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The Continuing Struggle for Judicial Independence and the Rule of Law

1. Rule of Law

Since coming to power in October of 2015, the now ruling party in Poland – Law and Justice – has introduced several major changes to the judiciary. The sequence in which they were introduced, their scope and their results demonstrates that the reform was engineered to hamper judicial independence, and in consequence cripple the rule of law in Poland.

In December of 2017 the act on the Supreme Court was amended, introducing new regulations on eligibility criteria, status, retirement and disciplinary proceedings of Supreme Court judges. The executive gained great influence with respect to the disciplining and professional advancement of judges – both directly and indirectly. The newly introduced Disciplinary Chamber of Supreme Court is now responsible for conducting the disciplinary proceedings against judges.

One of the other controversial changes introduced by the governing party's reform is the one through which the Parliament became empowered to choose 21 out of 25 members of the National Council of Judiciary - a Polish constitutional organ the duty of which is to safeguard the judges' independence. The Polish Constitution expressly states that only 6 members of the Council are to be chosen by the Parliament.

Recently Poland has also witnessed an unprecedented and scandalous case of spreading hate and internet trolling targeting certain judges who have openly opposed the unconstitutional reforms and fought to maintain the rule of law. A high ranked official from the Ministry of Justice masterminded these actions, and a few judges linked to the government participated in this manipulative internet smear campaign aimed at discrediting independent judges. Additionally, a disciplinary cases based on unfounded allegations have been brought against judges who are deemed inconvenient by the government. Centralised disciplinary prosecutors hand picked by the Minister of Justice are targeting judges who are critical of the unconstitutional reforms by initiating disciplinary proceedings intended to bring about a chilling effect. These disciplinary proceedings will ultimately end up being judged by the newly created politically stacked Disciplinary Chamber of the Supreme Court.

In July of 2019 the Court of Justice of the European Union ruled that the provisions of the Polish law concerning lowering of the age of retirement for judges of the Supreme Court of Poland are contrary to EU law. The reason behind the introduction of these provisions was to effectively remove some of the judges including - above all - the First President of the Supreme Court, whose 6-year term of office had not yet elapsed and is expressly stipulated by the Constitution.

The reforms proposed by the ruling party are highly controversial and deemed by many as threatening for two main reasons. Firstly, they gravitate towards a model in which the judiciary is yet another arm of the government, serving a political purpose and obedient when necessary. Secondly, the legally questionable manner in which they were introduced, the propaganda-like coverage by the national media and the rhetoric used to justify the changes indicate that Law and Order's politicians accept the notion that the ends justify the means.

2. Recent Amendments in Criminal Procedure

In 2019, the Parliament amended the code of criminal procedure by further restricting defence rights, introducing such dangerous instruments as the prosecutor's right to suspend a court decision to release a suspect from pre-trial detention by submitting interlocutory appeal. This is a clear violation of the principle that pretrial detention should only be applied by a court, not a prosecuting authority.

The amendments also allow for a hearing to be conducted and witnesses to be interviewed in the justified absence of the defendant and their defense lawyer.

Other significant and controversial changes to criminal procedure include a restriction allowing the filing of an appeal against a regional court judgment only by a professional lawyer (i.e. an advocate or a solicitor), an introduction of belated evidence in the court of second instance (which means that evidence can be deemed inadmissible by a court solely on the basis that it could have been brought earlier).