proposal is not in line with jurisprudence of international tribunals. Examples include the rulings of the European Court of Human Rights in cases of *Baka* against Hungary and *Wille* against Lichtenstein. The disproportionate and unjustified restrictions on human rights and fundamental freedoms of judges contravene international standards in the area of protection of human rights, thus, at this point, the consequence for Poland of the Law entering into force should be evaluated.

G. The disciplinary liability of judges

Changes introduced in Arts. 107, 109, 110, 112, 114a, 128 the Law on the System of Common Courts are entirely unacceptable.

For the past few years, the catalogue of misconduct and disciplinary punishment has been expanded, and judges have been regularly accused of committing an offence pursuant to Art 231 of the Criminal Code (failure to fulfil obligations or abuse of power by a public official).

The aim of the provisions on disciplinary liability contained in the New Law have been aimed at ensuring that judges do not oppose constitutional violations committed by the legislature and the executive, and also to prevent them from fulfilling their obligations as guardians of the law.

The provisions adopted in the New Law should be regarded as contrary to EU Law and the Constitution of Poland. Their only goal is to create a restrictive system that is designed to repress judges from expressing critical views about the, so called, reform of the justice system and the actions of the legislative and executive powers towards the courts and judges, which cannot be reconciled with a democratic state that respects the law. The provisions do not fulfil basic standards of good legislation, which provide that normative acts should be precise, understandable, transparent and consistent with the existing legal system, as well as compliant with the Constitution of the Republic of Poland.

The Law provides for new types of disciplinary misconduct, which are the basis for establishing disciplinary liability of a judge. The criteria have been specified in vague and general terms, which do not meet the constitutional requirement of specificity of acts prohibited by law. The effect is amplified by the fact that the punishment for committing one of these misconducts is expulsion from the profession, even though these are to criminal offences.

Art. 107 § 1(2) the Law on the System Common Court introduces disciplinary misconduct that involves committing an act or omission that may prevent or significantly impede the functioning of the judicial system. This is a vague formulation.

Art. 107 § 1(3) the Law on the System of Common Court introduces disciplinary liability of judges for questioning the professional status of a judge, the effectiveness of the appointment of a judge or the designation of any constitutional organ of the Republic of Poland. This in effect leads to the prohibition on any considerations pertaining to the legality of the appointment of judges to the neo-KRS, exercise of the prerogative by the President, or election of representatives to the National Council of the Judiciary by Sejm. Therefore, the new legislation strengthens the repressive measures against judges.

Art. 107 § 1(4) the Law on the System of Common Court provides for a disciplinary misconduct that involves undertaking a public activity that cannot be reconciled with rules on independence of courts and independence of judges. The enacted provision is incredibly broad, which creates a risk of its abuse. In bad faith, it could be used to supress the judicial

activity in associations, free speech in the media, including social media, as well as public protests in defence of the rule of law.

Changes introduced in Art. 110 the Law on the System Common Courts deprive the courts disciplinary competences to waive the immunity of a judge, dismiss his/ her from the post to evaluate his/ her criminal liability and temporarily arrest, transfering jurisdiction in this area, in both instances, to the Disciplinary Chamber of the Supreme Court.

The Disciplinary Chamber will hear cases that are important from the point of view of safeguarding interests of the current ruling party. It is an organ, which (as confirmed by the Supreme Court in a judgment of 5 December 2019) is not a court within the meaning of EU law and national law, and every citizen (including judges) has a right to a fair trial before an independent court according to Art. 45 of the Constitution on the right to a court. The disciplinary proceedings fall within the scope of EU law, including Art. 19 TEU, which requires a Member State to provide sufficient remedies to ensure effective legal protection in the fields of EU law.

Particularly dangerous is the solution that the most serious disciplinary cases will be considered in both instances by the same organ (a special court) and, as a rule, the punishment in these cases is dismissal from the office or a transfer to a different court.

The drafting of the new disciplinary misconduct in the New Law provides the disciplinary prosecutors with new tools to bring prosecution for acts, which until now were being prosecuted without a legal basis, which legalises that practice.

The Law changes the rules on appointment of field prosecutors, by granting this competence to the Disciplinary Prosecutor of Judges of Common Courts, without indicating any criteria, a requirement of obtaining an approval and allowing broad discretion, which determines the arbitrariness of appointments. At the same time, judicial self-governments have been deprived of any influence on the appointment process of field prosecutors.

Most of all, this means that a model has been established whereby the disciplinary prosecutors are elected by the Disciplinary Prosecutor of Judges of Common Courts, who is appointed by the Prosecutor General- Minister of Justice, who is a politician. This amendment increases the influence of politicians on the system of the disciplinary liability of judges.

The disciplinary system in the judiciary has become a subject of infringement proceedings brought by the European Commission pursuant to Art. 258 TFEU on 29 October 2019. It contained a number of critical views on the new system from the perspective of ensuring effectiveness of EU law and effective legal protection guaranteed in the Treaties, particularly in Art. 19 TEU (Case C-791/19).

Comparing the changes implement in the New Law with the scope of the Commission's complaint, it can be observed that not only the Commission's recommendations made in the context of Art. 7 procedure in 2016-2017 have not been implemented, but also that these changes go further, by rendering the ruling of the CJEU of 19 November 2019 ineffective. Nonetheless, all state organs and national courts have a duty to apply the judgement of the CJEU in the areas govern by EU law.

The amendment concerning the disciplinary liability of judges clearly indicate that the legislative and executive powers have no intention to respect the aforementioned judgment of the CJEU.

H. Changes to the Law on the Supreme Court.

Changes introduced to the Law on the Supreme Court seek to ensure the greatest possible influence of the political power on the election of the First President of the Supreme Court.

Further aim of amendments to the Law on the Supreme Court is to grant the Extraordinary Control and Public Affairs Chamber key, from the perspective of the political power, competences associated with the ruling of the CJEU of 19 November 2019 and the judgment of the Supreme Court of 5 December 2019. The judges of the Extraordinary Control and Public Affairs Chamber have been appointed with involvement of the politicised neo-KRS, which status has been questioned in the abovementioned judgement of the Supreme Court.

The purpose of these measures is to preclude a possibility of verifying composition of a court, when there are doubts about an appointment of a judge with involvement of the defectively constituted the neo-KRS.

In other words, the legislator has deprived common courts of a possibility to apply the judgement of the CJEU, by transferring the jurisdiction in cases concerning the verification of a person appointed to the judicial office with the involvement of the politicised Council to the

aforementioned Chamber, which itself has been appointed upon recommendation of the Council, thus, it is in its own interest not to give the full effect the Judgment of the CJEU.

In the light of the implemented changes, the Extraordinary Control and Public Affairs Chamber gains a special status, which is contrary to the principle of equality among Chambers of the Supreme Court and, as a result, becomes a special court. This leads to a conflict with Art. 183(3) of the Constitution on the election of the First President of the Supreme Court, and with Art. 175(2) of the Constitution on the status of the aforementioned Chamber.

The New Law explicitly prohibits the Supreme Court and its organs from 'questioning the designation of Courts and tribunals, constitutional state organs and organs of control and enforcement of law' and 'determining or evaluating by the Supreme Court or other organ of the state legality of the appointment of a judge or, resulting from such an appointment, a right to fulfil competences associated with administration of justice.' The legislation also eliminated from the Polish legal order the ruling of the CJEU of 19 November 2019, contrary to commitments of Poland deriving from the Treaties.

I. Changes to the Law on the National Council of the Judiciary

Changes contained in the Law that concern Arts. 45a – 45c of the Law on the National Council of the Judiciary prevent the application of the judgment of the CJEU of 19 November 2019, by granting the President's prerogative a validating character that allows to nullify any defects.

The legislative measure eliminates a possibility of future applications for resumption of proceedings on grounds of defective judicial appointments, which could lead to a natural consequence of annulment of proceedings – both on the basis of the civil and criminal procedures – for a reason that a ruling was rendered by an organ that is not a court and requiring such a state of affairs to be remedied.

2. Summary

1. The Law consolidates the dominance of organs of the legislative and executive powers over the organs of the judiciary, which is contrary to the principle of the separation of powers (Art. 10(1) of the Constitution). This applies in particular to the method of appointing the First President of the Supreme Court, colleges of court, appointments to judicial office.

2. Measures that have been adopted completely politicise the nomination process and, result in a lack of an independent judiciary, which is contrary to Art. 45 of the Constitution and provisions of international conventions (Art. 6 of the European Convention on Human Rights).

3. The Law aims to legalise defective judicial appointments that have been undertaken with the involvement of the neo-KRS, which in its current composition is not an organ that is impartial and independent from the legislative and executive powers, while prohibiting Polish courts from examining the effects of defective nominations on court proceedings. This objective has been achieved mainly by the addition of the preamble and, institution of a jurisdiction of a judge, previously unknown in the Polish legal order.

4. The solutions implemented in the Act directly undermine independence of judges and independence of courts, as they allow for interference with the function of rendering a judgment and undermine the constitutional principle of the separation of powers. Independence of courts and independence of judges are constitutional principles, which determine the position of the judicial power within the structure of the state, and their purpose is to guarantee to all citizens effective judicial protection, when confronted with cases involving executive and legislative authorities. The right to have a case considered by an independent and impartial court is a right of all citizens guaranteed in Art. 45 of the Constitution and Art. 47 of the EU Charter of Fundamental Rights. Independence is not a right of a judge, but his/her basic duty and fundamental guarantee of the functioning of the judicial system. It is a constitutional duty of the legislator and the executive to defend independence of judges and independence of courts, rather than limiting and destroying them, which is what the legislative project evaluated herein achieves.

5. The main tool used to influence judgments rendered by the courts is the draconian system of disciplinary lability of judges. Changes contained in the legislation complete extremely restrictive rules on the disciplinary proceedings, which violate the right to defence and fair trial. The real goal of the legislation is to legalise the activity of the disciplinary prosecutors that before lacked a legal basis.

6. The provisions of the legislation, to large extent, limit competences of the judicial self-government. After their entry into force, the judicial self-government will virtually cease to exist.

7. The legislation gags judges and organs of the judicial self-government on important matters concerning the rule of law and the judicial system. This leads to unacceptable limitation of rights and freedoms protected by the Constitution, such as right to free speech and a right to assembly. In the light of the established case law of European courts, a judge has not only a right, but also a duty to speak in public about a reform of the judicial system.

8. The entry into force of the legislation forces judges to violate the Constitution and the EU Treaties, thus, to act contrary to the judicial oath. At the same time, it may lead to Poland's exit from the European Union, both as a matter of fact and law, which is not accepted by the judges.

9. Arguments presented in this opinion lead to the conclusion that, the Law, which has been enacted by the Sejm, is a real threat to the judicial protection of citizens at both national and European levels. It puts the consolidation of changes concerning the judicial system introduced by the current political power, including the protection of the status of an organ acting as the National Council of the Judiciary and persons appointed with its involvement to judicial office in courts at all levels, above the right of citizen to a fair trial.