A Year of Devastation of the Rule of Law in Poland

The most important violations of the rule of law and democratic principles by the government of Donald Tusk

Academic Editor
Łukasz Bernaciński

Reports of the Ordo Iuris Institute

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Main theses

I. Unlawful changes in the public media

- Late in the evening of December 19, 2023, the Sejm, dominated by the December 13 Coalition, passed a resolution "on the restoration of legal order and the impartiality and integrity of the public media and the Polish Press Agency."

- The next day, people claiming to be the new chairmen of the Supervisory Boards entered the buildings of Telewizja Polska, Polskie Radio and the Polish Press Agency, accompanied by anonymous individuals who were probably employees of private security companies.

- The changes in the public media were made illegally - they violated powers that were statutorily reserved for the National Media Council.

- On December 27, 2023, a communiqué was published by the Minister of Culture and National Heritage, Lieutenant Colonel Bartłomiej Sienkiewicz, in which he announced that the companies Telewizja Polska S.A., Polskie Radio S.A. and Polska Agencja Prasowa S.A. had been put into liquidation.

- In the case of public broadcasting companies, it is not possible to put them into liquidation without prior statutory amendments to broadcasting laws.

II. Fighting the independence of judges

- Minister of Justice Adam Bodnar has applied pressure on the judiciary by attempting to dismiss presidents and vice presidents of some courts, in violation of existing laws,

- The Constitutional Tribunal, in a ruling on October 16, 2024, said that the possibility of dismissing court presidents and vice presidents without the participation of the National Council of the Judiciary constitutes a violation of constitutional guarantees of judicial independence.

- The actions of the Minister of Justice are a clear example of a violation of the principle of separation of powers and can be considered political pressure to ensure that the judiciary is amenable to the actions of the government.

III. Questioning the procedure for electing judges to the National Council of the Judiciary

- The current government and the parliamentary majority behind it are attempting to undermine the legitimacy of the National Council of the Judiciary and, consequently, the validity of judicial appointments made with its participation since 2018.

- The first action taken to this end was a December 20, 2023 Sejm resolution that questioned the constitutionality of the then composition of the NCJ and called on its members to "cease their activities." However, the resolution has no legal force;

- Another action was the issuance of a decree by the Minister of Justice on February 6, 2024, to exclude judges appointed since 2018 from adjudicating certain cases. The decree was declared unconstitutional in a May 16 ruling by the Constitutional Tribunal;

- On July 12, 2024, the Sejm passed a law that, among other things, provided for the premature shortening of the term of the current NCJ and excluded judges who had been appointed since 2018 from running for the newly formed NCJ. President Andrzej Duda referred the law to the Constitutional Tribunal;

- On September 6, 2024, the Minister of Justice presented a proposal for solutions that would, among other things, include an obligation for judges appointed since 2018 to file an "active regret" for those who wish to remain in their positions. The proposals have been criticized by, among others, the Iustitia association of judges and the Venice Commission.

IV. Dispute over the Constitutional Tribunal

- In the fall of 2015, the Seventh Sejm elected 5 judges to the Constitutional Tribunal for terms that were likely to begin during the next term of the Sejm. In the case of two of these Judges, the Constitutional Tribunal explicitly stated that the legal basis for their election was unconstitutional.

- The current government's position is that the remaining three of these judges were duly elected, and therefore it is the composition of the Constitutional Tribunal formed by the Eighth Sejm that was flawed, as it included people elected to positions that had previously been filled.

- As of December 2023, the current government has been publishing CT verdicts with a notation about the participation of unauthorized persons in the panel. These annotations are made without a legal basis.

- In March 2024, the Sejm passed a resolution on removing the effects of the constitutional crisis of 2015-2023 in the context of the Constitutional Tribunal's activities, which questioned the effectiveness of all CT activities. From the time of its adoption, the government,

in violation of the Constitution, ceased to publish CT rulings in the OJ at all, regardless of the composition of the court that ruled on the case,

- Also in March 2024, the government presented a package of laws providing, among other things, for the annulment of some 100 judgments of the Constitutional Tribunal and the expiration of the terms of office of all Constitutional Tribunal judges. However, these solutions have been strongly criticized by, among others, the Polish Commissioner for Human Rights and the Venice Commission.

V. Takeover of the National Prosecutor's Office

- Donald Tusk's government decided to take over the prosecutor's office bypassing the provisions of the current Law on the Public Prosecutor's Office.

- The government ignored the procedure required for the dismissal of the National Prosecutor in the person of Dariusz Barski, for which the written consent of the President of the Republic of Poland was necessary for effective execution.

- In place of the National Prosecutor, the institution of an "acting national prosecutor," unknown to the law, was established, giving the position to Jacek Bilewicz.

- In the end, Prime Minister Donald Tusk appointed Dariusz Korneluk as National Prosecutor, without obtaining the opinion of the President of the Republic of Poland, as required by law.

VI. Issuing unlawful "guidelines" on maximizing access to abortion in the form of a press conference and website publication

- In Poland, there is a general ban on abortions, and the law specifies exceptions to this rule. This is the so-called "medical indication model," which excludes abortion at the woman's request.

- In July 2024, leftist parties attempted an amendment to legalize abortion on demand, but the Sejm failed to pass the bill with a majority vote.

- Having failed to amend the existing law in the Sejm, the Minister of Health is unlawfully "instructing" doctors on how to interpret the current legislation to make legally prohibited abortion on demand a reality.

- The Health Minister's actions violate a number of constitutional provisions, primarily the principle of adherence to the law.

VII. Issuance by the Minister of Education of a decree on the organization of religious instruction in school without the required consent of churches and religious associations

- Education Minister Barbara Nowacka's actions since her first day in office have been aimed at, among other things, lowering the reputation of religion classes and discouraging students from attending them.

- Already on the day the government was sworn in, Minister Nowacka announced that the number of religious instruction lessons was going to be halved, this subject would no longer be taken into account in a student's average grade and would not appear on his or her school certificate, and religious instruction, which is not compulsory, would have to be scheduled by schools at the beginning or the end of the school day. In addition, the Minister of Education has attempted to allow schools to group students of different ages for religious instruction classes.

- Minister Nowacka, faced with the impossibility of reaching an agreement with churches and other religious associations, began to introduce legal changes without fulfilling this constitutional requirement.

- The Constitutional Tribunal, in a November 27, 2024 ruling, ruled that due to the lack of agreement with churches and other religious associations, the July 26 decree of the Minister of Education is unconstitutional in its entirety.

VIII. Violation of the constitutional freedom of assembly and association against the Independence March

- Article 57 of the Polish Constitution guarantees everyone the freedom to organize and participate in peaceful assemblies.

- For months, the actions of politicians from the coalition that has been governing in Poland since December 13, 2023, that is, first and foremost, Justice Minister Adam Bodnar, the Governor of Mazovia Mariusz Frankowski, Interior Minister Tomasz Siemoniak, and Warsaw's Mayor Rafał Trzaskowski - whether acting personally or through officers subordinate to them - aimed at unduly restricting the constitutional freedom of assembly of the organizers and participants of the largest Polish (and European) patriotic demonstration of the 21st century, Warsaw's yearly Independence March.

- These actions were in line with the demands formulated for the March by Adam Bodnar when he was still Poland's Commissioner for Human Rights.

- Freedom of assembly and freedom of association in Poland after December 13, 2023 are not guaranteed by default, as the Polish Constitution would have it, but selectively, and entities that ideologically disagree with representatives of the ruling camp are sometimes forced to engage in months-long struggles to secure these freedoms.

IX. Inadmissibility of revocation of countersignature by the Prime Minister

- The Prime Minister's signature on the official act of the President of the Republic (countersignature) is an act whose effects cannot be rescinded.
- The immediate purpose of filing a complaint against the countersignature was to create a seemingly legal justification for Donald Tusk's political actions.
- The indirect effect was to create a legal ploy to circumvent the law and, in effect, allow each prime minister to abrogate his own responsibility.
- The alleged revocation of the countersignature was an example of the Prime Minister's violation of constitutional provisions.

X. Ordering of termination of parliamentary mandates of Maciej Wąsik and Mariusz Kamiński despite presidential pardon

- The Regional Court in Warsaw sentenced MPs Maciej Wąsik and Mariusz Kamiński to two years' imprisonment for offenses committed by public servants, in a judgment dated December 20, 2023.
- The court convicted Maciej Wąsik and Mariusz Kaminski of acts for which they were pardoned by the President of the Republic of Poland in 2015, following their conviction by a court of first instance.
- According to the Constitutional Tribunal's jurisprudence, Article 139 of the Polish Constitution grants the President of the Republic an unlimited right of clemency, allowing him to erase the effects of a conviction both after a final verdict or after a first-instance court verdict.
- The Speaker of the Sejm prematurely issued orders declaring the expiration of the mandates of Maciej Wąsik and Mariusz Kamiński, despite the fact that they were not listed as convicted persons in the National Criminal Register on the day those orders were issued.
- The Speaker of the Sejm unjustifiably suspended the voting rights of MPs Maciej Wąsik and Mariusz Kamiński. The Speaker of the Sejm's decisions to extinguish those two MPs' parliamentary mandates had previously been overruled by the Supreme Court's Extraordinary Control and Public Affairs Chamber, which was tantamount to declaring that Maciej Wąsik and Mariusz Kamiński had not lost their parliamentary seats.

XI. Double violation of the immunity of opposition MP Marcin Romanowski

- On July 15, 2024, opposition MP Marcin Romanowski was detained on the order of a prosecutor acting under the authority of Adam Bodnar, ignoring the fact that the MP had not only immunity as a parliamentarian (which had previously been waived by the Sejm), but also separate immunity as a member of the Parliamentary Assembly of the Council of Europe.

- Minister Bodnar stated that "immunities cannot ensure impunity," but it was only on October 2 that the Parliamentary Assembly of the Council of Europe lifted MP Romanowski's immunity, meaning that all previous government actions in his case were unlawful.

- The Prosecutor's Office has also openly announced its intention to disregard the Supreme Court's resolution, which on September 27, 2024 stated that Dariusz Korneluk, who signed the motion for Romanowski's prosecution, was not in fact the National Prosecutor, and therefore the entire procedure was conducted in violation of the law.

XII. Violations related to the pre-trial detention of Father Michał Olszewski

- From March 26 to October 24, 2024, Father Michał Olszewski, a catholic priest who was the – chairman of the Profeto foundation when this foundation received tens of millions of zlotys in funding from the government's Justice Fund for the construction in Warsaw of the Archipelag center for victims of violence.

- According to the accounts of both the detainee and his defense attorney, Father Olszewski repeatedly received terrible treatment from the authorities – it was made difficult for the clergyman to contact his lawyer, he was handcuffed without reason, food was denied for dozens of hours and the use of the restroom was impeded.

- Adam Bodnar's prosecutors also attempted to unlawfully deprive Father Olszewski of his self-appointed defense attorney Krzysztof Wąsowski by suggesting that the latter was a witness in the case, not a defense attorney.

- The conduct of the law enforcement agencies subordinate to Minister of Justice Adam Bodnar and Minister of Internal Affairs and Administration Marcin Kierwiński violated a number of guarantees set forth in applicable laws – the Constitution, laws and international agreements.

XIII. Failure to recognize judgments inconvenient to the authorities

- Government members recognize or do not recognize the rulings of the Constitutional Tribunal or the Supreme Court, as the case may be.

- Such practices violate the principles of the rule of law and the division and equality of legislative, executive and judicial powers expressed in the Polish Constitution.

- The actions of individual members of the government can be interpreted as an attempt to subordinate the judiciary to political interests.

Introduction

Following the Polish parliamentary elections of October 15, 2023, a new Council of Ministers formed by a coalition of the Civic Coalition (KO), Poland 2050, the Polish People's Party (PSL) and the Left was appointed on December 13, 2023, after 8 years of rule by the Law and Justice-led United Right coalition. The new Polish government headed by Donald Tusk, acting on the basis of ad hoc resolutions of the parliamentary majority it controls, informal "guidelines" and the opinions of friendly lawyers, took numerous unlawful actions over the following months to eliminate the opposition from the public space. These activities were undertaken under the cover of the illegally forcibly seized public media and private television groups friendly to the new government, and with the support of European Union representatives. These actions harm the foundations of the democratic state of law, creating a revolutionary order of "transitional justice," or as Donald Tusk himself called it, "militant democracy."

The second point of the coalition agreement stated: "[w]e will restore the legal order, shaken by the actions of predecessors. The courts will be free from political pressure, the prosecutor's office will be independent and apolitical. We will ensure the legitimacy of the functioning of the judiciary and the constitutional judiciary. We will make every effort to restore the constitutional and apolitical shape of the National Council of the Judiciary and the Supreme Court [...]."[1] In reality, however, the government's agenda in the area of "restoring the rule of law" is set by two statements made by Prime Minister Donald Tusk, who, in the context of the takeover of public media, promised on November 21, 2023, i.e. even before he took office, that "[e]verything will be done in accordance with the law as we understand it." Donald Tusk made his second "programmatic" statement on September 10, 2024: "If we want to restore the constitutional order and the foundations of liberal democracy, we must act in terms of militant democracy. This means that more than once we will probably make mistakes or take actions that, according to some legal authorities, may not be in accordance with the letter of the law, but nothing relieves us of our duty to act."

This report is an attempt to summarize a year of rule by the parliamentary majority and the government of Donald Tusk in the area of violations of the law amounting mainly to violations of the Constitutional principles of a democratic state of law, the principle of adherence to the law, and the constitutional principles of state relations with churches and other religious associations. At a more specific level, mention should be made, in particular, of the failure to respect the closed catalog and hierarchy of sources of law in Poland as well as the principles of functioning and competence of the various constitutional organs of the Polish state.

The report focuses primarily on presenting the legal facts about the Tusk government's questionable actions, while limiting the scholarly legal reflection on those facts. However, the views expressed in the rulings of the courts and the Constitutional Tribunal are presented in this report and the consequences of the government's unlawful actions are also explained. Each chapter begins with a listing of its main theses, so that the reader can easily and quickly familiarize himself with the authors' key findings, and ends with a summary of the legal violations committed under the Tusk government.

1 Coalition Agreement, https://platforma.org/upload/document/203/attachments/433/UmowaKoalicyjna.pdf (accessed: December 10, 2024).

Bartosz Zalewski

1. Unlawful changes in the public media

Main theses

- Late in the evening of December 19, 2023, the Sejm, dominated by the December 13 Coalition, passed a resolution "on the restoration of legal order and the impartiality and integrity of the public media and the Polish Press Agency."
- The next day, people claiming to be the new chairmen of the Supervisory Boards entered the buildings of Telewizja Polska, Polskie Radio and the Polish Press Agency, accompanied by anonymous individuals who were probably employees of private security companies.
- The changes in the public media were made illegally – they violated powers that were statutorily reserved for the National Media Council.
- On December 27, 2023, a communiqué was published by the Minister of Culture and National Heritage, Lieutenant Colonel Bartłomiej Sienkiewicz, in which he announced that the companies Telewizja Polska S.A., Polskie Radio S.A. and Polska Agencja Prasowa S.A. had been put into liquidation.
- In the case of public broadcasting companies, it is not possible to put them into liquidation without prior statutory amendments to broadcasting laws.

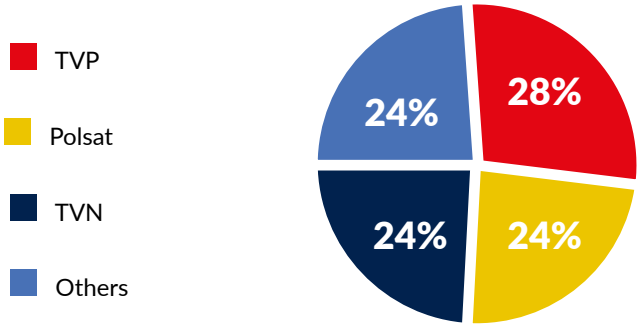
1. Media pluralism and the rule of law: the case of Poland

Until 1987, Poland had only public media. The opening of the media market began in 1993, when Polsat TV obtained a license for over-the-air broadcasting throughout the country. Three years later, TVN obtained a license for supra-regional broadcasting across northern Poland.[2] As a result of its capital structure, the Polish media is currently dominated by an oligopoly. The three largest broadcasters in

2 On the process of splitting up the television market in Poland, see: J. Dzierżyńska-Mielczarek, *Rynek telewizyjny w Polsce*, "Studia Medioznawcze" 2014, No. 1/56, pp. 102-103.

Poland in 2020 were those operating on publicly-accessible, over-the-air television multiplexes – TVP: 28.25%; Polsat: 24.43%; and the TVN Group: 23.45%.[3]

TV audience share in 2020.



Although the public media still hold a significant position in the television market, there can be no question of a monopoly or even a dominant market share. Their position is even weaker when it comes to the radio market: the share of public radio stations in 2020 was only 14.9%.[4]

For years, the public media have also faced accusations of politicization. This trend is by no means limited to recent years.[5] As early as 2010, during a lecture given at Jagiellonian University, Jarosław Kaczyński asserted that "the factor that has a huge impact on whether a state is under the rule of law is the existence of systems of external, non-state control. The media are at the center of this system. In Poland, the media are one-sided - that is, an overwhelming majority of them broadly support a single political viewpoint – namely, the Left-liberal view."[6] Paradoxically, the alleged politicization of the public media over the past eight years contributed to greater pluralism in the overall media market. A fairly stable media arrangement developed in Poland during the period between 2015 and 2023, with the most serious players representing different ideological and political positions. This phenomenon progressed to an extreme in which one could observe radically different profiles, and in part the actual creation of reality itself by the various media entities, especially the big TV stations and Internet sites. In general, however, a certain form of stability arose, with the public media presenting content that they produced in accordance with the ruling party's line (and thus they most often adopted a conservative-oriented perspective). The private media, on the other hand, and especially those owned by foreign companies, presented Left-liberal views. Initially, they even acted as a restraining force on the opposition parties, such as by criticizing those voices that sometimes advocated cooperating with the ruling coalition of the time.

The phenomenon of the public media's politicization, understood as the subordination of their message to the interests of the government currently in power, has always been an issue in Poland, including throughout the entire era of the Third Polish Republic (which succeeded the communist Polish People's Republic in 1989). Between 2015 and 2023, however, it also had the effect of putting an end

3 B. Bałazy, Ł. Bernaciński, *Funkcjonowanie rynku medialnego w Polsce i innych wybranych państwach europejskich. Przeciwdziałanie koncentracji kapitału i ochrona pluralizmu mediów*, Warsaw 2021, p. 44.

4 *Ibid.*, p. 46.

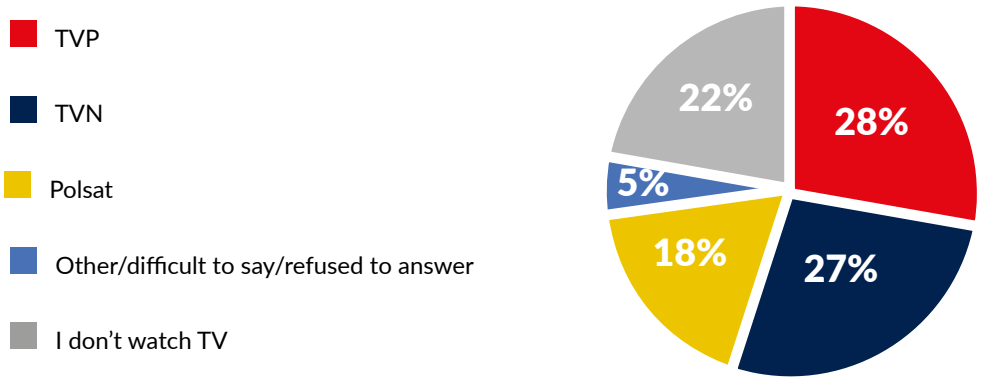
5 This problem has become particularly acute since 2015, however. See for example: P. Uhma, *Oblicza pluralizmów mediów publicznych w Polsce*, "Państwo i Społeczeństwo" 2019, No. 19/2, p. 67 et seq.

6 J. Kaczyński, *Czy Polska jest państwem prawa?* [Lecture at the Jagiellonian University], "Pressje" 2011, Vol. XXIV of the Jagiellonian Club, p. 226.

to the Left-liberal ideology's monopoly on media coverage – mainly on television; in the cases of the radio and newspaper market, this phenomenon was less pronounced. In practice, this meant that the public's views were much better reflected in the media market's structure at the time, where almost all types of voters had their own particular outlet. The media in Poland still had an oligopolistic capital structure, but nevertheless offered a relative form of political pluralism across the various media outlets despite the fact that there was a lack of pluralism within each of them.[7] Throughout the Law and Justice-led United Right coalition's eight-year reign, no significant conservative private television network was established, however.

The TV market was reflected in public opinion polls that were conducted concerning television stations as sources of daily information on events in Poland and the world which were conducted by the Centre for Public Opinion Research (CBOS) in early 2023. According to these surveys, 28% of adult Poles said that the main source of their knowledge of current events is public television (TVP), while 27% said the same of the TVN network and 18% attested that they get their information from Polsat. Only 0.4% said that they get this information from the Catholic channel Telewizja Trwam, while 0.1% said they get it from the private conservative news channel Telewizja Republika TV.[8]

Television stations as a source of knowledge about events in Poland and the world according to a 2023 survey by CBOS



It is also interesting to link the respondents' preferred TV station with their declared party sympathies. When asked which of the aforementioned stations is their main source of knowledge about events in Poland and the world, 70% of United Right (i.e. Law and Justice and its allies) voters pointed to public television (15% to Polsat, 4% to TVN), while 69% of Left-liberal Civic Coalition voters pointed to TVN (11% to Polsat and barely 1% to TVP). The answers given by the supporters of other political groups were more varied. Voters of the Left party and Szymon Hołownia's centrist Poland 2050 pointed primarily to TVN (47% and 43%, respectively) and Polsat (13% and 32%), while those declaring support for the agrarian party PSL and the Right-wing Confederation (an alliance of Christian nationalists and libertarians) instead indicated Polsat (39% and 21%), TVN (28% and 17%), and TVP (23% and 9%).[9] It is worth mentioning that among Confederation voters, as many as 52% declared that they do not watch TV at all or else get their information from stations other than those mentioned.

7 Cf. B. Bałazy, Ł. Bernaciński, *op. cit.*, p. 22-24.

8 CBOS [The Public Opinion Research Center], *Telewizja jako źródło informacji o bieżących wydarzeniach w kraju i na świecie. Komunikat z badań*, compiled A. Cybulska, 2023, p. 2.

9 *Ibid.*, p. 5.

The above data clearly indicated that Law and Justice voters most often drew their knowledge of the world not from the commercial media, but from the public media. Thus, the public media and TVN have become very much focused on a particular political identity. The events of December 2023 showed how dangerous this state of affairs is for media pluralism.

2. Donald Tusk's government takes control of the public media

Late in the evening on December 19, 2023, the Sejm, which was by then dominated by the so-called December 13 Coalition, passed a resolution "on the restoration of legal order and the impartiality and integrity of the public media and the Polish Press Agency."[10] This resolution accused the public media of, among other things, being totally subordinated politically and of being used as a mouthpiece for party and government propaganda, as well as of discrediting and spreading hate speech against the opposition and critics of the previous government. Later that night, Lieutenant Colonel Bartłomiej Sienkiewicz, in his new post as Minister of Culture and National Heritage, held general meetings regarding the public television and radio companies which led to the appointment of new supervisory boards for Polish Television, Polish Radio, and the Polish Press Agency.[11] This happened despite the Constitutional Tribunal's safeguard order (ref. K 29/23), which obliged the State Treasury to refrain from taking any steps toward liquidating the public broadcasting companies or making changes to their boards of directors.

The very next day, events took place that had no precedent in Polish history since the end of martial law in the 1980s, under communist rule. Individuals claiming to be the new chairmen of the public media's supervisory boards, accompanied by anonymous individuals who were likely employees of private security firms, entered the buildings of Polish Television, Polish Radio, and the Polish Press Agency. The broadcast of the public news television channel TVP Info was interrupted during the airing of a special edition of News that was being hosted by presenter Adrian Borecki. There was also a violation of the physical integrity of MP Joanna Borowiak, who was on site. The evening edition of the flagship news service of Polish public television was thus prevented from airing. On the other hand, the Television News Agency building remained under the control of TVP SA's legal authorities until January 2024. Non-governmental organizations, including the executive board of the Association of Polish Journalists[12] and the Helsinki Foundation for Human Rights,[13] expressed opposition to the unlawful actions taken by Donald Tusk's government.

On December 27, 2023 the Minister of Culture and National Heritage, Lieutenant Colonel Bartłomiej Sienkiewicz, announced that the companies Telewizja Polska SA, Polskie Radio SA, and Polska Agencja Prasowa SA had been put into liquidation.[14] The pretext for this decision was the refusal of the Presi-

10 The text of the resolution is available at: https://orka.sejm.gov.pl/proc10.nsf/uchwaly/117_u.htm (accessed: February 22, 2024).

11 *The Minister of Culture and National Heritage dismissed public media authorities and PAP* – Press release available (in Polish) at: https://www.gov.pl/web/kultura/minister-kidn-odwolal-wladze-mediow-publicznych-i-pap (accessed: February 22, 2024).

12 *Protest of SDP executive board against illegal takeover of public media by Donald Tusk's government*, https://cmwp.sdp.pl/protest-zarzadu-glownego-sdp-przeciwko-bezprawnemu-przejeciu-mediow-publicznych-przez-rzad-donalda-tuska/ (accessed: February 22, 2024).

13 *Position of the Helsinki Foundation for Human Rights on changes in public media*, https://hfhr.pl/aktualnosci/stanowisko-hfpc-ws-zmian-w-mediach-publicznych (accessed: February 22, 2024).

14 *Message from the Minister of Culture and National Heritage* – Press release available (in Polish) at: https://www.gov.pl/web/kultura/komunikat-ministra-kultury-i-dziedzictwa-narodowego (accessed: February 22, 2024).

dent of the Republic of Poland, Andrzej Duda, to sign the act of December 21, 2023 regarding special arrangements for the implementation of the budget law for 2024.[15]

On January 10, 2024, in the XIII Economic Department of the National Court Register of the District Court for the City of Warsaw, the motion to appoint Tomasz Sygut as Chairman of Telewizja Polska SA's Board of Directors was dismissed.[16] On January 22, 2024 the Registry Court in Warsaw dismissed applications to record the opening of liquidation proceedings for Telewizja Polska SA and Polskie Radio SA in the National Court Register (hereinafter: KRS).[17] The motion to record the liquidation proceedings of the Polish Press Agency SA in the KRS was nevertheless granted, however.[18]

3. The legal basis for the public media's operations in Poland vs. the way they were taken over by the "December 13 Coalition"

Public broadcasting companies have a special legal status that is defined primarily by the provisions of the Broadcasting Act of December 29, 1992 (hereinafter: Broadcasting Act)[19] and the Act of June 22, 2016 on the National Media Council (hereinafter: Media Council Act).[20] In addition, it should be pointed out that the status of the Polish Press Agency is regulated by a separate normative act: the act of July 31, 1997 on the Polish Press Agency (hereinafter: Press Agency Act).[21] The manner in which the government coalition has, in effect, taken control of the public media therefore requires consideration of these media outlets' special status.

Public broadcasting companies operate in the form of single-member joint-stock companies belonging to the State Treasury (Article 26[1-3] of the Broadcasting Act). It is the same for the Polish Press Agency (Article 3[1] of the Press Agency Act).

The rules for the appointment and dismissal of the personnel of the public broadcasting companies and the Polish Press Agency are regulated in a special way. This is because the issue is regulated by the law governing the National Media Council. Pursuant to Article 2(1) of the National Media Council Act, it is the **National Media Council that is the responsible body in matters of appointing and dismissing the personnel of the public broadcasting companies and the Polish Press Agency. Thus, the provisions of the law of September 15, 2000 – Code of Commercial Companies (hereinafter: CCC) do not apply to the appointment and dismissal of the personnel of the public radio and**

15 Request of the President of the Republic of Poland for reconsideration of the act of December 21, 2023 on special arrangements for the implementation of the Budget Law for 2024 – parliamentary print No. 138 – document available at: https://www.sejm.gov.pl/sejm10.nsf/druk.xsp?nr=138 (accessed: February 22, 2024).

16 *Thwarted attempt to change TVP SA's Board of Directors*, https://obserwator-praworzadnosci.pl/pl/udaremniona-proba-zmiany-zarzadu-tvp-sa/ (accessed: February 23, 2024).

17 See announcements from the Ministry of Culture and National Heritage: *Information from the Minister of Culture and National Heritage regarding the authorities of Polskie Radio SA, in view of the liquidation proceedings under consideration in the National Court Register, as well as information from the Minister of Culture and National Heritage regarding the authorities of Polskie Radio SA, in view of the liquidation proceedings under consideration in the National Court Register* is available in Polish at: https://www.gov.pl/web/kultura/informacja-ministra-kultury-i-dziedzictwa-narodowego-w-sprawie-wpisu-w-krajowym-rejestrze-sadowym-odnosnie-wladz-polskiego-radia-sa-w-likwidacji and https://www.gov.pl/web/kultura/informacja-ministra-kultury-i-dziedzictwa-narodowego-w-sprawie-wpisu-w-krajowym-rejestrze-sadowym-odnosnie-wladz-telewizji-polskiej-sa-w-likwidacji (accessed: February 22, 2024).

18 *Polish Press Agency entered in the National Court Register* – message available (in Polish) at: https://www.gov.pl/web/kultura/polska-agencja-prasowa-wpisana-do-krs (accessed: February 22, 2024).

19 See OJ 2022, item 1722.

20 See OJ 2021, item 692.

21 See OJ 2019, item 1595.

television broadcasting companies and the Polish Press Agency.[22] Indeed, as the Constitutional Tribunal opined in its resolution of December 13, 1995, ref. W 6/95, "the relevant provisions of the Broadcasting Act have the character of special provisions (*lex specialis*) in relation to the provisions of the Commercial Code (*lex generalis*)." Hence, the general conflict rule applies in the present case *lex specialis derogat legi generali*, which can be derived both from the letter and spirit (i.e., essence) of the law. Confirmation of the CCC's exclusion is found in the provisions of the Broadcasting Act and the Press Agency Act.

Pursuant to Article 26(4) of the Broadcasting Act, the CCC's provisions apply to the public broadcasting companies, **subject to articles 27-30 of the Broadcasting Act**[23] and with the exception of articles 312 and 402. Pursuant to Article 27(3) of the Broadcasting Act, members of the boards of directors of the public broadcasting companies, including the chairmen of these boards, are appointed and dismissed by the National Media Council. Pursuant to Article 28(1e) of the Broadcasting Act, the members of the supervisory boards of the public broadcasting companies are appointed and dismissed by the National Media Council. Thus, **the provisions of the Commercial Companies Code**, which were invoked by Lieutenant Colonel Bartłomiej Sienkiewicz in his attempt to make personnel changes in those who run the companies Telewizja Polska SA and Polskie Radio SA, do not apply. This – in view of the basic principles of linguistic and systemic interpretation – is unquestionable.

Pursuant to Article 5 of the Press Agency Act, the provisions of the CCC are applicable to the Polish Press Agency SA, unless the law itself provides otherwise. According to Article 8(2) of the Press Agency Act, members of the Board of Directors, including the President of the Board of Directors of the Polish Press Agency, are appointed and dismissed by the National Media Council. According to Article 9(1) of the Press Agency Act, the supervisory board of the Polish Press Agency is appointed by the National Media Council.

As the law currently stands, the only competent body for making personnel changes in the public broadcasting companies and the Polish Press Agency is the National Media Council. The Minister of Culture and National Heritage has no authority in this regard. Just for the record, it should be noted that neither the Sejm's resolutions nor the opinions of legal scholars constitute a source of law, and they do not affect the validity of the provisions indicated above. It should also be noted that already in the Constitutional Tribunal's resolution of December 13, 1995, ref. W 6/95, it was noted that the purpose of having public radio and television in the form of single-person joint-stock companies of the State Treasury was to ensure that they did not take on "the character of a government agency." At the time, the Tribunal noted that the multi-level structure in managing the affairs of public radio and television (which then included the National Broadcasting Council and the management and supervisory boards of the media companies) was intended to "ensure their independence," or at least "preclude unilateral subordination." The current flaw in this system, specifically, by marginalizing the importance of the National Broadcasting Council in favor of the National Media Council, in no way implies that it is permissible for any minister to appropriate the powers of the National Council. It should also be noted that when a public official exceeds his authority, it is a crime that is prosecutable

22 OJ 2024, item 18.

23 The phrase "subject to" means that the CCC's personnel and organizational issues do not apply to public broadcasting companies. Precisely this interpretation was given by the Constitutional Tribunal when it was led by Professor Andrzej Zoll in its resolution of December 13, 1995, ref. W 6/95, item III.3.

by public indictment and punishable by imprisonment for up to three years (see Article 231 § 1 of the Law of June 6, 1997 – Penal Code; hereinafter: the Penal Code[24]).

It should be noted that the aforementioned resolution of the Sejm dated December 19, 2023 concerning the restoration of legal order and the impartiality and integrity of the public media and the Polish Press Agency cited, among other things, the "unimplemented judgment of the Constitutional Tribunal of December 13, 2016 (file K 13/16), which declared unconstitutional the entrustment of the National Media Council with the appointment and dismissal of public media authorities while depriving the National Broadcasting Council of participation in these processes." It is necessary to refer briefly to this judgment, since numerous misunderstandings have arisen in public discourse in relation to its content.

In a judgment dated December 13, 2016, ref. K 13K 13/16, the Constitutional Tribunal, acting at the request of the then Commissioner for Human Rights and now Minister of Justice, Adam Bodnar, ruled that the provisions amending the Broadcasting Act, to the extent that they exclude the participation of the National Broadcasting Council in the procedure for appointing and dismissing members of the management and supervisory boards of the public broadcasting companies, are inconsistent with Article 213(1), in connection with Article 14 and Article 54(1) of the Polish Constitution.[25] **This judgment therefore did not repeal any of the provisions of the National Media Council Act**, but only the provisions amending the Broadcasting Act. The Constitutional Tribunal likewise did not repeal any of the previous provisions of the Broadcasting Act or the Press Agency Act, cited above. The verdict rather concerned those regulations according to which members of the management and supervisory boards of the public broadcasting companies were appointed and dismissed by the minister responsible for the Treasury.

It should be recalled that, in the motion initiating the proceedings before the Constitutional Tribunal, the purpose of the amendment in question was alleged, among other things, to be to gain direct influence over the staffing of the public media by the parliamentary majority and the Council of Ministers. Now it seems that Adam Bodnar, in his role as Minister of Justice, has revised his views and recognizes that it is expedient and desirable to obtain direct influence over the staffing of the public media by the parliamentary majority and the Council of Ministers. However, as the Tribunal itself noted in this ruling, **"In the current state of the law, there is no legal norm granting the minister responsible for the State Treasury the competence to appoint and dismiss members of the board of directors of a public broadcasting company."**[26] This opinion has remained relevant to this day.

The reference to the National Media Council was found not in the ruling itself, but in the rationale of the Constitutional Tribunal's cited decision. The Tribunal pointed out: "[With] the entry into force of the Law on the National Media Council, the appointment of persons to perform the listed functions is carried out with the participation of the National Media Council. This body is authorized to

24 OJ 2024, item 17.

25 Pursuant to Article 213(1) of the Polish Constitution: "The National Broadcasting Council upholds freedom of speech, the right to information, and the public interest in broadcasting." Article 14 of the Polish Constitution, on the other hand, states: "The Polish Republic shall ensure the freedom of the press and other societal media." Article 54(1) of the Polish Constitution, on the other hand, deals with freedom of speech and information: "Everyone shall be guaranteed the freedom to express his views and to obtain and disseminate information."

26 Judgment of the Constitutional Tribunal of December 13, 2016, ref. K 13/16, para. III.7.5.

appoint members of the management and supervisory boards of the public broadcasting companies and to approve the appointment of the director of the field branch of such a company."[27]

As the Constitutional Tribunal further elaborated: "The Tribunal did not rule [...] on the question of granting certain competencies to a newly-established body such as the National Media Council. The subject of its ruling was solely whether the legislature could deprive the National Broadcasting Council of certain powers. In the Tribunal's view, the role of the entity performing the function of guardian of the public interest in broadcasting, as defined in the constitution, requires that the National Broadcasting Council have the ability to effectively influence the operations of the public media. This view is based on the conviction that it is impossible to exercise the functions of a legal protection and control body – and this is how the National Broadcasting Council is characterized in the constitution – without the existence of appropriate competencies that will not only focus on the implementation of control tasks, but also enable the body in question to take action in order to achieve constitutionally-defined goals."[28]

Commissioner for Human Rights Marcin Wiącek aptly referred to the Tribunal's cited opinion: "The Act on the National Media Council (RMN) and the amendments it made to the Broadcasting Law have not been challenged in a separate application to the Constitutional Tribunal (CT). The provisions of the National Media Council Act, as well as the resulting amendments to the Broadcasting Act, remain in effect. [...]. Assessing the effect of the K 13/16 judgment from this point of view, one must come to the conclusion that the ruling – even though it did not directly concern the provisions of the Broadcasting Act, as it was in effect at the time of the ruling – led to the overturning of the presumption of this legal norm's constitutionality as soon as it was promulgated, allowing the appointment and dismissal of the management and supervisory boards of the public broadcasting companies without the participation of the National Broadcasting Council (KRRiT). Thus, the legal basis for the appointment and dismissal of boards of directors and supervisory boards does not enjoy a presumption of constitutionality whenever the applicable regulations do not provide for the participation of the National Broadcasting Council in these procedures – regardless of which body in the current state of the law is authorized to appoint and dismiss these bodies."[29]

In other words, it follows from the Constitutional Tribunal's ruling that depriving the National Broadcasting Council of its functions **runs contrary to its constitutional role, and the provisions of the law on the National Media Council do not enjoy the presumption of constitutionality, even though at the same time they are still in force. Similarly, it follows from this ruling that solutions which exclusively entrust the authority to carry out personnel changes in the public broadcasting companies to the Council of Ministers or its members, as we have seen in the case of Lieutenant Colonel Sienkiewicz's actions, run contrary to the Constitution of the Polish Republic**.

From the point of view of the Constitution of the Polish Republic, it is desirable to grant the competencies of the National Media Council to the National Broadcasting Council, rather than unjustifiably assign them to the Minister of Culture and National Heritage.

27 *Ibid*., para. III.2.3.

28 *Ibid*., para. III.7.8.

29 *The situation in the public media. Commissioner for Human Rights Marcin Wiącek writes to the Minister of Culture and National Heritage*, https://bip.brpo.gov.pl/pl/content/rpo-media-publiczne-sytuacja-potrzebna-nowelizacja-mkidn (accessed: February 23, 2024).

4. Other possible violations of the law in the takeover of the public media

The actions of Lieutenant-Colonel Bartłomiej Sienkiewicz, Minister of Culture and National Heritage, led to the discontinuation of the public television channels TVP Info and TVP 3, both regional broadcasters – as well as TVP World. It seemed that the whole undertaking was planned and coordinated.[30] TVP Info and the regional broadcasters' news programs were not resumed until December 29,[31] while TVP World – despite announcements stating otherwise – did not resume broadcasting until March 11, 2024. Given that these public television channels were not allowed to broadcast, the company did not fulfill its obligations under its contracts (as, for example, in terms of showing advertisements). **This exposed Telewizja Polska to huge financial losses. The initial estimates by experts of the losses suffered by TVP Info alone during the suspension of its broadcasting indicate that it may have amounted to about PLN 130,000 (approximately $31,000) per day.**[32]

This may involve not only civil (i.e. financial) liability, but also **criminal**. According to Article 296 § 1 of the Penal Code, whoever is obliged under a provision of the law, a decision by a competent authority, or a contract to deal with the property affairs or business activities of a natural or legal person or an organizational unit without legal personality and, **as a result of abusing the powers granted to him** or by failing to fulfill a duty incumbent upon him, causes substantial property damage to such person, shall be subject to a penalty of deprivation of liberty from three months to five years. If the perpetrator of such a crime causes property damage of great magnitude, then he is punishable by imprisonment from one to ten years (Article 296 § 3 of the Criminal Code). "Damage of great magnitude" is considered to be damage (it is both loss – *damnum emergens*, as well as lost benefits – *lucrum cessans)* the value of which exceeds, at the time the criminal act was committed, one million PLN (approximately $2.6 million) (Article 115 § 6 in conjunction with Article 115 § 7a of the Criminal Code).

A separate issue is criminal liability in connection with the commission of other crimes, such as **abuse of power** (Article 231 of the Criminal Code), **forcing someone to carry out a certain act under the influence of a threat** (Article 191 of the CC – this may have involved the forcing of the media companies' legal authorities to sign documents under duress), or **violation of physical integrity** (including that of an MP – Article 217 of the Criminal Code). This includes the perpetrators, as well as those directing and recommending said perpetrators.

It should also be noted that certain individuals went to work in the buildings of Telewizja Polska without any legal basis, and therefore they were in **violation of the labor laws as well as health and safety standards** – i.e. outsiders were allowed to work. In turn, TVP's employees and contractors have not been allowed to work, which further impacts the company's financial liability and therefore constitutes an act to its detriment. However, **an assessment of the validity and effectiveness of any decisions** made by persons who, despite being unauthorized to do so, performed legal acts on behalf of the public broadcasting companies (these acts may in fact have been approved by "real" bodies) remains in a kind of limbo. This raises the issue of possible liability for damages to these companies.[33]

30 Cf. *How was TVP Info technically turned off?*, Wirtualne Media, https://www.wirtualnemedia.pl/artykul/nie-dziala-tvp-info-jak-wylaczono-sygnal (accessed: February 27, 2024).

31 D. Kelman, *TVP Info far behind the Republic. Changes in public media have translated into a decline in viewership*, i.PL, https://i.pl/tvp-info-daleko-w-tyle-za-republika-zmiany-w-mediach-publicznych-przelozyly-sie-na-spadek-ogladalnosci/ar/c1-18218267 (accessed: February 27, 2024).

32 M. Niedbalski, *Lack of TVP Info and "Teleexpress" means about 150 thousand zlotys a day in lost advertising revenue*, Press, https://www.press.pl/tresc/79752,brak-tvp-info-i-_teleexpressu_-to-ok_-150-tys_-zl-dziennie-utraconych-wplywow-z-reklam (accessed: February 27, 2024).

33 See *Thwarted attempt to change TVP SA's board of directors*, https://obserwator-praworzadnosci.pl/pl/udaremniona-proba-zmiany-zarzadu-tvp-sa/ (accessed: February 27, 2024).

5. Putting public media into liquidation

On December 27, 2023 the Minister of Culture and National Heritage, Lieutenant Colonel Bartłomiej Sienkiewicz, by citing the alleged decision of the President of the Republic of Poland to "withhold funding from the public media" (in fact it was merely his refusal to sign a law concerning the annual budget, which only partially affected the public media's financial situation), decided to put the companies Telewizja Polska SA, Polskie Radio SA, and Polska Agencja Prasowa SA into liquidation.[34]

This decision sparked controversy.[35] First of all, the public broadcasting companies possess a special status. According to the Constitutional Tribunal's jurisprudence, these companies operate in a specific essential context resulting from the direct connection of public broadcasting to the maintenance of freedom of speech and the public's right to information.[36] In carrying out a specific mission of a public nature, the character of the public broadcasting companies is not determined by the need to generate profits or any other goal of an economic nature. Hence **it is not possible to put them into liquidation**. The nature of the liquidation proceedings regulated by articles 459 et seq. of the CCC is determined by its purpose: the termination of the company's interests and its removal from the register. In the case of public radio and television broadcasting companies, this would only be possible with parallel statutory amendments to the broadcasting laws. The inadmissibility of the liquidation of the public broadcasting companies was confirmed by the Constitutional Tribunal in its ruling of January 18, 2024, ref. K 29/23, which stated that, in view of the content of the legal system's provisions, including articles 27-30 of the Broadcasting Act, public broadcasting companies cannot be dissolved and liquidated.

It should therefore be assumed that putting the public media into liquidation is in fact a**fraudulent act**. Lieutenant Colonel Sienkiewicz's own statements seem to indicate this: "First of all, liquidation is also a form of restructuring – that is, restoring proper order in companies. Liquidation can be canceled at any time, and it can also take a very long time."[37] In this context, however, it should be noted that, according to Article 468 § 1 of the CCC, liquidators should complete the company's ongoing business, collect debts, fulfill obligations, and liquidate the company's assets (these are so-called "liquidation activities"), whereas **they may undertake new business only when it is necessary to complete the company's ongoing affairs**. This puts a question mark over the permissibility of those agreements that are necessary for at least launching new journalistic or entertainment programs, or even – in certain situations – perpetuating existing ones in their current formats (e.g., by recording a new season of a program). The validity of such legal actions, taking into account their admissibility within the framework of liquidation proceedings, shall be evaluated on a case-by-case basis since, as a rule, actions that run contrary to the law are invalid (Article 58 § 1 of the Act of April 23, 1964 – Civil Code[38]). If this assumption is to be made about the way in which the entire liquidation appears, however, it should be recalled that, according to the general rules of civil law, pretended acts are also, as a rule, invalid by nature (see 83 § 1-2 of the Civil Code).

34 *Message from the Minister of Culture and National Heritage* – Press release available (in Polish) at: https://www.gov.pl/web/kultura/komunikat-ministra-kultury-i-dziedzictwa-narodowego (accessed: March 1, 2024).

35 *How Bartłomiej Sienkiewicz liquidated (not!) the Polish Television (Telewizja Polska)*, Rule of Law Observer, https://obserwator-praworzadnosci.pl/en/how-bartlomiej-sienkiewicz-liquidated-not-the-polish-television-telewizja-polska/ (accessed: March 1, 2024).

36 Cf. Resolution of the Constitutional Tribunal of December 13, 1995, ref. W 6/95, item III.3.

37 Quoted in: *Sienkiewicz does not want controversy. He changed the liquidator after a few days*, Money.pl, https://www.money.pl/gospodarka/sienkiewicz-nie-chce-kontrowersji-likwidator-zmieniony-po-kilku-dniach-6998036971875296a.html (accessed: March 2, 2024).

38 OJ 2023, item 1610.

6. Summary

For many years, the operations of the public media have given rise to various controversies that primarily involve allegations regarding their politicization. In the period from 2015 to 2023, these allegations were especially made by those who nevertheless saw no reason to criticize the lack of pluralism as well as the politicization of the public media during the period of the PO-PSL coalition government from 2007 to 2015. Nevertheless, the lack of pluralism in the public media itself – regardless of the political alignment with which the media's activities are associated – is a state of affairs that always deserves criticism from the perspective of Polish constitutional principles.

This does not, however, justify making changes to the public media in a completely unlawful manner that is incompatible with the principles of a democratic state of law. This is how the actions of the Minister of Culture and National Heritage, Lieutenant Colonel Bartłomiej Sienkiewicz, must be evaluated. Although one may have doubts about the compatibility of the regulations governing the National Media Council with the Constitution of the Polish Republic, they are nevertheless universally binding regulations that have not been repealed by any legislative or judicial procedure (i.e. as a result of their derogation by a new law or a Constitutional Tribunal ruling). The application of the Commercial Companies Code's provisions to making personnel changes in the public broadcasting companies stands in clear contradiction to both the wording of the provisions of articles 27-30 of the Broadcasting Act as well as these regulations' very purpose, which was aptly defined in the Constitutional Tribunal's case law already back in the 1990s.

It should be recalled that taking unlawful actions entails liability. It can take a variety of forms and involve both policymakers and those who carry out their will. Depending on potential future court decisions, both civil (financial) and criminal liability may be at stake.

Jędrzej Jabłoński

2. Stifling the independence of judges

Main theses

- Minister of Justice Adam Bodnar has been pressuring the judiciary by attempting to dismiss the presidents and vice presidents of some of the courts, in violation of existing laws.
- The Constitutional Tribunal, in its ruling on October 16, 2024, said that the possibility of dismissing court presidents and vice presidents without the participation of the National Council of the Judiciary constitutes a violation of the constitutional guarantees of judicial independence.
- The Minister of Justice's actions are a clear example of an infringement of the principle of separation of powers and can be considered as a form of political pressure aimed at ensuring that the judiciary is amenable to the government's actions.

1. The importance of judicial independence

The basic building block of a democratic state based on law is judicial independence, which is not a power that a judge has, but is rather his fundamental duty.[39] This principle constitutes a fundamental attribute of the state's judicial system. On the other hand, the lack of such independence results in a sham, a mere facade of handling disputes impartially and objectively, and above all fairly. There is no doubt that turning this principle into a reality is governed by the guarantees set forth in the Constitution: Article 178(1) explicitly states that judges, in the exercise of their office, are independent and subject only to the Constitution and the law. In turn, Article 179 stipulates that judges are appointed by the President of the Republic of Poland based on a recommendation by the National Council of the Judiciary (hereinafter: NCJ) for a period lasting for an indefinite time. Finally, Article 180 stipulates that judges are, as a general rule, irremovable and can only be dismissed, suspended from office, or transferred to another courthouse or another position against their will only by court order and only in cases specified by law.

39 Cf. R. Hauser, *Konstytucyjna zasada niezawisłości sędziowskiej*, "Zeszyty Naukowe Sądownictwa Administracyjnego" 2015, No. 1, p. 10.

Those elements which make up judicial independence can be summarized as follows, according to the case law of the Constitutional Tribunal:

1) impartiality with regard to the participants in the proceedings;

2) independence from non-judicial bodies (i.e. institutions);

3) the judge's autonomy from the political authorities and other judicial bodies;

4) independence from the influence of political factors, especially political parties; and

5) the judge's personal independence.[40]

There is no doubt that judicial independence should also be considered from the perspective of the judge's relationship with other entities, including public authorities. As pointed out in the doctrine itself, "The independence of a judge means, first of all, his freedom from external influence – from the influence of representatives of the executive and legislative branches – but also from the judiciary and all outsiders, including politicians and journalists. Independence in relation to such parties is usually referred to as impartiality. Independence is an extremely important factor, without which there can be no talk of judges or even of an independent court at all. [...] The independence of the judge [...] is a subjective public right of the citizen. It is the citizen who has the right to an independent court and an independent judge. The independence of judges is thus the very foundation of a democratic state based on law. Without this independence, the judicial branch would be deprived of an essential attribute for carrying out the task entrusted to it, which is the administration of justice. Judges would become mere officials who are beholden to the recommendations and instructions of their superiors, and the fundamental rights of citizens would therefore be left unprotected."[41] The Constitutional Tribunal further pointed out that the impermissibility of any outside interference or coercion ensures "the neutrality of the judge and guarantees objective proceedings before the court on the basis of the Constitution and the law."[42]

2. Attempts to remove presidents of certain courts from office

A clear example of those actions of the Minister of Justice which are aimed at violating the principle of judicial independence are the attempts to remove court presidents from their positions, which are being carried out in violation of the proper procedures. Since the entry into force of the law of July 12, 2017 that amends the Law on the System of Common Courts as well as certain other legislation,[43] court presidents no longer determine the rules by which cases are assigned to individual judges, as this is done randomly, in accordance with Article 47a of the law of July 27, 2001. This law, which governs the common courts,[44] is still a very important one from the point of view of the courts' daily operations.

40 Judgment of the Constitutional Tribunal of October 24, 2007, Sk 7/06, OTK ZU 9A/2007, item 108.
41 S. Dąbrowski, *Niezawisłość sędziów – gwarancje ustrojowe i zagrożenia*, "Krajowa Rada Sądownictwa" 2012, No. 2, pp. 12-13.
42 Judgment of the Constitutional Tribunal of November 8, 2016, ref. P 126/15, OTK ZU A/2016, item 89.
43 OJ 2017, item 1452.
44 OJ 2024, item 334, as amended, hereinafter: "Law on the System of Common Courts."

According to Articles 22 and 21 of the Law on the System of Common Courts, the president of the court, among other things, is the head of it and represents it externally, and also ensures its proper functioning; acts as the official superior of the judges, court assessors, court reporters, and assistant judges of a given court; and entrusts the judges, court assessors, and court reporters with performing their functions and can dismiss them. Additionally, following consultation with the court's college of judges, court presidents determine the assignment of judges, court assessors, and court reporters to the court's various divisions; as well as the scope of their duties, the manner of their participation in the assignment of cases, and the schedule of their on-call duties and substitutions.

3. Court of Appeals in Warsaw

On January 18, 2024, Minister of Justice Adam Bodnar requested, pursuant to Article 27 of the Law on the Organization of Common Courts, the college of judges of the Court of Appeals in Warsaw to dismiss Judge Piotr Schab from his position as president of that court.[45] At the same time, acting in accordance with § 3. of this provision, the Minister suspended the president from performing his duties. According to Article 27, the Minister can remove a court's president or vice-president if the college of judges gives a positive opinion concerning his decision or if it does not offer an opinion within 30 days. However, should the college of judges offer a negative opinion, then the Minister of Justice must appeal to the National Council of the Judiciary, addressing a request for dismissal to it along with a written rationale.

Although the Minister justified his decision by alleging that the president had grossly and persistently failed to perform his duties, and further that he had been unable to reconcile his continuing in the position with the good of the judiciary, it appears that his actual motives were political in nature.[46]

On the very day of the announcement of his request to remove Judge Piotr Schab from his position, the court's college of judges unanimously expressed a negative opinion concerning this decision.[47] In spite of this, the Minister did not refer his request to the National Council of the Judiciary, but rather took the position that the college of judges of the Court of Appeals in Warsaw had failed to provide a negative opinion in response to the Minister's expressed intention to dismiss, as solely information concerning the result of the college of judges' vote had been submitted to the Ministry – which,

45 *The Ministry of Justice is initiating the procedure to dismiss Judge Piotr Schab from his post as President of the Court of Appeals in Warsaw. At the same time, from today onwards Judge Schab is suspended from his duties*, January 18, 2024, https://www.gov.pl/web/sprawiedliwosc/ministerstwo-sprawiedliwosci-wszczyna-procedure-odwolania-ze-stanowiska-prezesa-sadu-apelacyjnego-w-warszawie-sedziego-piotra-schaba-jednoczesnie-sedzia-schab-zostaje-od-dzisiaj-zawieszony-w-pelnieniu-czynnosci (accessed: January 22, 2024).

46 "[...] it seems that the reasons for such an urgent takeover of this Court are less sublime:

- it was the judges of this Court who drew attention to the faulty empowerment of the prosecutors against whom decisions were made by the "acting National Prosecutor", prosecutor Jacek Bilewicz;
- it is this Court that examines the complaints against the refusal to grant consent for operational control from all over Poland;
- it is this Court that has jurisdiction to hear appeals in many cases of politicians from the current ruling majority (the case of Slawomir N., the case of Senator Krzysztof K. or the former head of the PSL parliamentary club, Jacek B.);
- it is this Court that in 2013 changed the ruling of the District Court in Warsaw and acquitted Beata Sawicka of the charge of corruption, while at the same time recognizing that the then MP had indeed accepted a bribe from CBA agents posing as businessmen;
- it is this Court that hears the appeals against rulings made within the election procedures during the electoral campaigns" – *Attempt to forcibly remove the President of the Court of Appeals in Warsaw*, Rule of Law Observer, https://obserwator-praworzadnosci.pl/en/attempt-to-forcibly-remove-the-president-of-the-court-of-appeals-in-warsaw/ (accessed: November 8, 2024).

47 The announcement was originally available on the court's website: *Announcement on the suspension of the President of the Court of Appeals in Warsaw*, Arkadiusz Ziarko, Vice President of the Court of Appeals in Warsaw, January 19, 2024, https://waw.sa.gov.pl/komunikat-w-sprawie-zawieszenia-prezesa-sadu-apelacyjnego-w-warszawie,new,mg,264.html,682 (accessed: January 22, 2024).

according to the same Ministry, cannot be considered an opinion on the dismissal.[48] In view of the above, after 30 days had passed the Minister dismissed the president and shortly thereafter appointed a new individual to the position.[49] It should be noted here, however, that the provisions of the Law on the System of Common Courts do not in any way specify what form an opinion on a motion to dismiss the court president should take.

Accordingly, on February 16, 2024 the Presidium of the National Council of the Judiciary adopted a resolution[50] to examine the constitutionality of Article 27 § 5 of the Law on the System of Common Courts, to the extent that it authorizes the Minister of Justice to dismiss the president or vice president of a court without an opinion from the NCJ; as well as the second sentence of Article 27 § 5a, to the extent that it limits the binding nature of the negative opinion of the NCJ for the Minister of Justice when it is issued regarding an intention to dismiss the president or vice president of a court only to those resolutions which are adopted by a two-thirds majority.

4. Constitutional Tribunal ruling of October 16, 2024, case K 2/24

The judgment in the above case was handed down on October 16, 2024. The Court ruled that the provisions in question in the Law on the System of Common Courts are unconstitutional insofar as they deprive the National Council of the Judiciary from participating in the procedure for suspending the president or vice president of a court; do not specify the duration of the suspension; limit the binding nature for the Minister of Justice of the National Council of the Judiciary's negative opinion, when it is issued with the intention of dismissing the president or vice president of a court, to resolutions adopted only by a two-thirds majority; and provide that the failure of the National Council of the Judiciary to issue an opinion within 30 days from the date when the Minister of Justice presents his intention of dismissing the president or vice president of a court does not preclude the dismissal.[51] While the written justifications for the judgment was not available at the time of issue of this report, a communiqué posted on the Court's website summarized its motives.[52] The Constitutional Tribunal took the position that the dismissal of court presidents is not a purely administrative action, but rather constitutes a form of interference in judicial independence as guaranteed by the Constitution, and as such can only be carried out with the participation of the NCJ, a body whose primary constitutional duty (as set forth in Article 186(1) of the Constitution) is to uphold this principle. The Court also found that the requirement of a two-thirds majority vote, as well as the 30-day time limit for expressing an opinion – which would determine whether the NCJ's negative opinion regarding the dismissal of a court president is binding on the Minister of Justice – are too far-reaching and may prevent the NCJ from performing its constitutional tasks.

48 *Appeal of the President of the Court of Appeals in Warsaw Judge Piotr Schab*, February 21, 2024, https://www.gov.pl/web/sprawiedliwosc/odwolanie-prezesa-sa-w-warszawie-sedziego-piotra-schaba (accessed: November 11, 2024).

49 *Minister of Justice Adam Bodnar appointed Judge Dorota Markiewicz as President of the Court of Appeals in Warsaw*, March 25, 2024, https://www.gov.pl/web/sprawiedliwosc/odwolanie-prezesa-sa-w-warszawie-sedziego-piotra-schaba (accessed: November 8, 2024).

50 Resolution No. 113/2024 of the National Council of the Judiciary of February 16, 2024 on referring a request to the Constitutional Tribunal in order to examine compatibility with the Constitution of the Republic of Poland, February 16, 2024, https://krs.pl/pl/aktualnosci/2402-uchwala-nr-113-2024-krajowej-rady-sadownictwa-z-dnia-16-lutego-2024-r-w-sprawie-skierowania-do-trybunalu-konstytucyjnego-wniosku-o-zbadanie-zgodnosci-z-konstytucja-rzeczypospolitej-polskiej-art-27-5-oraz-art-27-5a-zdanie-drugie-ustawy-z-dnia-27-lipca-2001-r-prawo-o-ustroju-sadow-powszechnych-dz-u-z-2023-r-poz-217-ze-zm.html (accessed: November 8, 2024).

51 *Procedure for the removal of the president or vice president of the court*, ref. K 2/24, https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/procedura-odwolania-prezesa-lub-wiceprezesa-sadu-2 (accessed: November 8, 2024).

52 *Communication after: Procedure for removal of the president or vice president of the court K 2/24*, https://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-po/art/procedura-odwolania-prezesa-lub-wiceprezesa-sadu-1 (accessed: November 12, 2024).

5. Poznań Court of Appeal

Minister Bodnar also made other attempts to dismiss court presidents whose legality raised serious questions. On January 15, 2024 the Minister requested the college of judges of the Court of Appeals in Poznań to express an opinion regarding the dismissal of this court's president, Judge Mateusz Bartoszek, as well as its vice presidents, judges Przemysław Radzik and Sylwia Dembska, from their positions.[53]

According to the position which was taken on January 17 by the Presidium of the NCJ,[54] the positive opinion of the court's college of judges in this regard was given in a faulty manner; specifically, the vote was attended by a judge who had in fact been appointed by the Minister in connection with the suspension of the current president in order to carry out his functions. According to the NCJ's position, the provisions of the Law on the System of Common Courts do not provide the authority for such a person to take part in the work of the court's college of judges. According to the NCJ, the college of judges should therefore have been considered to have offered a negative opinion in the absence of this vote. The NCJ's appeal to reconvene the college of judges in its correct composition was not heard, however, and on January 19 the Ministry issued an announcement regarding the "final dismissal" of the president and vice presidents as of January 18, 2024.[55]

6. Radom Regional Court

On January 19, 2024 the Presidium of the National Council of the Judiciary took a position on the procedure for the dismissal of Judge Stanislaw Olchowy from his post as President of the Radom Regional Court.[56] Stanislaw Olchowy had been appointed via a decision dated October 30, 2023 to perform his duties starting on December 19, 2023. Subsequently, however, on December 29, 2023, he was served with a decision from the Minister of Justice dated December 15, 2023, which revoked his appointment.

The Presidium of the NCJ, in a resolution dated January 19, 2024,[57] took the position that the Minister's decision had no legal basis, citing general principles of public law. It was pointed out that such an act, as a statement of the executive branch's intentions, has an impact in the spheres of both constitutional law as well as individual rights and obligations only from the moment it is introduced into legal circulation, i.e. at the moment it is passed. If the act is not properly served, it should be

53 *The Ministry of Justice is initiating the procedure to remove the president and two vice presidents of the Poznań Court of Appeals from their positions, as well as suspending them from their duties starting today (15.01.2024)*, January 15, 2024, https://www.gov.pl/web/sprawiedliwosc/ministerstwo-sprawiedliwosci-wszczyna-procedure-odwolania-ze-stanowisk-prezesa-i-dwoch-wiceprezesow-sadu-apelacyjnego-w-poznaniu-oraz-ich-zawieszeniu-od-dzisiaj-15012024-r-w-pelnieniu-czynnosci (accessed: January 22, 2024).

54 *Position of the Presidium of the National Council of the Judiciary of January 17, 2024 on the meeting of the college of judges of the Court of Appeals in Poznań on January 15 and 16, 2024, which was contrary to the law*, January 17, 2024, https://krs.pl/pl/aktualnosci/2352-stanowisko-prezydium-krajowej-rady-sadownictwa-z-dnia-17-stycznia-2024-r-w-sprawie-sprzecznego-z-przepisami-prawa-posiedzenia-kolegium-sadu-apelacyjnego-w-poznaniu-w-dniach-15-i-16-stycznia-2024-r.html (accessed: January 22, 2024).

55 *President and vice presidents of the Court of Appeals in Poznań dismissed*, January 19, 2024, https://www.gov.pl/web/sprawiedliwosc/prezes-i-wiceprezesi-sadu-apelacyjnego-w-poznaniu-odwolani (accessed: January 22, 2024).

56 *Decision on withdrawal of appointments to court presidents' positions*, December 19, 2023, https://www.gov.pl/web/sprawiedliwosc/komunikat-prasowy-ministra-sprawiedliwosci (accessed: November 12, 2024).

57 *Position of the Presidium of the National Council of the Judiciary of January 19, 2024 on the procedure for the dismissal of Stanislaw Olchowy, Regional Court judge, from the position of President of the Regional Court in Radom*, January 19, 2024, https://krs.pl/pl/aktualnosci/2353-stanowisko-prezydium-krajowej-rady-sadownictwa-z-dnia-19-stycznia-2024-r-w-przedmiocie-trybu-odwolania-sso-stanislawa-olchowego-z-funkcji-prezesa-sadu-okregowego-w-radomiu.html (accessed: January 22, 2024).

considered non-existent, which is a conclusion the Presidium of the NCJ drew by citing extensive case law from the Supreme Administrative Court.[58]

This resolution further stressed that from the moment of taking office, dismissal can only be carried out through the procedure discussed above, as described in Article 27 of the Law on the System of Common Courts. The attempt to circumvent this procedure finds no legal basis and thus contradicts the principle of legalism, as contained in Article 7 of the Constitution[59] and addressed in particular to the organs of the executive branch, ie. to the government in the first place. Accordingly, the Presidium of the NCJ urged the Minister of Justice to rescind the act of dismissal dated December 15, 2023, and stated that if his intention is to dismiss the president, he must follow the correct procedure. This appeal likewise went unheeded.

7. Warsaw Regional Court

Another such action by the Justice Ministry was a request made on June 18, 2024 for the college of judges of the Warsaw Regional Court to issue an opinion on the dismissal of the president and vice presidents of the court.[60] The motion was accompanied by the suspension of the president and vice presidents from office, but more than that, at the same time the Justice Minister initiated the procedure to suspend the presidents and vice presidents of six of the eight Warsaw district courts, who are all members of the Regional Court's college of judges. This was obviously intended to prevent the Regional Court's college of judges from issuing a negative opinion. Since the Minister had set June 19 as the suspension date, however, the Warsaw Regional Court's college of judges met on the day of the application (June 18) and issued a negative opinion.

In view of the above, Minister Adam Bodnar again on July 1 attempted to dismiss the presidents of the Warsaw Regional Court and the Warsaw District Courts, this time suspending them with immediate effect. After the modified college of judges issued a favorable opinion in relation to the Justice Minister's request, the Regional Court's president and all its vice presidents but one were dismissed effective July 16.[61] In response, the Presidium of the NCJ reiterated its position, pointing to the likely political context of the Minister's actions.[62]

58 "See judgments of the Supreme Administrative Court: of December 11, 2007, ref. II OSK 1650/06, LEX No. 456865; of January 23, 2009, ref. I OSK 1467/08, LEX No. 1381151; of May 19, 2006, ref. I OSK 1176/05, LEX No. 236587, of October 21, 2008, ref. II GSK 800/08, LEX No. 565691" – *ibid.*

59 Public authorities act on the basis of and within the limits of the law.

60 *Suspension of the president and vice presidents of the Warsaw Regional Court and initiation of the procedure for their dismissal*, July 3, 2024, https://www.gov.pl/web/sprawiedliwosc/zawieszenie-prezesa-i-wiceprezesow-sadu-okregowego-w-warszawie-oraz-wszczecie-procedury-ich-odwolania (accessed: November 12, 2024).

61 *Revocation of the president and vice presidents of the Regional Court in Warsaw*, July 17, 2024, https://www.gov.pl/web/sprawiedliwosc/odwolanie-prezesa-i-wiceprezesow-sadu-okregowego-w-warszawie#:~:text=Minister%20Sprawiedliwo%C5%9Bci%2016.07.2024%20r.%20po%20zapoznaniu%20si%C4%99%20z,Prezes%20S%C4%85du%20Okr%C4%99gowego%20w%20Warszawie%3A%20s%C4%99dzi%C4%99%20Joann%C4%99%20Przanowsk%C4%85-Tomaszek (accessed: November 12, 2024).

62 "The National Council of the Judiciary notes that the suspension of the authorities of the Regional Court in Warsaw from the performance of their duties coincided with the submission to the Regional Court in Warsaw by the National Prosecutor's Office – which is subordinate to the Minister of Justice-Prosecutor General – of an application for the extension of the temporary detention of those persons who have been deprived of their liberty in a case of political interest to the Minister of Justice." *Resolution of the National Council of the Judiciary No. 365/2024, June 19, 2024*, June 20, 2024, https://krs.pl/pl/aktualnosci/2531-uchwala-krajowej-rady-sadownictwa-nr-365-2024-z-19-czerwca-2024-r.html (accessed: November 12, 2024).

8. Summary

Although constitutional guarantees of the irremovable status of judges prevent Minister Bodnar from revoking those judicial appointments which were made in recent years (even though attempts to circumvent these guarantees have also been announced and carried out[63]) – at least for the time being – the Justice Minister has nevertheless been trying to gain significant influence over the judiciary in other ways. Attempts to remove court presidents and vice presidents from their positions, as described above, can be considered an act which serves this purpose.

In light of the Constitutional Tribunal's ruling of October 16, 2024, these attempts should be unequivocally assessed as flawed and in violation of constitutional guarantees of judicial independence. The position of a court's president entails significant influence over the court's activities, hence the requirement of independence as stipulated by the Constitution also applies to it. The actions of the Minister of Justice constitute a clear example of a violation of the principle of separation of powers and can be considered as a form of political pressure aimed at ensuring that the judiciary is amenable to the government's actions. The consequences of such a state of affairs should be of the utmost concern, especially in the context of the government's announced efforts to violate the very foundations of the Polish constitutional order, at least when it comes to such fundamental issues as the protection of life and the definition of marriage.

63 See the section on the National Council of the Judiciary.

Jędrzej Jabłoński

3. Questioning the procedure for electing judges to the National Council of the Judiciary

Main theses

- The current government and the parliamentary majority supporting it are attempting to undermine the legitimacy of the National Council of the Judiciary and, consequently, the validity of judicial appointments made with its participation since 2018;
- The first action taken to this end was a December 20, 2023 Sejm resolution that questioned the constitutionality of the then composition of the NCJ and called on its members to "cease their activities." However, the resolution has no legal force.
- Another action was the issuance of a decree by the Minister of Justice on February 6, 2024, to exclude judges appointed since 2018 from adjudicating certain cases. The decree was declared unconstitutional in a May 16 ruling by the Constitutional Tribunal.
- On July 12, 2024, the Sejm passed a law that, among other things, provided for the premature shortening of the term of the current NCJ and excluded judges who had been appointed since 2018 from running for the newly formed NCJ. President Andrzej Duda referred the law to the Constitutional Tribunal.
- On September 6, 2024, the Minister of Justice presented a proposal for solutions that would, among other things, include an obligation for judges appointed since 2018 to file an "active regret" for those who wish to remain in their positions. The proposals have been criticized by, among others, the Iustitia association of judges and the Venice Commission.

1. Constitutional regulation on the functioning of the National Council of the Judiciary

According to Article 186(1) of the Polish Constitution, the National Council of the Judiciary (hereinafter: NCJ) upholds the independence of courts and the independence of judges. Its personal composition,

however, is regulated by Article 187, according to which the NCJ is composed of: the First President of the Supreme Court, the Minister of Justice, the President of the Supreme Administrative Court, a person appointed by the President of the Republic, 15 members elected from among judges of the Supreme Court, common courts, administrative courts and military courts, four members elected by the Sejm from among deputies and two members elected by the Senate from among senators. The remainder of the Constitution's provisions on the NCJ are rather laconic – namely, it stipulates that the NCJ: may petition the Constitutional Tribunal on the constitutionality of normative acts insofar as they relate to the independence of courts and the independence of judges (Article 186 para. 2); elects a president and two vice-pr from among its members (Art. 187 para. 2); the term of office of elected NCJ members is four years (Art. 187 para. 3); and, most importantly, that the NCJ's structure, scope of activities, mode of work and method of electing its members are determined by law (Art. 187 para. 4).

Significantly, the Constitution in no way specifies who is to elect these 15 members chosen from among the judges. This was clearly emphasized by the Constitutional Tribunal in its June 20, 2017 judgment,[64] in which, incidentally, the Tribunal declared unconstitutional the then-current legislation, which provided for a rather complex procedure for the election of representatives of judges in curiae composed of representatives of different types of courts. In that judgment, the Tribunal noted that: "The authors of the Constitution, however, did not indicate who is to elect these judges[.] These issues have been delegated to be regulation by the law. Nothing prevents judges from being elected to the NCJ by judges. However, one cannot agree with the assertion that the active electoral rights in this area must necessarily and exclusively lie with the judicial branch."

This position was upheld in a March 25, 2019 judgment,[65] in which the Tribunal declared the constitutionality of the new procedure to elect judges' representatives to the NCJ by the Sejm, as introduced under the Act of December 8, 2017 amending the Act on the National Council of the Judiciary and certain other acts (OJ 2018, item 3). In that judgment, the CC noted that: "The statement that Article 187(1)(2) "explicitly states that members of the NCJ may be judges, elected by judges" finds no basis in the text of the cited provision [...]. Since the Constitution, in Article 187 (1) (1) and (3) of the Constitution, indicates exactly to whom the active right to elect NCJ members is granted, the fact that it does not do so with regard to representatives of courts allows us to conclude that it did not regulate this issue consciously and relegated it to the legislature. [...] In fact, the fact of being a representation of the legal community is due not to the manner in which the NCJ members are elected, but to the fact that a large majority of them are judges , which is covered by the constitutional guarantee."

On the other hand, with regard to the suggestion in the initiating motion that "the requirement that judges be selected exclusively by judicial bodies can be derived from the other enumerated [non-Article 187] constitutional provisions," the Tribunal found that the amended legal provisions on the NCJ are compatible with Articles 2, 10(1) and 173 of the Constitution – a thought, however, that was not developed in detail in the justification.

64 Judgment of June 20, 2017, ref. K 5/17, OTK ZU A/2017, item 48, https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?pokaz=dokumenty&sygnatura=K%205/17 (accessed: November 13, 2024).

65 Judgment of March 25, 2019, ref. K 12/18, https://ipo.trybunal.gov.pl/ipo/view/sprawa.xhtml?pokaz=dokumenty&sygnatura=K%2012/18 (accessed: November 13, 2024).

2. Sejm resolution of December 20, 2023 – undermining the status of the NCJ

On December 20, 2023, by a vote of 239 deputies[66] The Sejm adopted a resolution to address the consequences of the constitutional crisis in the context of the constitutional position and functions of the National Council of the Judiciary in a democratic state under the rule of law. In this resolution, the Sejm took the position that "The election of representatives of the judicial community to the National Council of the Judiciary should [...] have an autonomous nature and be carried out by the judicial community, without the possibility of active participation of legislative and executive authorities." In view of the above, the Sejm concluded that the resolutions concerning the election of NCJ members, adopted by the Sejm of the previous term, "were adopted in flagrant violation of the Constitution of the Republic of Poland," and therefore called on the NCJ members to "immediately cease their activities."

Such a resolution, adopted without an explicit legal basis, is of course not binding in any way. However, the NCJ presidium vigorously protested against its adoption, stating, in its own resolution of December 20, 2023,[67] that the Sejm's resolution "undermines confidence in constitutional bodies, harms the legal order, and, contrary to its title, initiates a conflict with the hallmarks of a constitutional crisis." In particular, it has been pointed out that the appeal to the NCJ's member judges to cease activities constitutes a *de facto* encouragement to act in violation of the law, that is, not to perform their duties. Moreover, the Sejm's action can be considered an attempt to pressure the body that upholds judicial independence, which would violate the principle of separation of powers and indirectly undermine judicial independence itself. Finally, the NCJ rightly pointed out that the allegation that the current composition of the Council is unconstitutional is not justified in light of the aforementioned judgments of the Constitutional Tribunal, which is the only body authorized to examine the compliance of legal acts with the Constitution.

Thus, if the current parliamentary majority wishes to change the procedure for appointing the NCJ members drawn from among judges, it should simply amend the law on the NCJ, rather than adopt this type of resolution, which has no legal effect.

3. Decree of the Minister of Justice of February 6, 2024, amending the decree on rules of procedure of common courts – discrimination against judges appointed since 2018.

The Minister of Justice issued a decree,[68] which provided for the addition to the decree of the Minister of Justice of June 18, 2019 – Rules of Procedure of common courts[69] a new provision that would exclude from consideration of certain cases judges who took office on the basis of an application submitted by the reformed National Council of the Judiciary, whose members who are representatives of courts were elected by the Sejm. Specifically, these judges were to be excluded from ruling on an application to exclude a judge based on circumstances surrounding the judge's appointment. In

66 Vote No. 132 at the 1st session of Parliament on 20-12-2023 [December 20, 2023] at 19:04:06, https://www.sejm.gov.pl/Sejm10.nsf/agent.xsp?symbol=glosowania&nrkadencji=10&nrposiedzenia=1&nrglosowania=132 (accessed: November 13, 2024).

67 Resolution of the Presidium of the National Council of the Judiciary of December 20 [2023], https://krs.pl/pl/aktualnosci/2331-uchwala-prezydium-krajowej-rady-sadownictwa-z-dnia-20-grudnia-2023-r.html (accessed: November 14, 2024).

68 OJ 2024, item 149.

69 OJ 2022, item 2514, as amended.

practice, the idea was that judges appointed from 2018 onward would not be able to hear requests to exclude other judges appointed during the same period.

Already on February 14, the presidium of the NCJ passed a resolution[70] on referring a motion to the Constitutional Tribunal to examine the decree's compliance with the Constitution. The Constitutional Tribunal already ruled on the matter on May 16,[71] stating that all three paragraphs of the decree are unconstitutional. First and foremost, the Tribunal pointed out that provisions of the decree clearly go beyond the statutory authorization, and even attempt to regulate issues that, according to Article 176(2) of the Constitution, can only be regulated at the level of a law. The Tribunal also argued that the arbitrary exclusion of certain judges in certain cases constitutes a violation of judicial independence and a violation of the right to a court as set forth in Article 45(1) of the Constitution. The Tribunal even suggested that the content of the adopted provision is a sham, and is indeed intended to allow judges, appointed since 2018, to be excluded from ruling on all cases.

In addition, the Tribunal stated that the acts of appointment of judges by the President under his constitutional prerogative cannot be challenged in any way, either by law or, even more so, by sub-statutory acts.

4. Law of July 12, 2024, amending the Law on the National Council of the Judiciary – unconstitutionally shortening the term of the NCJ and prohibiting judges appointed since 2018 from running for the new NCJ

On April 12, 2024, the Sejm, by a vote of 240 deputies[72] passed a law amending the law on the National Council of the Judiciary.[73] The law aims to restore the mode of election of the 15 judge members of the NCJ by judges, except that it would be done by universal suffrage and not by the pre-2018 curial system, which, as indicated above, the Constitutional Tribunal declared unconstitutional. Importantly, however, the law provides for a shortening of the term (referred to in its Article 3 as "cessation of activity") of the current NCJ, as well as (Article 2(2)) a prohibition on possible candidacy to the "new" NCJ of judges appointed at the request of the NCJ operating under current rules (with the only exception of judges who returned to the office of judge and the position held before 2018). Significantly, deletion of the latter provision, as arguably unconstitutional and contrary to the "Urgent Joint Opinion of the Venice Commission and the General Directorate of Human Rights and Rule of Law of the Council of Europe on the Draft Law Amending the the Law on the National Council of the Judiciary",[74] which stated that "the blanket exclusion of between 2,000 and 3,000 judges out of approximately 10,000 from being candidates lacks individual assessment, and thus raises

70 Resolution No. 99/2024 of the National Council of the Judiciary dated February 14, 2024, https://krs.pl/pl/aktualnosci/2396-uchwala-nr-99-2024-krajowej-rady-sadownictwa-z-dnia-14-lutego-2024-r.html (accessed: November 14, 2024).

71 Judgment of May 16, 2024 ref. U 1/24, OTK ZU A/2024, item 47, https://ipo.trybunal.gov.pl/ipo/Sprawa?cid=1&sprawa=27643 (accessed: November 14, 2024).

72 Vote No. 15 at the 9th Sejm session on 12-04-2024 [April 12, 2024] at 14:22:26, https://www.sejm.gov.pl/sejm10.nsf/agent.xsp?symbol=glosowania&nrkadencji=10&nrposiedzenia=9&nrglosowania=15 (accessed: November 14, 2024).

73 The text of the law, as finally determined after consideration of the Senate's amendments, is available on the Sejm's website, at: https://orka.sejm.gov.pl/opinie10.nsf/nazwa/219_u/$file/219_u.pdf (accessed: November 14, 2024).

74 CDL-PI(2024)009-e Poland – *Urgent Joint Opinion of the Venice Commission and the Directorate General of Human Rights and Rule of Law of the Council of Europe on the draft law amending the Law on the National Council of the Judiciary of Poland*, 8.05.2024, https://www.venice.coe.int/webforms/documents/?pdf=CDL-PI(2024)009 (accessed: November 14, 2024).

questions of proportionality",[75] was proposed by the Senate as one of the amendments adopted to the law.[76] However, the Sejm rejected the Senate's amendment by a vote of 237 MPs[77].

On August 1, 2024, the President of the Republic of Poland referred the law in question to the Constitutional Tribunal[78] under the so-called preventive control procedure, accusing it of: unauthorized restriction of the passive right of election of judges to the NCJ, questioning the prerogative of the President of the Republic of Poland to appoint a person to serve as a judge, violation of the principles of judicial independence, balance of powers, adherence to the law and, above all, the permanence of the term of office of the NCJ as stipulated in the Constitution.[79]

Following President Andrzej Duda's decision, in a resolution dated October 11, 2024[80] the NCJ presidium decided to proceed before the Constitutional Tribunal, stating that the law's provisions "lead to a violation of the principles of: democratic legitimacy of power, sovereignty of the nation, tri-partition of powers, balance of powers, judicial independence and adherence to the law." In addition to supporting the charges raised by President Duda, the NCJ also criticized the very main idea of returning to a system of election of judges' representatives by judges, describing it as a change from "the current democratic model of electing the judicial portion of the National Council of the Judiciary to a co-optation-corporate model that does not meet the standards of Article 2 and Article 4 of the Polish Constitution." According to the NCJ, it follows from the principles of a democratic state under the rule of law and the principle of the sovereignty of the people that the judges sitting on the NCJ must be elected either directly by the people or at least indirectly, as long as an "unbroken chain of democratic legitimacy" is maintained.

As long as the Constitutional Tribunal has not ruled on the above issue, the President cannot sign the law in question, thus it cannot be published and enter into force. It seems that, at least with regard to Articles 2(2) and 3 of the law, the Tribunal should declare it unconstitutional.

5. Minister Bodnar's communication of September 6, 2024 – announcement of new solutions for changes in the judiciary

On September 6, 2024, Minister of Justice Adam Bodnar announced proposed statutory changes regarding the status of judges.[81] The presented changes are to divide judges appointed after 2018 into three groups. The first of these, i.e. those who were first appointed to a judicial post after serving as an assessor, are to be given the status of "judges appointed in accordance with the Constitution" – their status will not be questioned in any way.

75 *Ibid.*, para. 81.

76 Resolution of the Senate of May 9, 2024 on the Law Amending the Law on the National Council of the Judiciary, Parliamentary Print No. 378, https://orka.sejm.gov.pl/Druki10ka.nsf/0/CF450942F34E684AC1258B18004F7042/$File/378.pdf (accessed: November 14, 2024). Specifically, it was Amendment 31.

77 Vote No. 92 at the 15th session of the Sejm on 12-07-2024 [July 12, 2024] at 15:06:36, https://www.sejm.gov.pl/sejm10.nsf/agent.xsp?symbol=glosowania&NrKadencji=10&NrPosiedzenia=15&NrGlosowania=92 (accessed: November 14, 2024).

78 Case Kp 2/24 – Request of the President of the Republic, https://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=Kp 2/24 (accessed: November 14, 2024).

79 As an aside, it may also be noted that the President has charged the entire law as being unconstitutional on procedural grounds, in connection with blocking the ability of MPs Mariusz Kamiński and Maciej Wąsik to exercise their mandates.

80 Resolution No. 852/2024 of the National Council of the Judiciary dated October 11, 2024. 11.10.2024, https://krs.pl/pl/aktualnosci/2637-uchwala-nr-852-2024-krajowej-rady-sadownictwa-z-dnia-11-pazdziernika-2024-r.html (accessed: November 14, 2024).

81 *New solutions for changes in the judiciary*, 06.09.2024, https://www.gov.pl/web/sprawiedliwosc/nowe-rozwiazania-dotyczace-zmian-w-sadownictwie (accessed: November 14, 2024).

The second was defined as "people who have a so-called joint undertaking" in common, i.e. those who actively participated in the reform of the justice system. These individuals will absolutely and irrevocably be removed from their positions and moved to those previously held. From the minister's somewhat unclear announcements, it seems that such individuals will furthermore be barred from applying for promotion and will also be subject to disciplinary proceedings conducted by a new body specially established for this purpose – the "Disciplinary Council."

Finally, the third group is made up of individuals who, although promoted in the judicial structure, "cannot be charged with participation in a joint undertaking." It is envisaged to introduce an "institution of so-called active regret" for these people, namely that if they issue an appropriate statement declaring that "it was their mistake in life." While their promotion will also be revoked, they will not, however, be excluded from applying for it again, nor will they be subject to disciplinary proceedings.

The above proposals have met vigorous opposition from many quarters. First, in a resolution dated September 12, 2024,[82] the NCJ presidium took the position that the proposals directly violate constitutional guarantees of judicial independence and non-removability. Particular criticism was directed at the institution of "active regret," as "an obvious reference in its historical clarity to self-criticisms made by people who fell foul of authorities in the systemic realities of the Soviet Union or the Stalinist beginning of the People's Republic of Poland." The NCJ also noted that "Verification [of judges - of the type proposed by the Minister] [...] was not carried out either [after independence was recovered in 1918] with respect to judges of the occupying powers, nor in 1989 with respect to judges appointed by communist authorities, and not even applied by Nazi Germany after the occupation of our country in 1939 with respect to judges of the Second Republic, and only carried out by the communists during the seizure of power in the second half of the 1940s." Finally, the NCJ correctly argues that it is inadmissible to draw negative legal consequences against persons who merely used the procedure provided for by law, the constitutionality of which, moreover, has not been challenged by the body authorized to do so (i.e., the Constitutional Tribunal). In view of the above, the NCJ urged the Sejm of the Republic of Poland to express strong opposition to the Minister's proposal.

In a similar vein is the position taken by representatives of the legal community,[83] which emphasizes that "The demand from judges by the Minister of Justice for an act of contrition in the form of 'active regret' – an institution taken from the norms of criminal law and intended for compliant criminals – should be read as obvious blackmail, leading to a violation of judicial independence and retention in the profession of only those who accept this violation of the Constitution and dependence on the executive power." At the same time, it was warned that if the Justice Minister actually wishes to execute the above announcements, this could amount to a "constitutional tort, which is the basis for future liability before the State Tribunal [...]."

Of particular note, opponents of the NCJ's model of functioning in force since 2018, grouped in the judges' association "Iustitia," also spoke out against the institution of "active regret." One of their

82 Resolution No. 747/2024 of the National Council of the Judiciary dated September 12, 2024, https://www.krs.gov.pl/pl/aktualnosci/2610--uchwala-nr-747-2024-krajowej-rady-sadownictwa-z-dnia-12-wrzesnia-2024-r.html (accessed: November 14, 2024).

83 *Polish legal profession on purges in courts planned by Polish PM Donald Tusk and Justice Minister Adam Bodnar*, September 9, 2024, https://en.ordoiuris.pl/institute-activity/polish-legal-profession-purges-courts-planned-polish-pm-donald-tusk-and-justice (accessed: November 14, 2024).

leading representatives, Warsaw Regional Tribunal Judge Igor Tuleya, stated that he himself would never have made such a humiliating statement.[84]

First and foremost, however, it should be pointed out that also the Venice Commission, in its opinion of October 14, 2024,[85] took a critical stance on the proposals put forward by the Justice Minister. The Commission stressed that the evaluation of the work of judges must always be individual, and group removal is not possible. It also pointed out that it is not possible under the Polish Constitution to remove a judge by law alone and without a court ruling. Judgments of the European Court of Human Rights or the Court of Justice of the European Union cannot be considered such rulings, as these courts do not have such powers. Nor can it be the Supreme Court's December 5, 2019 ruling,[86] in which it did not declare specific and individual actions taken by the NCJ invalid.

The Venice Commission further took the position that the evaluation of judges cannot be conducted by a body dependent on the government. If, on the other hand, such an authority is to be non-judicial, any negative assessment must be subject to appeal to a court. The Commission also stated that the above cannot be replaced by merely retaining the right to participate again in competitions for a judicial position after a possible negative evaluation resulting in deprivation of the current position.

The Commission also suggested that, in its view, there is no basis for concluding that judges who have been promoted since 2018 have thereby committed disciplinary torts entitling them to a reduction in their emoluments.

However, with regard to decisions made in individual cases by judges appointed after 2018, the Commission took the position that here, too, an individual assessment of each case is necessary. It has been proposed to create a special procedure that would allow petitions for the rescission of rulings, but only within a certain time limit, after which the procedure would be revoked. The absence of such a deadline would mean the risk of legal uncertainty. Rulings can be overturned only if it has been shown that the manner in which the judge was nominated affected the outcome of proceedings.

Finally, the Venice Commission indicated that some of the proposals presented to it (for example, the general idea of returning judges to previously held positions) were overly general for it to take a comprehensive position on them and instead expressed its willingness to express an opinion when a full draft of the amendment to the regulations is presented.

Perhaps this above-mentioned opinion, which was strongly negative towards the proposals presented by the Justice Minister in September, although non-binding, is the reason why until now a specific bill in the subject area has not been published.

84 *"Active regret" of judges. Tuleya: I would never make such a statement*, September 9, 2024, https://trojka.polskieradio.pl/artykul/3422874,czynny-zal-sedziow-tuleya-nigdy-nie-zlozylbym-takiego-oswiadczenia (accessed: November 14, 2024). It should be noted, however, that according to Judge Tuleya, all judges appointed at the request of the NCJ functioning under the rules in effect since 2018 should be removed from the profession outright and without any verification.

85 *CDL-AD(2024)029-e Poland – Joint Opinion of the Venice Commission and the Directorate General Human Rights and Rule of Law on European standards regulating the status of judges, adopted by the Venice Commission at its 140th Plenary Session (Venice, 11-12 October 2024)*, https://venice.coe.int/webforms/documents/?pdf=CDL-AD(2024)029-e (accessed: November 14, 2024). It should be noted at this point that this opinion is in no way binding on the Polish legal system.

86 Reference III PO 7/18.

6. Supreme Court: The test of independence applies to all judges and can only take place under the law

There has also been a recent decision of the Supreme Court[87] relevant to the status of judges appointed to office from 2018. The Supreme Court considered complaints against an earlier decision of its other panel on July 18, 2024, on the application of pre-trial detention, issued on the occasion of a cassation ruling,[88] in which the Supreme Court remanded the case back to the first-instance court for retrial. The only basis for the July ruling was the Supreme Court's finding that the sentence issued by the first instance court must be annulled by law on grounds that the court was improperly staffed within the meaning of Article 439.1.2 of the Criminal Procedure Code Act of June 6, 1997.[89] This improper staffing, on the other hand, allegedly consisted of a judge who was appointed to his position on the basis of a proposal from the National Council of the Judiciary functioning under the rules in effect since 2018, so that "the composition of the Regional Tribunal that ruled on the case as a court of first instance did not meet [...] the criteria of independence and impartiality belonging to a 'court established by law' in the constitutional and convention sense."[90]

In a decision in August, the Supreme Court strongly disagreed with the permissibility of such an outcome. First of all, it stressed that in the current state of the law, the so-called "test of a judge's independence and impartiality" can only take place on the basis of Article 42a § 3. et seq. of the Law on the System of Common Courts. These regulations (specifically, §6) grant the right to make such a request, in the case of criminal proceedings, only to a party and only (§5) within 7 days of notification of the panel hearing the case. The Supreme Court further stated that this power can be exercised by a party against any judges, not only those appointed since 2018. It was pointed out that doubts about independence and impartiality can be raised especially against judges who were appointed until 1989 by the Council of State of the People's Republic. However, also after this period, and before 2018, various constitutional concerns were raised against the procedure for appointing judges already with the participation of the NCJ. The above led the Court to conclude that "legislation has recognized that no judge of the Supreme Court, a general court, military court, Supreme Administrative Court or administrative court, regardless of the date of appointment, meets the statutory and convention guarantees of independence and impartiality, and this resulted in – according to an amendment introduced by the law of June 9, 2022 – granting the parties and participants in any particular proceeding the right to file motions to examine the fulfilment of the requirements of independence and impartiality by a particular judge appointed to hear the case."[91] In turn, the entire argument about the Supreme Court's July ruling was summed up by the following statement, bolded in the original text of the August decision: "In conclusion, it should be stated that the annulment of judgments of first and second instance courts by the Supreme Court reviewing the cassation, carried out [...] in a procedure of an inquisitorial nature that is unknown to the law, constitutes a clear and flagrant violation of Article 42a § 3 - § 14 of the Law on the System of Common Courts and Article 7 in connection with Art. 87 of the Constitution of the Republic of Poland, resulting at the same time in deprivation of the tested judge's right to a court of competent factual and local jurisdiction established by law and in deprivation of the right to an effective remedy, and

87 Supreme Court ruling dated August 7, 2024, in I KZ 34/24, https://www.sn.pl/sites/orzecznictwo/orzeczenia3/i kz 34-24.pdf (accessed: November 15, 2024).
88 Ref. I KK 86/24
89 OJ 2024, item 37, as amended.
90 Supreme Court ruling dated August 7, 2024.
91 *Ibid.*

moreover in deprivation of the defendant's right to have the case heard within a reasonable time – which constitutes a clear and flagrant violation of Articles 45(1) and 78 of the Constitution of the Republic of Poland and Articles 6(1) and 13 of the Convention for the Protection of Human Rights and Fundamental Freedoms."

7. Summary

Despite numerous rulings by the Constitutional Tribunal and the Supreme Court stating that actions taken by the new ruling coalition, especially by Justice Minister Adam Bodnar, to undermine the status of the NCJ operating under rules in effect since 2018 are legally flawed, the government is not giving up its pursuit of this goal. In doing so, it disregards obvious social consequences, such as undermining the confidence of citizens in the judiciary, judges, or the Polish state and law in general. Moreover, these activities can be viewed as a waste of public funds. The chaos created in this way is, unfortunately, also exacerbated by the attitude of a part of the judicial community, which openly supports the course set by the government, thereby undermining the coherence of the Polish legal system, especially when it comes to the division of the jurisdiction and competencies of the various bodies delineated within it.

All of the solutions adopted by the government that were legislative in nature, have either already been challenged by the Constitutional Tribunal as obviously contradictory to the Constitution, or, it is reasonable to assume, soon will be. One must agree with the position of the Constitutional Tribunal that the model for the election of judges to the NCJ, which has been in operation since 2018, does not contradict the Constitution, and in fact better realizes the principle of balance of powers (through so-called "checks and balances") and reduces the risk of an oligarchization of judicial power.

It should also be noted that attempts to undermine the status of individual judges lead to protracted proceedings and legal uncertainty, which mostly harms ordinary people – the participants in proceedings in the first place. It is to be hoped that a consistent application of the current legislation allowing the so-called "independence tests" to be carried out against all judges (and not just a certain group of them selected for political reasons) on clear and unambiguous principles will contribute to mitigating the above negative phenomena.

In view of the above, recent actions by the Minister of Justice, including such curiosities as a proposal to require judges to file an "active regret," can be considered another manifestation of the current government's interference in judicial independence.

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4. Dispute over the Constitutional Tribunal

Main theses

- In the fall of 2015, the Seventh Sejm elected five judges to the Constitutional Tribunal (out of a total of 15) for terms that were likely to begin during the next term of the Sejm. In the case of two of these Judges, the Constitutional Tribunal explicitly stated that the legal basis for their election was unconstitutional.

- The current government's position is that the remaining three of these judges were duly elected, and therefore it is the composition of the Constitutional Tribunal formed by the Eighth Sejm that was flawed, as it included people elected to positions that had previously been filled.

- As of December 2023, the current government has been publishing CT verdicts with a notation about the participation of unauthorized persons in the panel. These annotations are made without a legal basis.

- In March 2024, the Sejm passed a resolution on removing the effects of the constitutional crisis of 2015-2023 in the context of the Constitutional Tribunal's activities, which questioned the effectiveness of all CT activities. From the time of its adoption, the government, in violation of the Constitution, ceased to publish CT rulings in the OJ at all, regardless of the composition of the court that ruled on the case,

- Also in March 2024, the government presented a package of laws providing, among other things, for the annulment of some 100 judgments of the Constitutional Tribunal and the expiration of the terms of office of all Constitutional Tribunal judges. However, these solutions have been strongly criticized by, among others, the Polish Commissioner for Human Rights and the Venice Commission.

1. The genesis of the dispute over the Constitutional Tribunal

The beginning of the crisis around the Constitutional Tribunal, which continues to this day, dates back to 2015, when the law on the Constitutional Tribunal dated June 25, 2015 was passed.[92] Article 137 of that law provided a special legal basis for electing successors to replace judges whose terms expired in 2015. Significantly, the terms of all the newly elected judges were to begin after the expiration of the four-year term of the Seventh-term Sejm (in which the Civic Platform-Polish People's Party coalition had a majority), counting from November 8, 2011, when the President of Poland convened its first session. The terms of office of three newly elected judges were to begin on November 7, 2015,[93] which is exactly the first day after expiration of the term of the Sejm. The terms of the next two judges, meanwhile, were to begin on December 3 and 9, respectively.[94]

However, it should be borne in mind that according to Article 98(1) of the Constitution, the term of office of the Sejm may be extended beyond the strictly understood four years, since it ends only on the day before the next Sejm convenes for its first session. In turn, according to Article 109(2) of the Constitution, the First Session of the Sejm shall be convened by the President of the Republic within 30 days from the date of elections, and, according to the prevailing doctrinal position, it may not be convened earlier than after expiration of the four-year term of the previous Sejm. At the time of electing the five new Constitutional Tribunal judges, it was known that the terms of two of them would certainly begin more than 30 days after the elections, which the President had set for October 25, 2015.[95]

Finally, the Eighth Sejm (in which the Law and Justice-led United Right coalition had an absolute majority) convened for its first session on November 12, 2015.[96] Shortly thereafter, on November 25, 2015, the Sejm passed five resolutions declaring the earlier resolutions on the election of Constitutional Tribunal judges to be of no legal force.[97] In each of the resolutions adopted by the Sejm, it was written that "the Sejm of the Republic of Poland requests the President to refrain from taking the oath of office from the person named in the subject resolution." On December 2, 2015, the Sejm elected five candidates as judges of the Constitutional Tribunal,[98] and on the following day the President of the Republic of Poland took the oath of office from four of these candidates.

On the same day, the Constitutional Tribunal issued a judgment,[99] in which it found that Article 137 of the 2015 Law on the Constitutional Tribunal complies with the Constitution with regard to judges of the Tribunal whose terms expired on November 6, 2015, while at the same time being inconsistent with the Polish Constitution insofar as it applies to judges whose terms was to expire on December 2 and December 8, 2015, respectively. The Constitutional Tribunal based its reasoning on the position that "it follows from Article 194(1) of the Constitution that a Tribunal judge should be elected by

92 OJ 2015, item 1064.

93 See Resolutions of the Sejm of the Republic of Poland of October 8, 2015 on the election of a judge of the Constitutional Tribunal, M.P. 2015, items 1038, 1039 and 1040.

94 See Resolutions of the Sejm of the Republic of Poland of October 8, 2015 on the election of a judge of the Constitutional Tribunal, M.P. 2015, items 1041 and 1042.

95 Decision of the President of the Republic of Poland of July 17, 2015 on ordering elections to the Sejm of the Republic of Poland and to the Senate of the Republic of Poland (OJ 2015, item 1017).

96 *First sessions of the Sejm and Senate on November 12*, November 05, 2015, https://www.prezydent.pl/aktualnosci/wydarzenia/pierwsze-posiedzenia-sejmu-i-senatu-12-listopada,52 (accessed: December 5, 2024).

97 Resolutions of the Sejm of the Republic of Poland of November 25, 2015 on declaring invalid a resolution of the Sejm of the Republic of Poland of October 8, 2015 on the election of a Constitutional Tribunal judge published in Monitor Polski of October 23, 2015, items 1038-1042, M.P. 2015, items 1131-1135.

98 Resolutions of the Sejm of the Republic of Poland of December 2, 2015 on the election of a Constitutional Tribunal judge, M.P. 2015, items 1182-1186.

99 Ref. K 34/15, OTK ZU 11A/2015, item 185, https://ipo.trybunal.gov.pl/ipo/Sprawa?&pokaz=dokumenty&sygnatura=K 34/15 (accessed: December 5, 2024).

the Sejm of the term during which the position of a Tribunal judge was vacated." The Constitutional Tribunal stressed that "the election of a Tribunal judge cannot be made, as it were, in advance (ahead of time) in relation to judicial positions that will only be vacated during the term of the future Sejm. Bringing things *ad absurdum*, the mechanism provided for in Article 137 of the Law on the Constitutional Tribunal could be used not only for Tribunal judges whose terms expired in 2015, but also for those positions that will be vacated in subsequent years. This would set a dangerous precedent."

In the end, however, both the President and the eighth-term Sejm, even after the CT ruling of December 3, 2015, stood by the position expressed in the resolutions of November 25, according to which all appointments of judges to the CT by the Sejm in October on the basis of Article 137 of the then law on the CT are invalid. The President did not take the oath from any of these judges, and consequently they have not been allowed to rule.

2. Announcement of the Constitutional Tribunal's judgments in the OJ with a note that its composition does not comply with Article 6 of the ECHR

The dispute over the Constitutional Tribunal entered a new phase after the October 15, 2023 elections, especially after the December 13 formation of Donald Tusk's government. The Constitutional Tribunal's rulings, which were issued with the participation of judges appointed for terms beginning November 7, 2015, were published from December 18, 2023, in the OJ with the notation "In accordance with the judgments of the European Court of Human Rights in the cases: Xero Flor in Poland Sp. z o.o. p. Poland dated 7.05.2021, complaint No. 4907/18; Walesa p. Poland dated 23.11.2023, complaint No. 50849/21; M.L. p. Poland dated 14.12.2023, Complaint No. 40119/21, the Constitutional Tribunal is deprived of the characteristics of a tribunal established by law when an unauthorized person sits in its composition. According to these rulings, the published judgment was issued in a composition established in violation of the basic principle applicable to the election of Constitutional Tribunal judges and consequently violating the essence of the right to a court established by law."

It is necessary to emphasize that there exists a law on the promulgation of normative acts and certain other legal acts,[100] which determines the rules and procedure for the promulgation of such acts. The law does not authorize the authority issuing the official journal to make any adnotations. There is no legal basis for such activity on the part of the government, which thereby violates the principle of adherence to the law, as stated in Article 7 of the Constitution. In view of the above, it should be considered that the placement of the annotation has no legal effect.

Thus, since there has been an announcement of the judgment in question in the official publication, in accordance with Article 190 of the Constitution, the judgment entered into force on the date of its announcement and acquired the force of general application and attribute of finality. The government's undermining of these effects causes chaos from which citizens suffer the most.

It is unprecedented for the executive branch to indicate which Constitutional Tribunal judgments should be taken into account by the courts. Such behaviour should be unequivocally assessed negatively, and should even be considered an attempt by the executive branch to exert pressure on the

100 Act of July 20, 2000 on promulgation of normative acts and certain other legal acts (OJ 2019, item 1461).

judiciary, which contradicts the principle of a tripartite division of power expressed in the Polish Constitution.

3. Sejm resolution challenging the status of Constitutional Tribunal judges

On March 6, 2024, the Tenth Sejm passed a resolution on removing the effects of the constitutional crisis of 2015-2023 in the context of the Constitutional Tribunal's activities.[101] The current Sejm stated that the resolutions of the 8th Sejm – respectively, regarding the annulment of the resolutions of the 7th Sejm on the election of Constitutional Tribunal judges, as well as the election of Constitutional Tribunal judges in place of those previously elected, were adopted "in flagrant violation of the law, including the Constitution of the Republic of Poland and the Convention for the Protection of Human Rights and Fundamental Freedoms, and thus are devoid of legal force and have not produced the legal effects envisaged therein." With this in mind, the Polish Sejm stated that "consideration in the actions of a public authority of Constitutional Tribunal resolution issued in violation of the law can be considered a violation of the principle of adherence to the law by the authority."

In the subject resolution, the Sejm also stated that Constitutional Tribunal President Julia Przyłębska was defectively elected, and even if one accepts that fact of her appointment, the her six-year term expired on December 21, 2022. Moreover, the Sejm approved the questioning of the Constitutional Tribunal President's decisions, pointing out that: "As a result, all procedural decisions in directing the work of the Constitutional Tribunal, especially the appointment of adjudicating panels, by Julia Przyłębska may be questioned." In addition, the Sejm expressed the view that the scale of violations of the existing law "makes it impossible for this body to carry out its systemic tasks of controlling the constitutionality of the law, including for the protection of human and civil rights." Such a situation, in the Sejm's view, requires "the re-creation of a constitutional court, in accordance with constitutional principles and taking into account the voice of all political forces that respect the constitutional order." In turn, with regard to constitutional court judges, the Sejm made an appeal for them to resign from their posts and "join the process of democratic transition."

The above resolution, of course, has no legal effect. The Sejm does not have the authority to shorten or extinguish the term of office of a judge sitting on the Constitutional, nor to review the election of a previously elected judge, as long as the elected person has taken office. Nor does the Sejm have the power to annul a constitutional court ruling.

The resolution passed by the Sejm should therefore be considered only a political statement. Despite this, it should not be passed over indifferently, as it may pose a significant threat to the legal order in Poland, especially in the aspect in which it calls on other bodies to violate the Constitution by ignoring judgments of the Constitutional Tribunal, despite their final and universally binding nature. This may also be another manifestation of the current government's violation of the guarantee of judicial independence by attempting to influence the adjudication of cases.

101 Resolution of the Sejm of the Republic of Poland of March 6, 2024 on removing the effects of the constitutional crisis of 2015-2023 in the context of the activities of the Constitutional Tribunal (M.P. 2024, item 198).

What is particularly reprehensible, however, is that after the adoption of the resolution, the government stopped publishing CT judgments at all, regardless of whether judges on the bench were judges whose circumstances of appointment were questioned by the current governing coalition or not.[102] Despite appeals by the CT President to representatives of the Government Legislation Center,[103] this state of affairs persists to this day (December 2024). However, this does not undermine the effectiveness of judgements, as they are binding from the time of issue, i.e. when announced in the courtroom. The CT also expressed this position in a March 9, 2016 judgment,[104] incidentally issued during a period of fierce dispute between the CT and the then-government over, among other things, the non-publication of CT judgments.

4. Government bills on the Constitutional Tribunal

On March 4, 2024, the Justice Ministry presented a so-called package of solutions to heal the Constitutional Tribunal[105] comprising:

1) draft law – Introductory Provisions to the Law on the Constitutional Tribunal – formally submitted by a group of deputies (parliamentary print No. 254);[106]

2) Draft of a new law on the Constitutional Tribunal – formally submitted by a group of deputies (parliamentary print No. 253);[107]

3) Bill to amend the Constitution of the Republic of Poland – in practice submitted by a group of Senators (Senate print No. 55).[108]

Both parliamentary bills were passed as laws by the Sejm on September 13, 2024. However, the President referred them to the Constitutional Tribunal on October 7 for preventive control.[109] The Tribunal was initially scheduled to hear them both together under the joint reference number Kp 3/24 on December 9,[110] but the case was taken off the docket at the last minute.

4.1. Draft law – Provisions introducing the law on the Constitutional Tribunal

The essence of this draft is:

1) The annulment of approximately 100 Constitutional Tribunal rulings issued by benches with judges elected for terms that began on November 7, 2015.

102 G. Sroczyński, *A "non-existent" judge, but an "existing" ruling. How the government is deepening the chaos in courts [Sroczynski Interviews]*, October 9, 2024, https://wiadomosci.gazeta.pl/wiadomosci/7,114884,31369638,sedzia-nieistniejacy-ale-wyrok-istniejacy-jak-rzad-poglebia.html (accessed: December 9, 2024).

103 *The government does not publish CT rulings. "Violation of the Polish Constitution,"* August 21, 2024, https://dorzeczy.pl/kraj/624720/przylebska-napisala-do-knapinskiej-czemu-rzad-nie-publikuje-wyrokow-tk.html (accessed: December 9, 2024).

104 Ref. K 47/15, OTK ZU A/2018, item 31.

105 Ministry of Justice press release: https://www.gov.pl/web/sprawiedliwosc/pakiet-rozwiazan-uzdrawiajacych-trybunal-konstytucyjny (accessed: May 8, 2024).

106 https://www.sejm.gov.pl/sejm10.nsf/PrzebiegProc.xsp?nr=254 (accessed: December 9, 2024).

107 https://www.sejm.gov.pl/sejm10.nsf/PrzebiegProc.xsp?nr=253 (accessed: December 9, 2024).

108 https://www.senat.gov.pl/prace/proces-legislacyjny-w-senacie/inicjatywy-ustawodawcze/inicjatywa,243.html (accessed: December 9, 2024).

109 *Two laws to the CT under the preventive control procedure*, October 7, 2024, https://www.prezydent.pl/aktualnosci/wydarzenia/dwa-wnioski-do-tk-w-trybie-kontroli-prewencyjnej,92504 (accessed: December 9, 2024).

110 *Communiqué: Law on the Constitutional Tribunal, Kp 3/24*, https://trybunal.gov.pl/postepowanie-i-orzeczenia/komunikaty-prasowe/komunikaty-przed/art/ustawa-o-trybunale-konstytucyjnym-2 (accessed: December 9, 2024).

2) Recognizing as null and void the appointments to the positions of President of the Constitutional Tribunal (this function at the time of both submission and adoption of the law was held by Julia Przyłębska, whose term expired on December 9, 2024) and Vice President of the Constitutional Tribunal (this position is currently vacant, but on July 21, 2023 the General Assembly of Judges of the Constitutional Tribunal passed a resolution to submit the candidacies of Bartłomiej Sochański and Jakub Stelina to the President of the Republic of Poland, which had not yet been considered at the end of 2024).

3) Expiry of the employment of employees of the reorganized Chancellery of the Tribunal, except of those discretionarily designated by its Head.

The draft has been criticized by, among others, the Commissioner for Human Rights,[111] the Office of Studies and Analyses of the Supreme Court,[112] as well as by some experts such as Dr. Marcin Szwed of the Helsinki Foundation for Human Rights.[113]

The Commissioner for Human Rights strongly criticized the statutory annulment of judgments involving unauthorized persons. In the opinion of the CHR, statutory nullification or declaration of non-existence of judgments or a group of judgments of courts or tribunals is excluded as contradictory to the principle of finality of judgments of the Constitutional Tribunal (Article 190(1) of the Constitution), the principle of adherence to the law (Article 7 of the Constitution), the principle of separation and independence of the judiciary from the legislature (Articles 10 and 173 of the Constitution), and principles derived from the principle of the rule of law of the security of legal transactions, trust of the citizen in the state and non-retroactivity of the law (Article 2 of the Constitution).

In the view of the Commissioner for Human Rights, recognition that in certain circumstances parliament is allowed to single out a group of Constitutional Tribunal judgments and declare that they are not "rulings" within the meaning of the Constitution will create a dangerous precedent for the future, which can be used in other circumstances by a current political majority at the time.

According to the CHR, the optimal solution, also constitutionally permissible, would be to allow the Constitutional Tribunal itself – acting in its correct composition – to resume proceedings in cases decided by incorrect compositions of the Constitutional Tribunal.

Dr. Marcin Szwed, on the other hand, additionally argued that the draft does not specify the consequences of "the 'annulment' of Constitutional Tribunal judgments (without at least determining whether this will lead to the resurrection of repealed regulations)," which "poses a threat to legal certainty."[114]

In turn, Article 11(1) of the draft provides for the assumption of the duties of President of the Constitutional Tribunal by the Constitutional Tribunal judge with the longest tenure at the Tribunal on the

111 Opinion of the CHR on the draft law - introductory provisions of the law on the Constitutional Tribunal (parliamentary print No. 254, https://bip.brpo.gov.pl/sites/default/files/202404/Do_Sejmu_TK_projekt_opinia_22_04_2024.pdf (accessed: May 8, 2024).

112 Opinion of the Supreme Court's Office of Studies and Analysis on the parliamentary draft law – Introduction of the Constitutional Tribunal Act, https://orka.sejm.gov.pl/Druki10ka.nsf/0/C27826D353DAB67CC1258B0A00538E4A/$File/254-007.pdf (accessed: May 8, 2024).

113 Opinion of M. Szwed on the constitutionality of the parliamentary draft law introducing the Constitutional Tribunal Act (print No. 254), as commissioned by the Bureau of Expertise and Regulatory Impact Assessment of the Sejm of the Republic of Poland, https://orka.sejm.gov.pl/rexdomk10.nsf/0/4B2B203E05C-CF039C1258AEB0036BE3E/$File/i659-24A_MS.pdf (accessed: May 8, 2024).

114 CHR Opinion, *op. cit.* p. 18.

date of entry of the law into force (paragraph 1), and for the appointment of the new Constitutional Tribunal President and new Constitutional Tribunal Deputy President within 6 months of the entry of the law into force (paragraph 2). The Supreme Court's Office of Studies and Analyses points out that this solution will have the effect of challenging the chairmanship of Julia Przyłębska's successor (Bogdan Święczkowski, elected to the post on December 9, 2024), even if he was appointed in full compliance with the law. The same applies to the selection for the currently vacant position of CT Deputy President. According to the CHR, declaring appointments to the positions of President and Deputy President of the Constitutional Tribunal as null and void will be a clear violation of the principle of adherence to the law (Article 7 of the Constitution) and the competence of the General Assembly of Judges of the Constitutional Tribunal and the President of the Republic to fill these positions (Article 194(2) of the Constitution). The Supreme Court's Office of Studies and Analyses additionally points out the incompatibility of this solution with the principle of separation and independence of the judiciary (Article 173 of the Constitution).

The proposal to statutorily extinguish employment of all employees of the Tribunal's clerical staff, i.e., Chancellery of the Constitutional Tribunal and Office of the Legal Service of the Constitutional Tribunal, was also met with a negative assessment by the CHR, the Supreme Court's Office of Studies and Analyses and Dr. Szwed. According to the CHR, such a solution is incompatible with the principle of labor protection (Article 24 of the Constitution) and the right of citizens to access the public service on equal terms (Article 60 of the Constitution). The Commissioner for Human Rights stresses that, in principle, the reorganization of staff of a state office is not excluded, but it must be based on the assumption that the value of each employee should be assessed individually and on the basis of precise criteria, with adequate guarantees of appeal to courts. The incompatibility of this solution with Article 24 and Article 60 of the Constitution is also pointed out by the Office of Studies and Analysis of the Supreme Court and Dr. Szwed of the Helsinki Foundation for Human Rights. According to the Supreme Court's Office of Studies and Analysis , the subject proposal "violates numerous standards (including international standards) of legal protection due to employees and elementary principles of social intercourse." In turn, Dr. Szwed points out that "the drafters have not presented any convincing arguments to justify the introduction of such unfavourable solutions for employees."

4.2. Draft of the new law on the CT

Unlike the draft of the introductory regulations, the draft of the new CT law itself did not raise fundamental objections. Critical comments – made, among others, by the CHR,[115] the national chamber of legal advisers (KIRP)[116] and expert-authors of opinions commissioned by the parliamentary Office of Expertise and Regulatory Impact Assessment[117] – mainly concerned details, although some of them are significant.

The Commissioner for Human Rights notes that the draft requires some amendments, as some of its provisions contain loopholes, some are questionable from the standpoint of compliance with the Constitution, and some repeat previous solutions, without taking into account the systemic experience

115 Opinion of the CHR on the parliamentary draft law on the Constitutional Tribunal (parliamentary print No. 253), https://bip.brpo.gov.pl/sites/default/files/2024-04/Do_Sejmu_TK_ustawa_projekt_opinia_25_04_2024.pdf (accessed: May 8, 2024), on: CHR Opinion (2)

116 Opinion of the Center for Research, Studies and Legislation of the National Council of Legal Advisers on the parliamentary draft law on the Constitutional Tribunal, https://orka.sejm.gov.pl/Druki10ka.nsf/0/D861FE8A99ADB0D0C1258B010039E4B1/$File/253-001.pdf (accessed: May 8, 2024).

117 See list: https://www.sejm.gov.pl/sejm10.nsf/opinieBEOS.xsp?nr=253 (accessed: May 8, 2024).

of the Tribunal's functioning in 2015-2024 (such as the refusal to take the oath from Constitutional Tribunal judges, withholding of the publication of Constitutional Tribunal judgments, or abuse of the institution of protective orders).

The Commissioner for Human Rights also expresses doubts about the advisability of maintaining the requirement for CT judges to take an oath to the President of the Republic. The Polish Constitution does not require that a CT judge elected by the Sejm take an oath before anybody and even less so that the establishment of an official relationship and a judge's assumption of office depend on this action. From the standpoint of Article 194(1) of the Constitution, a resolution of the Sejm is sufficient for the effective election of a CT judge. Introducing another step in the electoral procedure at the level of the law and granting a competence to a state body other than the Sejm that may result in blocking a CT judge from taking office would be inconsistent with the indicated constitutional provision.

According to the CHR, the draft also unnecessarily grants the Prosecutor General and President of the Republic of Poland the authority to initiate disciplinary proceedings against Constitutional Tribunal judges, pointing out that a similar solution was deemed incompatible with the principle of the independence of Constitutional Tribunal judges (Article 195(1) of the Constitution) in the Constitutional Tribunal's judgment of March 9, 2016, K 47/15.

The Commissioner for Human Rights also criticized the extension of preliminary control to legal questions from courts and requests from public authorities such as the First President of the Supreme Court, the President of the Supreme Administrative Court, the Prosecutor General, the National Council of the Judiciary, the President of the Supreme Audit Office or the CHR. As a result, a single-judge bench of the Tribunal would be able to declare a legal question or application "manifestly unfounded" without in-depth analysis and without referring it to an enlarged panel. In the CHR's view, such entities should enjoy, as is the case in the current legal state, a type of "presumption of professionalism."

4.3. Bill to amend the Constitution of the Republic of Poland

The essence of the bill to amend the Constitution of the Republic of Poland is to extinguish the term of office of all current Constitutional Tribunal judges and for the Sejm to elect new judges in one of two modes: by a 3/5 majority, or, if unsuccessful, by an absolute majority (Articles 2 and 3 of the bill). The bill is still at the first reading stage in the Senate, and work on it last took place on July 23.

It seems that the solution it proposes, which is to resolve the dispute over the CT by amending the Constitution, would merit acceptance from the standpoint of the rule of law. On the other hand, however, the First President of the Supreme Court expressed doubt that the transitional provisions of the law on constitutional amendment can provide, as the draft provides, a stand-alone basis for expiration of the term of office of CT judges and the election of their successors.[118] She also rightly pointed out that the draft treats those judges whose election to the Constitutional Tribunal is not questioned by anyone in any way the same way as for the few questioned judges.The vast majority

118 *Opinion on the draft Warsaw law on amending the Constitution of the Republic of Poland* (Senate print No. 55), May 16, 2024, mark: BSA III.021.12.2024, https://www.senat.gov.pl/download/gfx/senat/pl/senatinicjatywypliki/2124/4/055_sn.pdf (accessed December 9, 2024).

of judges whose terms would be shortened belong to the first group. Finally, the President of the Supreme Court raised that the election of all 15 judges at the same time would be an unprecedented situation in the history of the Polish Third Republic.

4.4. Position of the Venice Commission

At its 141st plenary session on December 6 and 7, 2024, the Venice Commission adopted an opinion on the Polish government's proposed amendments to the Constitutional Tribunal.[119] First of all, the Venice Commission said that it would be unacceptable to extinguish the term of office of all CT judges as violating guarantees of judicial non-removability.

In addition, the Commission took the position that all judgments issued by the CT since March, 2024 should be published by the government. At the same time, the Commission found acceptable the practice of placing annotations next to sentences, as mentioned above. The opinion of the Venice Commission in this regard (as well as analogous opinions issued with regard to the National Council of the Judiciary[120]) are not legally binding.

5. Summary

The current governing camp in Poland is not only responsible for creating the crisis around the Constitutional Tribunal by electing two of its judges in the fall of 2015 in a manner clearly contrary to the Constitution and attempting to elect three more in a manner contrary, if not to the Constitution, then certainly to good parliamentary practice, but also for its significant deepening of the crisis after it took power again in December 2023. A number of its actions, led by the placing of annotations next to judgments of the Constitutional Tribunal or the cessation of their publication altogether as of March 2024, are characterized by a lack of any legal basis, thus making them likely to be considered a serious constitutional tort.

Particularly worthy of condemnation is the decision to halt the publication of any Constitutional Tribunal rulings. Due to the binding nature of the mere promulgation of Constitutional Tribunal judgments, this should not in theory prevent citizens from asserting their constitutional rights and freedoms. Yet, in practice, this undoubtedly reduces the level of legal certainty in which citizens evolve.

As in the case of the National Council of the Judiciary, the government's proposed radical statutory measures, such as declaring legally null and void all CT verdicts issued by judges whose status the government questions or extinguishing the terms of office of all CT members, are also questionable under European rule-of-law standards. It is highly telling that the government, which emphasizes values such as judicial independence and the tripartite division of power, also in this aspect proposes solutions based on legislative actions without respect for the right to a court.

119 As of December 2014, the opinion had not been published, but its main theses, however, had been cited in media reports – see, for example, *There is an opinion of the Venice Commission on the Constitutional Tribunal. "Unacceptable,"* Polish Press Agency, December 6, 2024, quoted by: https://wiadomosci.onet.pl/kraj/komisja-wenecka-donald-tusk-powinien-publikowac-wyroki-trybunaly-konstytucyjnego/jx7jb1k (accessed: December 9, 2024).

120 See the section on the National Council of the Judiciary.

This peculiar hypocrisy of the Tusk government also manifests itself in exactly the same actions being taken for which its members most fiercely criticized their predecessors. The most blatant manifestation of this is the failure to publish Constitutional Tribunal judgments, which is exactly the same action, albeit at a much larger scale, as that alleged against the ruling camp during the Eighth Sejm.

It can also be considered particularly telling that, in seeking to enact appointments to the CT before the 2015 elections, the then-Sejm majority as the main reason cited the desire to preserve the continuity of CT work with a 15-member composition, which would be impossible in the event of the election of the five judges in question by the next Sejm. Meanwhile, when the nine-year terms of three disputed CT judges elected by the eighth-term Sejm ended in early December, 2024, the current parliamentary majority declared that it did not intend to put forward candidates for the vacant positions.[121] Thus, one gets the impression that the dispute is by no means about the efficiency of the Tribunal's work, and perhaps never was.

121 *There will be an additional deadline for submitting candidates to the CT. "That the formalities be completed,"* November 19, 2024, https://www.bankier.pl/wiadomosc/Bedzie-dodatkowy-termin-na-zglaszanie-kandydatow-do-TK-Zeby-formalnosci-zostaly-dopelnione-8847578.html (accessed: December 9, 2024).

Patryk Ignaszczak, Marek Puzio

5. Takeover of the National Prosecutor's Office

Main theses:

- Donald Tusk's government decided to take over the prosecutor's office bypassing the provisions of the current Law on the Public Prosecutor's Office.
- The government ignored the procedure required for the dismissal of the National Prosecutor in the person of Dariusz Barski, for which the written consent of the President of the Republic of Poland was necessary for effective execution.
- In place of the National Prosecutor, the institution of an "acting national prosecutor," unknown to the law, was established, giving the position to Jacek Bilewicz.
- In the end, Prime Minister Donald Tusk appointed Dariusz Korneluk as National Prosecutor, without obtaining the opinion of the President of the Republic of Poland, as required by law.

1. Introduction

The background of the events surrounding the takeover of the National Prosecutor's Office by representatives of the current ruling team in January 2024 are essentially two issues: the debate that has been going on since the political transition (the fall of communism) regarding the model of the public prosecution system, and the actions of the Civic Coalition (KO) – Third Way (PSL – Poland 2050) – Left coalition government after the change of power in December 2023.

The first of these, the dispute over the shape and position of the prosecutor's office, centers around the application of two different concepts of its functioning. This state of affairs is due, among other things, to the lack of empowerment of the prosecuting authorities in the provisions of the 1997 Constitution of the Republic of Poland.[122] As a result, the issues of normalizing the rules of operation and functioning of this institution were left within the scope of statutory matters (ordinary legislation), making it susceptible to frequent changes.[123]

122 Constitution of the Republic of Poland of April 2, 1997 (OJ 1997, No. 78, item 483, as amended).

123 The 1997 Constitution of the Republic of Poland does not generally refer to the constitutional position of the prosecutor's office, mentioning only in Article 191(1)(1) the competence of the Prosecutor General to submit applications to the Constitutional Tribunal.

In Europe, two models of prosecutorial system can be distinguished. In the former, the prosecutor's office is independent of the parliament and the government; in the latter, it is subordinate to either of these authorities, but enjoys a certain degree of independence in its actions.[124] In particular, a manifestation of the latter model is the merger of the offices of Minister of Justice and Prosecutor General so that the holder of the former office holds the latter position *ex officio*.

In the Polish legal system, the second model, according to which the positions of Minister of Justice and Prosecutor General are intertwined, has been in place for most of the time. The change was decided only in 2009, when, declaring a desire to increase the independence of the prosecutor's office, the then authorities reformed the rules of this institution (the function of the prosecutor general and the minister of justice was separated).[125]

However, the prosecutor's office is now operating under new legislation from 2016, when the then-conservative government passed a new law on the public prosecutor's office,[126] strengthening the position of the Prosecutor General and reconnecting this function with that of the Minister of Justice. In addition, the National Prosecutor has returned to the structure of the prosecutor's office. Influence on the filling of this position was obtained by the President of the Republic. Indeed, the National Prosecutor, as well as his deputies, are appointed by the Prime Minister on the proposal of the Prosecutor General, after obtaining the opinion of the President of the Republic. In turn, the dismissal of these bodies no longer requires just an opinion, but the consent of the President. The 2023 amendment[127] clarified that this consent must be granted in writing.[128] This factor was intended to move in the direction of reducing political influence on the prosecutor's office by requiring consensus between the two state bodies.

At the same time, with the same amendment, the powers of the Minister of Justice (Prosecutor General) were significantly curtailed, granting de facto powers to direct the activities of the prosecutor's office and conduct personnel policy within this framework to the National Prosecutor. In addition, the National Prosecutor was given the authority to undertake covert actions by, among others, the Police, the Internal Security Agency (ABW), the Central Anti-Corruption Bureau (CBA), the Border Guard or the Military Police.

The effect of the aforementioned changes, therefore, was to significantly strengthen the position of the National Prosecutor, whom the Prime Minister (acting at the request of the Prosecutor General) cannot dismiss without the written consent of the President of the Republic.

2. New government illegally seizes control of prosecutor's office

In the prevailing legal and factual state of affairs, the new government, with Donald Tusk as Prime Minister and Adam Bodnar as Minister of Justice and Prosecutor General, did not have the capacity

124 H. Suchocka, *W poszukiwaniu modelu ustrojowego prokuratury (w świetle prac Komisji Rady Europy "Demokracja poprzez prawo")*, "Ruch Prawniczy, Ekonomiczny i socjologiczny" 2014, p. 160.

125 See the Law of October 9, 2009 amending the Law on the Public Prosecutor's Office and certain other laws (OJ 2009 No. 178, item 1375).

126 Law of January 28, 2016. Law on the Public Prosecutor's Office (OJ 2016, item 177, hereinafter referred to as the: "Law on the Public Prosecutor's Office").

127 See the Law of July 7, 2023 on Amendments to the Law – Code of Civil Procedure, to the Law – Law on the System of Common Courts, to the Law – Code of Criminal Procedure, and to Some Other Laws (OJ 2023, item 1860).

128 See Article 14 § 1 of the Law on the Public Prosecutor's Office.

to direct the prosecutor's activities on its own. Indeed, gaining significant influence over its operation would require the appointment of a new National Prosecutor.

As already mentioned, the change of the tenure of this position should be initiated by a motion of the Minister of Justice – Prosecutor General, and carried out by the Prime Minister with the written consent of the President of the Republic of Poland. In practice, the appointment of a new National Prosecutor by the current ruling coalition could prove problematic because the position was filled by the previous conservative government, while Andrzej Duda became President with the votes of the conservative part of society.

A second eventuality, theoretically enabling political influence over the prosecutor's office, would be to amend the provisions of the Law on the Public Prosecutor's Office as to the rules for the appointment and dismissal of the National Prosecutor. In such a case, however, the government coalition would have to reckon with a presidential veto, for which it does not have a sufficient majority (qualified majority of 3/5 votes in the presence of at least half of the statutory number of deputies). As a result, the Prime Minister and the Minister of Justice decided to use extra-legal solutions aimed at taking actual control of the office of the National Prosecutor.

On January 12, 2024, the Minister of Justice – Prosecutor General Adam Bodnar, without indicating the legal basis for his action, handed National Prosecutor Dariusz Barski a document stating that his reinstatement to active duty, on February 16, 2022, by the previous Prosecutor General Zbigniew Ziobro, was carried out in violation of the current legislation and had no legal effect. This is because Barski's reinstatement was carried out on the basis of Article 47 of the Law of January 26, 2016. Introductory provisions of the Law on the Public Prosecutor's Office[129] (hereinafter: PWPoP), which, according to the Minister of Justice, was no longer in effect at the time.[130] At the same time, on the same day, Prime Minister Donald Tusk entrusted the duties of First Deputy Prosecutor General of the National Prosecutor's Office to prosecutor of the National Prosecutor's Office, Jacek Bilewicz[131] (despite the fact that the Law on the Public Prosecutor's Office does not recognize the institution of "entrusting the duties" of the National Prosecutor to any other prosecutor).

At this point, it is important to note the reasoning of the Minister of Justice – Prosecutor General, Adam Bodnar, who stated that the reinstatement of prosecutor Dariusz Barski **had no legal effect**. Consequently, it would have to be concluded that Dariusz Barski did not become the National Prosecutor in 2022. This, in turn, would lead to the conclusion that all actions taken by Dariusz Barski as National Prosecutor (which he should not have become) are ineffective. One such action must have been the request for the appointment of prosecutor Jacek Bilewicz to the National Prosecutor's Office. Indeed, according to Article 74 § 1 of the Law – Law on the Public Prosecutor's Office, prosecutors of common organizational units of the public prosecutor's office (as is clear from Article 16, one such unit is the National Public Prosecutor's Office) are appointed to a prosecutorial position by the Prosecutor General on the proposal of the National Prosecutor. Jacek Bilewicz was appointed as

129 OJ 2016, item 178.

130 *Information on the recognition of the reinstatement of prosecutor Dariusz Barski to active duty as an act done in violation of the regulations*, https://www.gov.pl/web/sprawiedliwosc/informacja-o-uznaniu-przywrocenia-prokuratora-dariusza-barskiego-do-sluzby-czynnej-za-akt-dokonany-z-naruszeniem-przepisow (accessed: October 31, 2024).

131 *Prosecutor of the National Prosecutor's Office Jacek Bilewicz Acting National Prosecutor*, https://www.gov.pl/web/sprawiedliwosc/prokurator-prokuratury-krajowej-jacek-bilewicz-pelniacym-obowiazki-prokuratora-krajowego (accessed: October 31, 2024).

a prosecutor of the National Prosecutor's Office by the Prosecutor General on January 12, 2024,[132] i.e. on the same day that the same Prosecutor General stated that Dariusz Barski (whose application was necessary for the appointment of Jacek Bilewicz) was not a National Prosecutor, as he had not been effectively reinstated to active duty on February 16, 2022. Consequently, recognizing the argumentation presented by the Minister of Justice – Prosecutor General Adam Bodnar as accurate, would imply that the appointment of prosecutor Jacek Bilewicz to the National Prosecutor's Office was ineffective, since it was carried out without the legally required motion of the National Prosecutor.

Another contradiction in Adam Bodnar's position handed to Dariusz Barski, which is worth noting, is the statement that **Dariusz Barski is not a prosecutor on active duty as of January 12, 2024, making him "ineligible to be a National Prosecutor**, which means that as of January 12, 2024, he does not hold this position." Meanwhile, since the reinstatement of Dariusz Barski by the previous Prosecutor General – Zbigniew Ziobra on February 16, 2022 was "ineffective," the question arises – on what basis would Dariusz Barski, until January 12, 2024, be a prosecutor on active duty and serve as National Prosecutor?

In addition to their *quasi*-formal actions, representatives of Donald Tusk's government also took steps to actually take control of the Prosecutor's Office. On January 24, 2024, the Minister of Justice – Prosecutor General Adam Bodnar and the "acting" National Prosecutor Jacek Bilewicz, assisted by Prison Service officers, entered the headquarters of the National Prosecutor's Office and occupied the office of then absent prosecutor Dariusz Barski.[133] During the action of the uniformed law enforcement agencies, Minister Bodnar allegedly ordered Barski's belongings to be packed up, which, however, was not ultimately done. The actions of the current ruling team have been strongly criticized by opposition politicians, who have described them as a "creeping coup,"[134]

It is impossible to ignore the consequences of the unlawful actions of the current ruling team on the daily functioning of the judiciary and citizens seeking justice before the courts. This is because the position presented by the Minister of Justice creates the possibility of undermining the status of other prosecutors, too, who were appointed at the request of Dariusz Barski, or who were restored to active duty under Article 47 of the PWPoP (after the expiration of 60 days from the date of promulgation of this law). Challenging the effectiveness of the appointment of a prosecutor signed to the indictment filed with a court may even result in the discontinuation of criminal proceedings due to the lack of a complaint from a legitimate accuser.[135] All of this leads to unimaginable chaos in the administration of justice, undermines the confidence of citizens in the organs of the state, and undermines the constitutional right of everyone to a fair and public hearing without undue delay by a competent, independent, impartial and independent court of law.[136]

132 See National Prosecutor's Office, *Position of the Deputy Prosecutors General on the attempt to illegally deprive the National Prosecutor of his position and to fill this position in a manner unknown to the law*, https://www.gov.pl/web/prokuratura-krajowa/stanowisko-zastepcow-prokuratora-generalnego-dotyczace-proby-bezprawnego-pozbawienia-funkcji-prokuratora-krajowego-i-obsadzenia-tej-funkcji-w-trybie-nieznanym-ustawie (accessed: December 6, 2024).

133 M. Sławiński, *Pilna konferencja Kaczyńskiego i Błaszczaka. An attempted forceful takeover of the National Prosecutor's Office is underway*, https://www.polsatnews.pl/wiadomosc/2024-01-24/trwa-proba-silowego-przejecia-prokuratury-krajowej-pilna-konferencja-pis/ (accessed: October 31, 2024).

134 M. Zaborowska, *Law and Justice party speaks of "forceful takeover of the National Prosecutor's Office." Justice Ministry denies it*, https://www.rmf24.pl/polityka/news-pis-mowi-o-silowym-przejeciu-prokuratury-krajowej-resort-spr,nId,7289490#crp_state=1 (accessed: October 31, 2024).

135 See Decision of the Regional Court in Szczecin of February 9, 2024, ref. III K 348/22 (decision later reversed by decision of the Court of Appeals in Szczecin of April 10, 2024, II AKz 106/24).

136 See Article 45 of the Polish Constitution.

In this context, it should also be noted that there have been media reports of "punitive" postings of prosecutors from regional prosecutors' offices to district prosecutors' offices (two levels below).[137] The Commissioner for Human Rights, Prof. Marcin Wiącek,[138] pointed out that the sudden removal of a prosecutor from an assignment could lead to a violation of his right to respect for private and family life (Article 47 of the Constitution, Article 8 of the ECHR), such as by requiring an immediate move, which could involve, for example, a change in the school his children attend. Such removal may also adversely affect the efficiency and thoroughness of the investigations conducted and supervised by the transferred prosecutor.

3. Untrue claims by government representatives

At the heart of the current ruling team's actions in the prosecutor's office is the claim that prosecutor Dariusz Barski was not reinstated from retirement, and thus was not effectively appointed to the position of National Prosecutor – First Deputy Prosecutor General. In 2007, he served as Deputy Prosecutor General to Justice Minister Zbigniew Ziobro and as National Prosecutor. In 2010, after the liquidation of the National Prosecutor's Office carried out under the PO-PSL coalition, prosecutor Dariusz Barski retired. This was due to the amendment of the Law on the Public Prosecutor's Office by the Law of October 9, 2009 amending the Law on the Public Prosecutor's Office and certain other laws.[139] Article 19 (1-5) of that amendment provided that the Prosecutor General may transfer prosecutors of the former National Prosecutor's Office (in connection with the reorganization) who were not appointed to the General Prosecutor's Office to other official positions in the appellate or regional prosecutor's office, with retention of the right to the salary received in the position previously held. According to Article 19(3), a prosecutor of the former National Prosecutor's Office could file an objection to such a decision with the Prosecutor General, which meant retiring within a month of filing the objection. Prosecutor Dariusz Barski took advantage of this privilege.

The arguments of the government representatives essentially boiled down to the claim that the provision under which prosecutor Dariusz Barski was reinstated in 2022 was episodic in nature, limited in time in terms of its applicability to two months from its entry into force, i.e. from March 4, 2016 to May 4, 2016. Meanwhile, the Prosecutor General reinstated prosecutor Dariusz Barski to active service nearly six years after the entry into force of the said provision, which results (in the opinion of the Ministry of Justice) in the ineffectiveness of the decision taken.[140]

The above position, according to which Article 47 of the PWPoP was episodic, can hardly be considered correct. This is because the provision had no specific time limit, which is typical of this type of norms.[141] A linguistic interpretation here leads to the unequivocal conclusion that Article 47 of the PWPoP was in effect on the date of Dariusz Barski's reinstatement to active service in the prosecutor's office and is still in effect, as it has not been repealed or found to be unconstitutional.

137 *Delegations – revenge against inconvenient prosecutors?*, Rule of Law Observer, https://obserwator-praworzadnosci.pl/en/delegations-revenge-against-inconvenient-prosecutors/ (accessed: November 6, 2024).

138 Biuletyn Informacji Publicznej RPO, *The case of prosecutors recalled from delegations*, Clarification issued by the Minister of Justice and Procurator General, https://bip.brpo.gov.pl/pl/content/rpo-prokuratorzy-delegacje-odwolania-ms-odpowiedz, accessed: November 06, 2024.

139 OJ No. 178, item 1375.

140 *Legal opinions on the change in the position of National Prosecutor*, https://www.gov.pl/web/sprawiedliwosc/opinie-prawne-dot-zmiany-na-stanowisku-prokuratora-krajowego (accessed: November 6, 2024).

141 See § 29a of the decree of the Prime Minister of June 20, 2002 on "Principles of Legislative Techniques" (OJ 2016, item 283).

A departure from the application of linguistic interpretation can be made only in exceptional situations, which did not occur in the case at hand. Moreover, the adoption of the position presented by the Minister of Justice would lead to a violation of the principle of protection of vested rights with respect to prosecutors who have acquired a specific subjective right by law, as well as the principle of citizens' trust in the state and the law created by it, which stems from Article 2 of the Polish Constitution.

It is impossible not to mention that the handing of a letter by Prosecutor General Adam Bodnar to Dariusz Barski, who was holding the position of National Prosecutor, stating that henceforth he is no longer the National Prosecutor, without any legal basis for such action, blatantly violates Article 7 of the Polish Constitution, according to which public authorities act on the basis and within the limits of the law.

The above was confirmed by the Supreme Court in a resolution dated September 27, 2024,[142] ruling that the provisions serving as the basis for the reinstatement of prosecutor Dariusz Barski to service in the prosecutor's office and his appointment as National Prosecutor were not episodic in nature and did not contain a temporal limitation on their validity, and therefore the appointment of Dariusz Barski to the position of National Prosecutor was a legally effective appointment.

4. Summary

The actions of the current ruling coalition described above and the cited legal acts indicate that the new ruling camp has decided to take over the prosecutor's office in disregard of the provisions of the current law – the Law on the Public Prosecutor's Office. These changes had a political dimension, as they were intended to lead to the removal from the office of National Prosecutor of the person appointed to this position in the previous term of the Sejm, and to the assumption of this position by a person designated by the current governing coalition.

Donald Tusk's government ignored the procedure required for the dismissal of the National Prosecutor in the person of Dariusz Barski, for which the written consent of the President of the Republic of Poland was necessary for effective execution. In place of the National Prosecutor, the institution of an "acting national prosecutor," unknown to the law, was established, giving the position to Jacek Bilewicz. In the end, Prime Minister Donald Tusk appointed Dariusz Korneluk as National Prosecutor, without obtaining the opinion of the President of the Republic of Poland, as required by law.

142 Supreme Court resolution of September 27, 2024, I KZP 3/24.

Katarzyna Gęsiak

6. Issuing unlawful "guidelines" on maximizing access to abortion in the form of a press conference and website publication

Main theses:

- In Poland, there is a general ban on abortions, and the law specifies exceptions to this rule. This is the so-called "medical indication model," which excludes abortion at the woman's request.
- In July 2024, leftist parties attempted an amendment to legalize abortion on demand, but the Sejm failed to pass the bill with a majority vote.
- Having failed to amend the existing law in the Sejm, the Minister of Health has been unlawfully "instructing" doctors on how to interpret the current legislation to make legally prohibited abortion on demand a reality.
- The Health Minister's actions violate a number of constitutional provisions, primarily the principle of adherence to the law.

1. Introduction

On July 12, 2024, abortion on demand lost in the Sejm. By a small number of votes, deputies decided that the bill to amend the Criminal Code (parliamentary print No. 176), authored by the Left, would not be further processed. However, this did not end the efforts of this group and other ruling coalition politicians to make so-called abortion on demand possible in Poland. Given the law in force in Poland, such abortions remain illegal, however. Steps are actually being taken in the government to result in real access to abortion on demand in Poland. These actions include, in particular, the issuance by the Minister of Health of its unlawful "Guidelines on the applicable legal provisions on access to the termination of pregnancy procedure" (hereinafter referred to as the: "Guidelines"), which were announced by government officials at a press conference on August 30, 2024.

2. Purpose of the Guidelines

The aim of the Ministerial Guidelines is to open the way to broad access to abortion in Poland, including to so-called "abortion on demand" mentioned in the introduction, where the decision to terminate a pregnancy is not supported by any medical indications, but only by a woman's will. This premise alone constitutes a revolution in the Polish legal system, since the law adopted by the legislature governing the permissibility of abortions is based on the so-called medical indication model. The essence of this model is the assumption that "throughout pregnancy, the conceived child is subject to legal protection, constitutes a legal good; consequently, a woman who is the de facto possessor of this good is not entitled to dispose of this good on her own. What conditions must be met in order for a pregnancy to be terminated, and whether they have occurred in a particular case, is determined by an authority of the state. The will of the woman – however necessary a condition – is not a sufficient condition."[143]

The content of the Guidelines does not undermine existing legal solutions – as the law in this regard has not changed in any way. This is because the provisions subjecting the conceived child to legal protection, as defined by the Constitutional Tribunal's judgment of October 22, 2020, are still in effect (ref. K 1/20).[144] However, the Guidelines have brought about a specific interpretation of selected provisions of the law, to the exclusion of others, to be followed by the personnel of hospitals where abortions are performed. To summarize the issue at hand, it can be said that the Guidelines "instruct" doctors how to understand the various provisions of the law in order to allow women to access abortion in particular on the basis of the so-called premise of risk to health, but now including mental health, the content of which is vague and gives wide room for abuse in practice. The goal is to create a de facto access to "on-demand" abortion, as mental health conditions are based on the subjective feelings of the patient and are generally not subject to objective verification.

3. The Guidelines and the constitutional principle of adherence to the law

The issuance of the Guidelines was met with harsh criticism from a sizable portion of the legal and medical community. In particular, reservations are raised by the fact that the Guidelines in question were issued in violation of one of the main principles of the Polish legal system – formulated in Article 7 of the Polish Constitution[145] the principle of adherence to the law, according to which public authorities act within the limits and on the basis of the law. This is because Health Minister Izabela Leszczyna does not have the authority to issue guidelines on applicable regulations, nor does she have the authority to make legal interpretations of laws. Moreover, in the current state of the law, there are no regulations under which it would be possible to issue such guidelines. Consequently, the Health Minister's action without a legal basis and in excess of her authority constitutes a violation of the principle of adherence to the law.

The Guidelines addressed to hospital directors, ward administrators, and department heads present a specific interpretation of the law, which the Tusk government expects to be applied in medical practice. However, in Poland, government guidelines cannot be a source of binding law. A closed

143 See A. Barczak-Oplustil, commentary on the Article 4a of the Law on Family Planning, Protection of the Human Fetus and the Conditions for Permissibility of Abortion [in:] *Szczególne świadczenia zdrowotne. System Prawa Medycznego*, Vol. 2, 2018, margin number 11.

144 Judgment of the Constitutional Tribunal of October 20, 2020, ref. K 1/20, OTK ZU A/2021, item 4.

145 Constitution of the Republic of Poland of April 2, 1997 (OJ No. 78, item 483 as amended).

catalog of legal acts whose provisions are binding on everyone (including doctors, hospital directors, ward administrators, heads of departments, etc.) is contained in Article 87(1) of the Constitution of the Republic of Poland, stating that the sources of universally binding law of the Republic of Poland are: the Constitution, laws voted by Parliament, ratified international agreements, and government decrees. The document published on the Health Ministry's website does not fall into any of the categories listed in Article 87(1) of the Polish Constitution. The following categories do however have such power: the Constitution, laws voted by Parliament and government decrees, including those of their provisions that impose certain duties and grant rights and freedoms to doctors and other health care workers.

Furthermore, the Guidelines were addressed to entities that are not organizationally subordinate to the Minister of Health. They do not have the character of universally binding law, nor do they belong to the category of internal laws referred to in Article 93 of the Polish Constitution, but even if one were to assume that they fall into this category (although they do not), under the Constitution of the Republic of Poland they would be binding only on organizational units subordinate to the body issuing the acts (Article 93(1)). Hence, the Ministry of Health's Guidelines do not meet any of the conditions required to make them applicable. Thus, the Health Minister's Guidelines were issued in violation of the principle of adherence to the law embodied in Article 7 of the Polish Constitution.

Because of this, from a legal point of view, no obligation arises on the part of the addressees (physicians) to comply with their content. Even worse, if and when they are applied in spite of the above considerations, these Guidelines may lead to criminal, civil and disciplinary liability of physicians. It should also be noted that the Health Minister's Guidelines refer to clinical practice. Recommendations in this area, however, can be issued not by politicians (ministries), but by recognized scientific bodies, i.e. groups that bring together experts in a particular field of medicine – in particular, "medical societies, provincial and national consultants in a particular field of medicine, working groups and teams that issue recommendations and their updates corresponding to the progress of knowledge in a particular field."[146] The issuance of guidelines should be preceded by credible scientific research based on appropriate methodology, and not by a political decision by the head of the health ministry, which the Supreme Medical Council sees as "an attempt to put pressure on the medical community."[147]

Although recommendations and guidelines issued by medical scientific societies and scientific bodies do not have legally binding force, they fall within the concept of "current medical knowledge," the prescription of which for physicians to apply is contained primarily in Article 4 of the Law of December 5, 1996, on the professions of physician and dentist (hereinafter referred to as the: "u.z.l.")[148] and Article 4 of the Code of Medical Ethics (hereinafter: "KEL").[149] It further follows from Article 6(1) of the Act of November 6, 2008 on Patient Rights and Commissioner for Patient's Rights,[150] which stipulates the right of patients to health services that correspond to the requirements of current medical knowledge. Guidelines set by expert bodies play a very important role in assessing whether a physician's action meets the criterion of acting in accordance with current medical knowledge. Politically motivated

146 See, for example, P. Najbuk, *Importance of standards of conduct for physician legal liability*, *Medical Standards*, https://www.standardy.pl/newsy/id/94 (accessed: December 9, 2024).

147 Position No. 4/24/IX of the Supreme Medical Council of September 6, 2024 on the guidelines of the Minister of Health on the current legal regulations on access to the procedure of termination of pregnancy and the guidelines of the Prosecutor General on the rules of conduct of the common organizational units of the prosecutor's office in conducting pre-trial proceedings on refusal to terminate pregnancy or conduct a so-called pharmacological abortion, https://nil.org.pl/uploaded_files/documents/doc_1725963996_rs-4-24-ix-wytyczne-mz-i-pg-dot-przerywania-ciazy-2.pdf (accessed: December 9, 2024).

148 OJ 1997 No. 28, item 152.

149 Code of Medical Ethics, available at: https://nil.org.pl/dokumenty/kodeks-etyki-lekarskiej (accessed: December 9, 2024).

150 OJ 2024, item 581.

recommendations of the Minister of Health are devoid of such a character, hence their application in practice exposes doctors to the charge of acting contrary to the art of medicine, consequently leading to the aforementioned legal liability.

4. Anti-constitutional interpretation of regulations. Rights and responsibilities of doctors vs. the content of the Guidelines

The Guidelines provide an anti-constitutional interpretation of the provisions of the Law of January 7, 1993 on Family Planning, Protection of the Human Fetus and the Conditions for Permissibility of Abortion (hereinafter: "u.p.r.").[151] A reading of the document leads to the erroneous conclusion that any pregnant woman experiencing ailments, including psychological ones, has the right to request an abortion from a gynecologist on the basis of a certificate obtained from a psychiatrist, and that it is incumbent on gynecologists to carry out the recommendations of psychiatrists. Meanwhile, the current regulations do not allow such an interpretation. Although Article 4a(1) of the u.p.r. does not specify a closed catalog of health indications for termination of pregnancy, this does not entitle one to interpret that such an indication can be "anything," i.e. any even minor health ailment. Such an interpretation is opposed, first of all, by the constitutional principle of protection of human dignity and life, included in Article 30 in conjunction with Article 38 of the Constitution of the Republic of Poland, as well as by the principles of limiting the exercise of constitutional rights and freedoms, which the legislator has included in Article 31(3) of the Constitution of the Republic of Poland, and which the Constitutional Tribunal has repeatedly confirmed in its jurisprudence.[152]

The direction adopted in the Guidelines for interpreting the so-called "health rationale" for aborting pregnancies further violates a number of provisions of the Law on the Medical Profession (u.z.l.) – the basic legal act defining the terms and conditions for the practice of the professions of physician and dentist (Article 1 of the u.z.l.). The content of Article 4 of the u.z.l., which states that a doctor is obliged to practice his profession in accordance with the indications of current medical knowledge, methods and means available to him for the prevention, diagnosis and treatment of diseases, in accordance with the principles of professional ethics and with due diligence, is particularly relevant here. This provision clearly indicates that an immanent element of practicing the medical profession is to undertake medical actions with respect to the patient in a manner consistent with the principles of professional ethics – with, therefore, the provisions of the Code of Medical Ethics (KEL), which "acquire legal value in the area of generally applicable law [...] due to the Law on Chambers of Physicians and to the extent specified by its provisions, in particular by Article 4[153] of this law."[154] Under these very principles, "when performing medical procedures on a pregnant woman, the doctor is simultaneously responsible for the health and life of her child. Therefore, it is the doctor's duty to try to preserve the health and life of the child even before birth" (Article 39 of the KEL).[155] Under these

151 OJ 2022, item 1575.

152 See, in particular, the judgment of the Constitutional Tribunal of May 28, 1997, ref. K 26/96, OTK ZU 2/1997, item 19, the judgment of the Constitutional Tribunal of September 30, 2008, ref. K 44/07, OTK ZU 7A/2008, item 126, the judgment of the Constitutional Tribunal of October 22, 2020, ref. K 1/20, OTK ZU A/2021, item 4.

153 Currently, Article 5.

154 Judgment of the Constitutional Tribunal of April 23, 2008, ref. SK 16/07, OTK-A 2008, No. 3, item 45; judgment available at: https://ipo.trybunal.gov.pl/ipo/Sprawa?sprawa=4611&dokument=986 (accessed: September 11, 2024).

155 Also in the revised version of the KEL, scheduled to come into force on January 1, 2025, it is stipulated in Article 39(1): when performing medical procedures on a pregnant woman, the doctor is simultaneously responsible for the health and life of the unborn child.

regulations, a human being in the prenatal stage of development essentially acquires the status of a patient, whose life and health the doctor must also take care of.

No less significant objections arise from the Guidelines' interpretation of Article 37 of the u.z.l., which assumes that if diagnostic or therapeutic doubts arise in a given situation, a physician may only consult with a competent specialist or organize a medical consortium. Meanwhile, the wording of the provision of Article 37 of the u.z.l. clearly stipulates that in the case of diagnostic or therapeutic doubts, the doctor, on his own initiative or at the request of the patient or the patient's legal representative, if he considers it justified in light of the requirements of medical knowledge, **should consult a competent specialist physician or organize a medical consilium**. This is a statutory order for a certain behavior of the doctor, for which he is responsible. The phrase "may" is not the same as "should." Since the provision explicitly states the doctor's duty, this should be understood to mean that in a situation of doubt **physician has a statutory duty to** to seek the opinion of a competent medical specialist or organize a medical consultation, while the Guidelines assume that a physician's action to obtain substantive support in a given doubtful situation constitutes a "deviation from the rule" (page 2 of the Guidelines).

Remaining in the sphere of duties, rights and freedoms of physicians, reservations should also be addressed to the interpretation of the issue of **of the physicians' conscience clause**, included in Article 39 of the u.z.l. The interpretation adopted by the Minister of Health, which assumes the "extraordinary" and "exceptional" nature of invoking the conscience clause by a doctor refusing to participate in a given medical action, contradicts the October 7, 2015 judgment of the full Constitutional Tribunal, ref. K 12/14[156] and earlier constitutional jurisprudence preceding the official codification of the conscience clause in statutory provisions (cf. CT ruling of January 15, 1991, ref. U 8/90, as well as the CT decision of October 7, 1992, ref. U 1/92). In the justification of the cited 2015 judgment, in particular, the Constitutional Tribunal stated that "it is indisputable that Article 39 of the u.z.l. does not create a privilege for a doctor, since the freedom of conscience of every human being is a primary and inalienable category, which constitutional law and international regulations only vouch for. Freedom of conscience – including that element of it which is conscientious objection – must therefore be respected regardless of whether there are statutory provisions affirming it."[157] The Tribunal also recalled that "acting in accordance with conscience in the case of physicians is not only an exercise of their constitutional freedom and the performance of a moral duty, but a statutory duty, arising from Article 4 of the u.z.l.in conjunction with Article 4 of the KEL."[158]

The Guidelines in question further express the view that "the so-called conscience clause is a right of the doctor only, it cannot be invoked by a medical entity" (page 6 of the Guidelines). This position, too, contradicts the interpretation made by the Constitutional Tribunal in the K 12/14 judgment cited above. In this judgment, citing **resolution 1763 of the Parliamentary Assembly of the Council of Europe of October 7, 2010 on the right to conscientious objection in legitimate medical care**, the Tribunal stated that "No person, hospital or institution shall be coerced, held liable or discriminated against in any manner because of a refusal to perform, accommodate, assist or submit to an abortion, the performance of a human miscarriage, or euthanasia or any act which could cause the death of a human foetus or embryo, for any reason. [...] the right to conscientious objection is very

156 Judgment available at: https://ipo.trybunal.gov.pl/ipo/Sprawa?sprawa=13434&dokument=13021 (accessed: September 6, 2024).
157 *Ibid.*
158 *Ibid.*

broad in both subject matter and scope, as it also includes medical providers other than individuals."[159] The Ministerial Guidelines, which questioned the freedom of conscience of a medical entity, did not provide any arguments to challenge the clear position expressed by the Constitutional Tribunal and the Parliamentary Assembly of the Council of Europe.

5. Possible violation of the right to health care

As already mentioned, addressees of the Health Minister's Guidelines are not legally obliged to apply them. On the other hand, the Guidelines include a reference, implicitly expressed, to the recently introduced changes within the annex to the decree of the Minister of Health of September 8, 2015 on the general terms and conditions of contracts for the provision of health care services,[160] according to which hospitals have been obliged to provide pregnancy termination services, regardless of the fact that a physician practicing in that hospital refrains from performing the service, in accordance with Article 39 of the u.z.l. (§ 3(6) of the annex to the decree). In the event of non-compliance with this obligation, the decree provides for a contractual penalty of up to 2% of the amount of the obligation under the contract with the National Health Fund (NFZ) for each detected violation (§ 30(1)(g) of the Annex). An additional even more severe sanction, provided for in §36.1(5b) of the annex to the decree, is the risk of contract termination by the NFZ in the event of a violation of the "obligation" to perform abortions. Thus, the cited legal solutions create a harsh sanction system, unjustified in light of the above-cited case law of the Constitutional Tribunal, provided for cases of refusal to provide "morally sensitive services," which may lead to a significant reduction in the availability and standard of medical services provided in hospitals. In particular, termination of a hospital's contract will reduce access to gynecological and obstetric services. Likewise, the application of financial sanctions will negatively affect the quality of services provided by the affected medical entities, as the deterioration of an hospital's financial condition will inevitably translate into the standard of medical care and negatively affect the quality of the services provided by this entity. This situation can lead to a disproportionate violation of everyone's constitutional right to health care and the right to equal access to health care services.

6. Summary

In Poland, abortion at a woman's request ("abortion on demand" remains illegal. The "medical indication model" adopted by the Polish legislator assumes that a termination of pregnancy can be carried out when it is justified by certain circumstances, including a threat to the mother's health. An attempt in July 2024 to legalize abortion on demand through a law failed, failing to get the required majority in the lower house of Parliament. In order to introduce de facto access to abortion on the basis of a woman's subjective feeling (and therefore "on request"), the Minister of Health unlawfully issued guidelines for doctors, in which she presented her own, anti-constitutional, interpretation of the regulations governing the termination of pregnancy, in particular regarding a woman's mental health. However, those guidelines were issued in violation of the principle of adherence to the law (Article 7 of the Constitution of the Republic of Poland) and present the rights, freedoms and duties

159 *Ibid.*
160 OJ 2023, item 1194, as amended.

of physicians performing abortions in a false light. Contrary to the government's narrative, these guidelines are not a source of law and do not create an obligation on the part of the addressees to apply them; on the contrary, they expose the implementing doctors to civil, criminal and disciplinary liability. However, adherence to the guidelines is to be enforced by a sanction system – through the use of an existing law in a way that provides for heavy financial penalties for hospitals that refuse to terminate pregnancies based on considerations concerning a woman's mental health. This may in turn lead to the violation of Polish citizens' constitutional rights to health care and to equal access to health services.

Łukasz Bernaciński

7. Issuance by the Minister of Education of a decree on the organization of religious instruction in school without the required consent of churches and other religious associations

Main theses:

- Education Minister Barbara Nowacka's actions since her first day in office have been aimed at, among other things, lowering the reputation of religion classes and discouraging students from attending them.

- Already on the day the government was sworn in, Minister Nowacka announced that the number of religious instruction lessons was going to be halved, this subject would no longer be taken into account in a student's average grade and would not appear on his or her school certificate, and religious instruction, which is not compulsory, would have to be scheduled by schools at the beginning or the end of the school day. In addition, the Minister of Education has attempted to allow schools to group students of different ages for religious instruction classes.

- Minister Nowacka, faced with the impossibility of reaching an agreement with churches and other religious associations, began to introduce legal changes without fulfilling this constitutional requirement.

- The Constitutional Tribunal, in a November 27, 2024 ruling, ruled that due to the lack of agreement with churches and other religious associations, the July 26 decree of the Minister of Education is unconstitutional in its entirety.

1. Introduction

One of the primary goals of the Minister of Education Barbara Nowacka is to combat religion in schools. This observation is supported by the fact that repeated initiatives have been taken in the past year resulting in the downgrading of the reputation of religion and ethics classes and the introduction of legal solutions to discourage students from attending these classes.

Already on the day Donald Tusk's government was sworn in, Barbara Nowacka announced that her goal would be to limit the number of hours of religious instruction in school, place them before or after compulsory classes, and not include the final year's grade in religion on a student's certificate.[161] On January 2, 2024, Secretary of State at the Ministry of Education Katarzyna Lubnauer confirmed that as of September 1, 2024, grades in religion will not count in a student's average grade.[162] On January 26, 2024, the Government Legislation Center's website published a draft decree on grading, classifying and promoting students and other participants in public schools, under which it was decided to abandon the inclusion in the average of annual or final grades of religion and ethics classifications.[163] Its rationale indicated that "since religion and ethics classes are not classes that a student is obliged to attend, it is unreasonable that the annual or final grade for these classes should affect the average of the grades obtained."[164] The decree of March 22, 2024 eventually came into effect on September 1, 2024.[165]

On the last day of April 2024, a draft decree of the Minister of Education amending the decree on the conditions and manner of organizing religious instruction in public kindergartens and schools appeared on the website of the Government Legislation Center.[166] The changes were to allow students attending religion or ethics classes to be combined into interdepartmental groups (including students at the same stage of education) or interclass groups (bringing together students from different stages of education).[167] Such practice violates Article 96 of the Law of December 14, 2016. – Education Law (OJ 2024, item 737, i.e.). The Decree of the Minister of Education dated July 26, 2024, amending the Decree on the conditions and manner of organizing religious instruction in public kindergartens and schools (OJ item 1158). The procedure for issuing the decree violated Article 25 (paragraphs 3-5 of the Polish Constitution), which sets the rules for the state's relations with religious communities in the Republic of Poland, because the minister did not reach an agreement with the religious communities concerned before issuing the decree, and this violates the constitutional principle of consensual regulation of state-church relations. Accordingly, on August 26, 2024, the First President of the Supreme Court filed a request with the Constitutional Tribunal to examine the constitutionality of the Decree of the Minister of Education,[168] asking the Constitutional Tribunal to issue a protective order.

161 *Nowacka on religious instruction lessons: Two hours is an exaggeration*, December 13, 2023, https://www.rmf24.pl/fakty/polska/news-nowacka-o-lekcjach-religii-dwie-godziny-to-jest-przesada,nId,7206792 (accessed: December 10, 2024).

162 *Deputy head of the Ministry of Education announces changes in schools. We would like them to come into force from September 1*, https://wiadomosci.radiozet.pl/Gosc-Radia-ZET/wiceszefowa-men-zapowiada-zmiany-w-szkolach-chcielibysmy-zeby-to-weszlo-od-1-wrzesnia (accessed: December 10, 2024).

163 For a broader commentary on the draft decree, see Ł. Bernaciński, K. Szymańska, *Assessment in religion is a natural consequence of organizing religious instruction by public schools*, https://ordoiuris.pl/wolnosc-religii-w-szkole/ocena-z-religii-stanowi-naturalna-konsekwencje-organizowania-nauczania (accessed: December 10, 2024).

164 Explanatory Memorandum to the Draft Decree of the Minister of Education Amending the Decree on the Grading, Classification and Promotion of Students and Other Participants in Public Schools, https://legislacja.rcl.gov.pl/projekt/12381254 (accessed: December 10, 2024).

165 Decree of the Minister of Education of March 22, 2024, amending the Decree on the Grading, Classification and Promotion of Students and Other Participants in Public Schools (OJ, item 438).

166 Draft Decree of the Minister of Education amending the Decree on the conditions and manner of organizing religious instruction in public kindergartens and schools, https://legislacja.rcl.gov.pl/projekt/12384702/katalog/13056500#13056500 (accessed: December 10, 2024).

167 For a broader commentary on the draft decree, see Ł. Bernaciński, M. Puzio, *Steps to take religion out of schools. Discriminatory project of the Ministry of Education*, https://ordoiuris.pl/komentarze/krok-do-wyrugowania-religii-ze-szkol-dyskryminujacy-projekt-ministerstwa-edukacji (accessed: December 10, 2024).

168 Contents of the proposal available (in Polish) at: https://www.sn.pl/sites/Serwis_WWW/SiteAssets/Lists/Wydarzenia/AllItems/Wniosek%20Pierwszego%20Prezesa%20Sądu%20Najwyższego%20do%20Trybunału%20Konstytucyjnego%20z%20dnia%2026%20sierpnia%202024%20r.%20BSA%20III.4011.1.2024.pdf (accessed: December 10, 2024).

2. Control of the constitutionality of the decree of July 26, 2024

The Constitutional Tribunal, by its decision of August 29 (ref. U 10/24),[169] granted the request of the First President of the Supreme Court, Małgorzata Manowska, suspending the application of the provisions of the decree of the Ministry of Education dated July 26, 2024. The following day, a communiqué was published on the website of the Ministry of Education, in which the Minister of Education "informs that the aforementioned protective order does not have any legal effect and the aforementioned decree was issued in accordance with the law and is generally effective as of September 1, 2024."[170]

The Constitutional Tribunal ruled on November 27, 2024 that the Minister of Education's decree of July 26, 2024, amending the decree on the conditions and manner of organizing religious instruction in public kindergartens and schools (OJ item 1158) is wholly inconsistent with Article 12(2) of the Law of September 7, 1991 on the educational system (OJ 2024, item 750, as amended) in connection with Article 92 (1) in connection with Article 25 (3) in connection with Article 2 and Article 7 of the Constitution of the Republic of Poland.[171] This means that the main reason for the unconstitutionality was the violation of the principle of adherence to the law and the principles of a democratic state of law by issuing a decree in violation of the constitutional requirement to agree on its content with the authorities of churches and other religious associations.

3. Draft decree of September 30, 2024 – Content in violation of the Constitution

On the first day of October 2024, a draft decree of the Minister of Education, amending the decree on the conditions and manner of organizing religious instruction in public kindergartens and schools in the version of September 30, 2024, was published on the website of the Government Legislation Center (number on the list of legislative works of the Minister of Education – 38).[172] This draft decree envisages limiting the number of religion classes to one per week and imposing an obligation on school principals to place religion or ethics classes before compulsory education classes or after those classes[173] on a given day starting in September 2025. In addition, the draft clarifies that the rules for organizing religious and ethics instruction in an interdepartmental group or interclass group will be applied to the organization of religious or ethics instruction in an interschool group or in an out-of-school catechism point. Thus, the draft extends the application of solutions from the July 26 decree, which was declared unconstitutional in its entirety by the Constitutional Tribunal.

The proposed § 8a provides for the imposition of an obligation to place religion and ethics lessons in the timetable either before or after the compulsory educational classes of the day. This constitutes a *de facto* obstruction of attendance of voluntary religious or ethics classes, and therefore amounts

169 The text of the decision is available at: https://www.sn.pl/sites/Serwis_WWW/SiteAssets/Lists/Wydarzenia/AllItems/postanowienie TK U 10-24.pdf (accessed: December 10, 2024).

170 The Minister of Education's position on the CT's protective order, https://www.gov.pl/web/edukacja/stanowisko-ministra-edukacji-ws-zabezpieczenia-tk (accessed: December 10, 2024).

171 See: https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/nauka-religii-w-publicznych-przedszkolach-i-szkolach-4 (accessed: December 10, 2024).

172 Decree of the Minister of Education amending the decree on the conditions and manner of organizing religious instruction in public kindergartens and schools, available at https://legislacja.rcl.gov.pl/projekt/12390003 (accessed: December 10, 2024).

173 This follows from the proposed § 8a of the decree, which refers to the compulsory classes listed in Article 109(1)(1) of the Law of December 16, 2016. – Education Law (OJ 2024, item 737, as amended).

to a violation of the constitutional right to education.[174] In the case of religious instruction, this also constitutes a violation of the freedom of religion manifested, among other things, in the freedom to teach it as a school subject.[175] As the Constitutional Tribunal pointed out, "religious instruction is, by the standards of a modern democratic state, one of the elements of freedom of religion, which is one of the essential manifestations of the idea of individual freedom in a democratic society."[176] Obstructing students from attending religion or ethics classes therefore also violates the principle of a democratic state of law as expressed in Article 2 of the Polish Constitution. It also violates the right of parents to raise their children according to their own beliefs (Article 48(1) of the Polish Constitution), including in the sphere of moral and religious teaching and upbringing.[177] In addition, the entry into force of the legislation in question will also mean discrimination against students wishing to attend religion or ethics classes and parents wishing to provide their children with an education that includes their system of values. Meanwhile, according to Article 32 of the Polish Constitution, everyone is equal before the law. All persons shall have the right to equal treatment by public authorities (paragraph 1). No one shall be discriminated against in political, social or economic life for any reason whatsoever (paragraph 2). The rigid order to place religious instruction before or after compulsory educational classes, in addition with the possibility of so-called "windows" between them, also raises reasonable doubts about its compliance with Article 12(1) of the Concordat,[178] according to which religious instruction is organized as part of the school and kindergarten timetable. Moreover, the proposed amendments must be considered contrary to Article 31(3) in conjunction with Article 53(5) of the Constitution of the Republic of Poland, because they take the form of a decree, i.e., a sub-statutory act. Furthermore, they are neither necessary nor implement the prerequisites that form the basis for the possibility of restricting freedom of religious instruction described in the aforementioned provisions, and therefore do not implement the constitutional requirements for lawful restrictions on human freedoms and rights.[179]

4. Draft decree of September 30, 2024 – Procedural notes

The order to place religious instruction before or after compulsory education classes and the limitation on the number of religious instruction lessons represents a significant change in the conditions and manner in which public kindergartens and elementary schools organize religious instruction. Carrying out such changes requires the state authorities to reach an agreement "with the authorities of the Catholic Church and the Polish Autocephalous Orthodox Church and other churches and religious associations," which follows directly from Article 12(2) of the Law on the Education System.[180] In doing so, this agreement must not be understood as an opportunity for representatives of churches and other religious associations to take a non-binding position, but requires a consensus to be reached

174 Cf. Article 70 (1) first sentence and (4) first sentence of the Polish Constitution.

175 Cf. Article 53 (1) and (4) of the Polish Constitution.

176 Judgment of the Constitutional Tribunal of December 2, 2009, ref. U 10/07.

177 Cf. Article 53(3) of the Constitution of the Republic of Poland, Article 2 of Protocol No. 1 of March 20, 1952 to the Convention for the Protection of Human Rights and Fundamental Freedoms of November 4, 1950 (OJ 1995, No. 36, item 175), hereinafter referred to as: Protocol No. 1; Article 18(4) of the International Covenant on Civil and Political Rights, opened for signature in New York on December 19, 1966 (OJ 1977 No. 38, item 167); Article 14(3) of the Charter of Fundamental Rights of the European Union (OJ EU C 83, p. 389).

178 Concordat between the Holy See and the Republic of Poland of July 28, 1993 (OJ 1998 No. 51, item 318).

179 For a broader discussion, see Ł. Bernaciński, *Comments on the draft decree of the Minister of Education amending the decree on the conditions and manner of organizing religious instruction in public kindergartens and schools*, https://ordoiuris.pl/wolnosc-religii-w-szkole/uwagi-do-projektu-rozporzadzenia-ministra-edukacji-zmieniajacego-0 (accessed: December 10, 2024)..

180 Law of September 7, 1991 on the educational system (OJ 2024, item 750, as amended).

among the parties involved. Therefore, it is not allowed in Poland to base changes in the law in this area only based on the knowledge of the opinion of the church party.[181]

In light of the Constitutional Tribunal's jurisprudence, "the elements of the reconciliation process are: 1) the obligation of the lawmaking body to provide information on the draft lawmaking decision; 2) the establishment of a deadline for the presentation of the position; 3) the discussion of the substantive content of this draft; 4) the possibility of presenting different positions, attempts to unify them and align them with the expectations of the partners in this discussion; 5) the development of a final, if possible common and optimal, law-making decision; 6) memoranda of agreement and memoranda of divergence in the event that divergent positions on the content of the act are maintained; 7) justification of the need to adopt the drafters' version in the event of divergence as to the content of solutions."[182] The elements indicated are universal and should also be applied to the co-participation of religious communities in the creation of laws concerning the state's relations with these entities.

The requirement for the state to come to an agreement with churches and other religious associations is a consequence of the recognition of the autonomy and independence of churches and other religious associations, as well as the principle of cooperation for the individual and the common good (Article 25(3) of the Constitution of the Republic of Poland) and the special position and function of these entities in a democratic society,[183] which is confirmed by the wording of the provisions of Chapter I of the Polish Constitution (only with religious communities does the state regulate its relations). The unique constitutional position of religious communities also justifies a special understanding of the term "in consultation" as limiting the powers, in this case, of the Minister of Education by obliging him to consensually interact with religious communities in the law-making process.[184] At the international legal level, an additional guarantee of the systemic mode of regulating the state's relations with the Catholic Church is provided by Article 27 of the Concordat, which states that matters requiring new or additional solutions will be regulated by new agreements between the Contracting Parties or arrangements between the Government of the Republic of Poland and the Polish Bishops' Conference authorized by the Holy See.

According to the Communiqué of the Commission for Catholic Education of the Polish Bishops' Conference following the meeting of the Polish Bishops' Conference's Working Group for Contacts with the Government of the Republic of Poland on Religion Lessons at School with representatives of the Ministry of Education on October 9, 2024, the church side presented its objections and doubts relating to the draft decree and the changes proposed by the Minister of Education.[185] The lack of agreement is emphatically confirmed by the communiqué of December 9, 2024, in which the church side

181 Cf. D. Walencik, *Formalnoprawne uwarunkowania stanowienia regulacji prawnych dotyczących finansowania związków wyznaniowych w Rzeczypospolitej Polskiej*, [in:] *Finansowanie Kościołów i innych związków wyznaniowych*, ed. P. Sobczyk, K. Warchałowski, Warsaw 2013, p. 40.

182 Judgment of the Constitutional Tribunal of June 27, 2013, ref. K 12/10.

183 Ł. Bernaciński, *Civic tax write-off as a potential source of funding for churches and other religious associations in Poland. A legal and denominational perspective*, p. 92. Text of the defended dissertation available (in Polish) at: https://www.bip.uni.lodz.pl/stopnie-naukowe/przewody-doktorskie-postepowania-w-sprawie-nadania-stopnia-doktora/mgr-lukasz-bernacinski, (accessed: 10/12/2024).

184 Cf. P. Stanisz, D. Walencik, *Tryb nowelizacji rozporządzenia Ministra Edukacji Narodowej z dnia 14 kwietnia 1992 r. w sprawie warunków i sposobu organizowania nauki religii w publicznych przedszkolach i szkołach*, "Studia z Prawa Wyznaniowego" 2024, https://doi.org/10.31743/spw.17760.

185 *Communiqué following the meeting of the Working Group on Contact with the Government of Poland*, Opoka.news, https://opoka.news/komunikat-po-spotkaniu-zespolu-roboczego-ds-kontaktow-z-rzadem-rp (accessed: December 10, 2024).

expresses its disapproval of the government side's rejection of its proposals and the failure to reach an agreement.[186]

5. Summary

Education Minister Barbara Nowacka's actions since her first day in office have been aimed at, among other things, lowering the reputation of religion classes and discouraging students from attending them. This is a product of the minister's personal worldview (she belongs to the left-wing party Inicjatywa Polska, and comes from the extreme liberal-left party Twój Ruch, which has a social-liberal and anticlerical profile) and the legal impossibility of completely abolishing a school subject such as religion.

Minister Nowacka, faced with the impossibility of reaching an agreement with churches and other religious associations, began to introduce legal changes without fulfilling this constitutional requirement. It was not until the Constitutional Tribunal's ruling of November 27, 2024 and Poland's presidential pre-campaign period that further changes were slowed down, and dialogue with churches and other religious associations, especially the Catholic Church, started being conducted in a formally correct manner. However, this does not mean that the parties are getting any closer to reaching an agreement, and the expectations of the leftist electorate could lead to further unlawful actions by Poland's education minister. It should therefore be emphasized that making further changes without the agreement required by the law and the Concordat between the government and church parties on changes to the organization of religious instruction lessons will constitute another constitutional tort.

186 *Communiqué from the Church side following the meeting of the Joint Commission of Representatives of the Government of the Republic of Poland and the Polish Bishops' Conference*, https://episkopat.pl/doc/222048.Komunikat-strony-koscielnej-z-posiedzenia-Komisji-Wspolnej (accessed: December 10, 2024).

Nikodem Bernaciak

8. Violation of the constitutional freedom of assembly and association against the Independence March

Main theses:

- Article 57 of the Polish Constitution guarantees everyone the freedom to organize and participate in peaceful assemblies.
- For months, the actions of politicians from the coalition that has been governing in Poland since December 13, 2023, that is, first and foremost, Justice Minister Adam Bodnar, the Governor of Mazovia Mariusz Frankowski, Interior Minister Tomasz Siemoniak, and Warsaw's Mayor Rafał Trzaskowski – whether acting personally or through officers subordinate to them – aimed at unduly restricting the constitutional freedom of assembly of the organizers and participants of the largest Polish (and European) patriotic demonstration of the 21st century, Warsaw's yearly Independence March.
- These actions were in line with the demands formulated for the March by Adam Bodnar when he was still Poland's Commissioner for Human Rights.
- Currently, freedom of assembly and freedom of association in Poland after December 13, 2023 are not guaranteed by default, as the Polish Constitution would have it, but selectively, and entities that ideologically disagree with representatives of the ruling camp are sometimes forced to engage in months-long struggles to secure these freedoms.

1. The Independence March – the largest patriotic demonstration of the 21st century in Europe

This largest Polish patriotic manifestation of the 21st century takes place every year in Warsaw on November 11 – National Independence Day, commemorating the anniversary of the end of World War I in Europe and the culmination of Poland's regaining of independence after 123 years of partition. The first anniversary demonstration of this type took place on November 11, 2006. Since 2010, after the Smolensk air disaster and the involvement of a much larger number

of patriotic and right-wing entities in its organization, it has become a mass demonstration with tens of thousands to hundreds of thousands of participants, often going there with entire families.

2. Resumption of proceedings against organizers of 2017 Independence March after 7 years

The Independence March was also held on November 11, 2017, the 99th anniversary of Poland's independence. Three days later, on November 14, Adam Bodnar, who is now Poland's Justice Minister but was Commissioner for Human Rights at the time, reacted to the march,[187] sending a letter to the Regional Public Prosecutor in Warsaw, in which he stated that the Independence March allegedly featured "slogans and symbols of a racist nature, presented in the course of the gathering by some of its participants",[188] which, in his opinion, could constitute features of a crime under Article 256 § 1 of the Criminal Code,[189] in connection with which he requested the submission of information on the status of the prosecution's case, pursuant to Article 13(1)(3) of the Act on the Commissioner for Human Rights.[190] With an analogous inquiry, the then CHR addressed the Commander of the Warsaw Metropolitan Police.[191] On April 26, 2018, the CHR, in turn, reported that "the prosecutor's office has appointed an expert to issue an opinion on determining the full and real meaning of the symbols and slogans presented during the Independence March and their possible connection with fascism or another totalitarian state system, taking into account the context, place and time of their presentation."[192] In June 2018. The CHR also conveyed that "in response to the CHR's request to draw consequences against the officers, the Commander in Chief wrote back on May 25, 2018 that the subordinate departments had made the relevant findings and analyses. They show that the response of the police in terms of actions against participants in the Independence March was in accordance with the adopted tactics, resulting from planned actions."[193] A decision of the Public Prosecutor of the Regional Prosecutor's Office in Warsaw dated December 20, 2019. (ref. PO I Ds.292.2017) discontinued the investigation in this case, but the CHR filed a complaint against this decision.[194]

Over four years later, Adam Bodnar, already as Justice Minister and Prosecutor General, announced on May 14, 2024, that he had "commissioned, among other things, a study into the legitimacy of substantive decisions made in dozens of cases involving the possibility of crimes against and by participants in marches organized by socially active organizations between 2016 and 2023. The survey covered marches organized by the Committee for the Defense of Democracy or the All-Poland Women's Strike, but also the 2017 Independence March. [...] A lack of justification for the decision to discontinue the proceedings, as well as errors in the due process of the proceedings were also found in

187 *What the Celtic cross and the black sun mean – CHR analysis for the Regional Prosecutor's Office after the November 11, 2017 demonstration in Warsaw*, November 15, 2017, https://bip.brpo.gov.pl/pl/content/krzyz-celtycki-i-czarne-slonce-analiza-rpo-dla-prokuratury-po-demonstracji-11-11-2017 (accessed: December 10, 2024).

188 Letter from the Commissioner for Human Rights to the Regional Prosecutor in Warsaw dated November 14, 2017, ref. XI.518.90.2017.MS, https://bip.brpo.gov.pl/sites/default/files/RPO%20do%20Prokuratury%20Okr%C4%99gowej%20%20w%20sprawie%20hase%C5%82%20i%20transparent%C3%B3w%20-11.11.17.pdf (accessed: December 10, 2024).

189 Law of June 6, 1997 – Criminal Code, consolidated text: OJ 2024, item 17.

190 Act of July 15, 1987 on the Commissioner for Human Rights, consolidated text: OJ 2024, item 1264.

191 *CHR asks police about racist slogans at "Independence March" and intervention against anti-fascist picket on November 11*, November 14, 2017, https://bip.brpo.gov.pl/pl/content/rpo-pyta-policje-o-hasla-rasistowskie-na-marszu-niepodleglosci-i-interwencję-wobec-pikiety-antyfaszystowskiej (accessed: December 10, 2024).

192 *CHR: On November 11, 2017, police officers violated civil rights and freedoms*, April 26, 2018, https://bip.brpo.gov.pl/pl/content/rpo-11-listopada-2017-r-policjanci-naruszyli-prawa-i-wolnosci-obywatelskie (accessed: December 10, 2024).

193 *Police should respond immediately to racist and fascist slogans and symbols – they must also be aware of them*, June 12, 2018, https://bip.brpo.gov.pl/pl/content/policja-powinna-niezwlocznie-reagowac-na-hasla-i-symbole-rasistowskie-i-faszystowskie-musi-tez-je-znac (accessed: December 10, 2024).

194 *Investigation into the promotion of totalitarianism and incitement to hatred during the 2017 Independence March has been discontinued. CHR lodges appeal*, January 13, 2020, https://bip.brpo.gov.pl/pl/content/rpo-chce-ponownego-sledztwa-ws-incydentow-na-marszu-niepodległosci-2017 (accessed: December 10, 2024).

the discontinued case concerning public propagation of a totalitarian state system by the organizer and participants of the Independence March in 2017."[195] On May 21, the Independence March Association] issued a statement saying that "Adam Bodnar's decision is scandalous and motivated by resentment against manifestations of Polishness and patriotism, so alien to the current left-liberal government," and that "the resumption of proceedings is unjustified" because both the organizer of the Independence March and its participants "are alien to the concepts of a totalitarian system."[196]

3. Searches and forcible entry into the headquarters of the organizers of the 2018 Independence March – Violation of Article 224 of the Code of Criminal Procedure

Also after the 2018 Independence March. Adam Bodnar's main focus as CHR was to seek out at all costs and expose marginal incidents that did not actually impinge on the entirety of the march of several hundred thousand people. On November 13, he asked "what steps have been taken to prevent the participation in the march of people associated with organizations that propagate a totalitarian state system and preach hatred on ethnic, racial or religious grounds."[197] The Warsaw Regional Prosecutor's Office opened an investigation into the case on January 4, 2019,[198] but it was discontinued on May 14, 2020, for lack of finding of features of a crime. After more than 4 years, on September 4, 2024, the Warsaw-Praga Regional Prosecutor's Office, which is subordinate to Adam Bodnar – already in his capacity as Prosecutor General – reported that "the investigation revealed, among other things, a video in which one of the marchers directs a criminal threat of violence against another person. The perpetrator's attire and behavior indicate his affiliation with the Guard of the Independence March," and "after the investigation was reactivated in 2024, it was determined that the Independence March website operated an electronic form for reporting to serve in the guard – so volunteer data must have been collected. In view of the above, the prosecutor, in order to detect the perpetrator, ordered the Headquarters of the Warsaw Metropolitan Police to search and secure documents and electronic data storage media at the disposal of the organizers of the 2018 Independence March."[199]

On September 4, 2024, at 06:00 in the morning, police officers reporting to Minister of the Interior and Administration Tomasz Siemoniak appeared with prosecutorial search warrants at the residences of Independence March Association board member Matthew Marzoch and former chairman Robert Bąkiewicz. The officers also summoned the association's current chairman, Bartosz Malewski, to appear within an hour for questioning, during which he was informed of the prosecutor's decision to forcibly enter the association's headquarters. The chairman made his way to the headquarters, where the commander in charge of the police action, when asked if the owner of the premises, which is the Przemysł II Association, had been informed of the whole affair, replied that it was enough that he

195 *Review of proceedings on the possibility of committing crimes against and by participants in marches organized by social organizations active in the period from 2016 to 2023*, May 14, 2024, https://www.gov.pl/web/prokuratura-krajowa/przeglad-postepowan-dotyczacych-mozliwosci-popelnienia-przestepstw-na-szkode-i-przez-uczestnikow-marszow-organizowanych-przez-organizacje-spoleczne-aktywne-w-latach-2016--2023 (accessed: December 10, 2024).

196 D. Drozd, *Adam Bodnar accuses the Independence March of promoting "Nazism." Association issues statement*, May, 24, 2024, https://narodowcy.net/adam-bodnar-zarzuca-marszowi-niepodleglosci-promowanie-nazizmu-stowarzyszenie-wydalo-oswiadczenie/. Cf. 21/05/2024, https://x.com/StowMarszN/status/1792919488037376436 (accessed: December 10, 2024).

197 *CHR takes action after incidents during Independence Day celebrations*, November 13, 2018, https://bip.brpo.gov.pl/pl/content/rpo-podejmuje-dzialania-po-incydentach-podczas-obchodow-swieta-niepodleglosci (accessed: December 10, 2024).

198 *Search of Robert Bąkiewicz's house. Prosecutor's office comments [NEWS]*, September 4, 2024, https://www.pap.pl/aktualnosci/przeszukanie-domu-roberta-bakiewicza-prokuratura-komentuje-nowe-informacje (accessed: December 10, 2024).

199 *Announcement on searches at organizers of Independence March*, September 4, 2024, https://www.gov.pl/web/po-warszawa-praga/komunikat-w-sprawie-przeszukan-w-sledztwie-3042-1ds762024 (accessed: December 10, 2024).

informed the building administrator. Nor were the other social organizations that are based there or use the premises notified of the police's actions. None of the representatives of these organizations were allowed to participate in these activities. Immediately prior to forcibly proceeding with the drilling of the locks, contrary to earlier assurances as to the possession and serving of an order from the Regional Prosecutor's Office granting a search warrant for the premises, no such document was served. Eventually, entry to the premises was gained forcibly, as the person who held the keys to the premises was not in Warsaw that day.

The locks inside the premises to the recording studio and storage room were broken, despite a clear indication that the rooms in question did not contain materials that the police would be looking for. A folder titled "Training Materials" and 4 laptops owned by the Independence March Association were seized, as well as a cell phone and a desktop computer, which representatives of the Independence March Association clearly indicated were not owned by the organization, as it did not possess any such devices.

Article 224 § 1 of the Code of Criminal Procedure[200] clearly indicates that a person on whose premises the search is to be conducted shall be notified before the commencement of the search of its objective and summoned to surrender the objects sought, but this was not done. "Searching and seizing objects shall be conducted in accordance with the objective of the action, with moderation and respect for the dignity of the persons to whom the action relates, and without unnecessary damage or hardship. The search of the Association's headquarters was a completely disproportionate action, with items significantly beyond the subject matter of the investigation being demanded and secured. This type of action, in our view, violates the constitutional freedom of assembly and association guaranteed by Articles 57 and 58 of the Polish Constitution" – pointed out President Malewski's attorney, Adv. Magdalena Majkowska.[201] In the end, the Independence March Association filed a complaint against the order to search and seize items and the manner in which the action was carried out.[202] On November 20, however, it was reported that the District Court for Warsaw-Prague North in Warsaw did not uphold any of the complaints.[203]

4. Refusal by the Mazovia governor to grant the 2024 Independence March the status of a cyclical assembly and maneuverings by Warsaw Mayor Rafał Trzaskowski

On November 17, 2017 Adam Bodnar, in his capacity as CHR at the time, expressed an opinion in which, with regard to the Independence March, he "expressed doubt as to whether, in light of Article 57 of the Polish Constitution and the provisions of the Law on Assemblies, permission to hold a cyclical assembly for the next three years should be upheld."[204] On December 29, the Governor of Mazovia at the time concluded that none of the statutory grounds for a possible ban on the assembly

200 Law of June 6, 1997 – Code of Criminal Procedure, consolidated text: OJ 2024, item 37.

201 *Warsaw's yearly Independence March, by far Europe's biggest patriotic march, is under attack from Tusk's left-liberal government*, September 24, 2024, https://en.ordoiuris.pl/civil-liberties/warsaws-yearly-independence-march-far-europes-biggest-patriotic-march-under-attack (accessed: December 10, 2024).

202 *Association of the March for Independence files complaint about the intrusion of law enforcement agencies into its premises]*, September 12, 2024, https://ordoiuris.pl/wolnosci-obywatelskie/stowarzyszenie-marsz-niepodleglosci-sklada-zazalenie-na-wtargniecie-sluzb-do-lokalu (accessed: December 10, 2024).

203 *Information on examination of complaints regarding searches in the investigation of the case concerning Independence March*, November 20, 2024, https://www.gov.pl/web/po-warszawa-praga/informacja-o-rozpoznaniu-zazalen-na-przeszukania-w-sledztwie-dot-marszu-niepodleglosci (accessed: December 10, 2024).

204 *CHR doubts whether governor should uphold approval for annual Independence March until 2020*, November 17, 2017, https://bip.brpo.gov.pl/pl/content/rpo-ma-watpliwosci-czy-wojewoda-powinien-podtrzymac-zgode-na-coroczny-marsz-niepodleglosci-do-2020-r (accessed: December 10, 2024).

existed.[205] Six years later, on December 11, 2023, the Independence March Association submitted an application under Article 26a of the Law on Assemblies for approval to hold cyclical assemblies on November 11 in 2024-2026. De facto, it was a matter of extending this status for the next statutory period, as the Independence March already had this status for 2021-2023.

However, in response to the application, the new Governor of Mazovia – Mariusz Frankowski, who has been affiliated with PM Donald Tusk's Civic Platform party since 2014 – issued a decision of refusal on January 31, 2024, on the grounds that, in his opinion, the Association was not responsible for the organization of the 2021 Independence March. In fact, the Association was then responsible for all the practical organizational aspects that ensured that the march, like every year, went smoothly and peacefully. Only formally was the organizer at the time exceptionally a public authority – the Office for War Veterans and Victims of Repression, which, however, chose a different place for the end of its march, so that it cannot be identified with the Independence March.[206] On February 2, the Regional Court reversed the governor's decision.[207] Then on February 4 the Court of Appeals reversed the Regional Court's decision.[208] On February 6 the Regional Court again revoked the governor's decision,[209] and on February 8 the Court of Appeals again revoked the decision of the court of first instance,[210] this time validly upholding the decision of the governor in force.[211] On June 25, after the local and European Parliament elections, the Independence March Association resubmitted its application, but on July 2 the Mazovia governor again issued a decision of refusal, and then on July 4 the Regional Court dismissed the Association's appeal. Finally, on July 6 the Court of Appeals dismissed the complaint against the decision of the court of first instance.[212]

Finally, due to the confrontational attitude of the governor, the Independence March Association filed a notice within the statutory deadline to hold a regular, non-cyclical assembly covering November 11. The organizers were forced to report as many as six gatherings because Warsaw Mayor Rafał Trzaskowski, vice-chairman of PM Donald Tusk's Civic Platform, did not post information about any of the gatherings in the Public Information Bulletin, which gave no assurance that the demonstrations could take place. At the same time, the organizers of the March wanted to avoid a situation in which someone else would report a gathering at the same place and time in order to prevent the March participants from passing through the streets of Warsaw. Trzaskowski on October 14 issued a decision of refusal,[213] arguing that the Association's actions were aimed at gaining an "advantage" over other gatherings that could possibly take place in Warsaw at that time, which would supposedly "limit the constitutional freedom" of the organizers of those demonstrations. The organization of the Independence March would also allegedly lead to "traffic paralysis" and create "a real threat to the safety of people in other areas and regions of Warsaw." The Mayor also stated that "holding these gatherings in the manner specified by the organizer may endanger the life or health of people or property of significant size."

205 Letter from the Governor of Mazovia to the Commissioner for Human Rights dated December 29, 2017, ref. WSO-I.6110.20.2017, https://bip.brpo.gov.pl/sites/default/files/Odpowiedź Wojewody Mazowieckiego na wystąpienie RPO.pdf (accessed: December 10, 2024).

206 *The battle for the Independence March continues. Appeals court strikes down freedom of assembly*, February 9, 2024, https://ordoiuris.pl/komentarze/trwa-walka-o-marsz-niepodleglosci-sad-apelacyjny-uderza-w-wolnosc-zgromadzen (accessed: December 10, 2024).

207 Order of the Regional Court of Warsaw dated February 2, 2024, ref. III Ns 18/24.

208 Decision of the Court of Appeals in Warsaw of February 4, 2024, ref. I ACz 223/24.

209 Order of the Regional Court of Warsaw dated February 6, 2024, ref. III Ns 19/24.

210 Decision of the Court of Appeals in Warsaw of February 8, 2024, ref. VI ACz 361/24.

211 *Decision on the organization of the cyclical assembly on November 11*, 09/02/2024, https://www.gov.pl/web/uw-mazowiecki/decyzja-ws-organizacji-cyklicznego-zgromadzenia-11-listopada (accessed: December 10, 2024).

212 *Governor of Mazovia strikes at freedom of assembly and once again denies status of cyclical assembly to Independence March*, July 12, 2024, https://ordoiuris.pl/wolnosci-obywatelskie/wojewoda-mazowiecki-uderza-w-wolnosc-zgromadzen-i-kolejny-raz-odmawia (accessed: December 10, 2024).

213 Decision of the Mayor of the City of of Warsaw dated October 14, 2024, No. WV/5310/ZG/5/2024.

Lawyers of the Ordo Iuris Institute, representing the Association, pointed out in the appeal that Mayor Rafał Trzaskowski, contrary to the regulations in force in Poland, did not allow the Independence March Association to actually participate in the administrative proceedings, and he did not inform it of his intention to close the investigation, thereby preventing it from taking a position and referring to the opinions obtained by the Mayor. He also failed to hold an administrative hearing on the matter, during which the authority could clarify any doubts, if, in his opinion, there were any. According to Ordo Iuris, the Warsaw Mayor's action was incompatible with Article 32 (1) and (2) of the Polish Constitution. By his actions, Rafał Trzaskowski commited discrimination and violation of the right to equal treatment of the organizer of demonstrations and their participants on the basis of his personal worldview and political opinions.[214]

On October 16, the Regional Court in Warsaw dismissed the appeal filed by the Association's attorneys.[215] However, it conceded to them that the Law on Assemblies does not preclude the organization of multi-day gatherings, and, consequently, the Association met the statutory deadline for filing a notice of demonstrations. But the court agreed with the Mayor's position that the Independence March would entail a significant threat to human life and health and to property. Lawyers of the Ordo Iuris Institute filed a complaint in this case with the Court of Appeals in Warsaw, which upheld the position of the Regional Court.[216] Ordo Iuris, together with the Independence March Association, also prepared a petition to stop unlawful attacks on the March. Finally, in late October, the Mayor of Warsaw, having come under public pressure, published in the Public Information Bulletin a notice regarding the November 11 assembly.[217] Only thanks to mass public action was the Independence March able to go ahead in full compliance with state laws. The course of the march was peaceful, and by arousing a public attitude of contrariness toward Civic Platform (PO) politicians fighting the March, it also proved to be a victory in terms of turnout, mobilizing some 250,000 people.[218]

5. Summary

Article 57 of the Polish Constitution stipulates that "the freedom of peaceful assembly and participation in such assemblies shall be ensured to everyone," and Article 58(1) stipulates that "the freedom of association shall be guaranteed to everyone."[219] The Independence March Association's chairman, Bartosz Malewski, pointed out that "no one cares more than us – the organizers of the Independence March – that Independence Day is a day celebrated with dignity and that the course of the event is peaceful and safe."[220] Meanwhile, the actions of politicians from the coalition that has been governing in Poland since December 13, 2023, that is, first and foremost, Justice Minister Adam Bodnar, the Governor of Mazovia Mariusz Frankowski, Interior Minister Tomasz Siemoniak, and Warsaw's Mayor Rafał Trzaskowski – whether acting personally or through officers subordinate to them – aimed at unduly restricting the constitutional freedom of assembly of the organizers and participants of the

214 *Poland's ruling left-liberal coalition bans Europe's largest patriotic march*, October 18, 2024, https://en.ordoiuris.pl/civil-liberties/polands-ruling-left-liberal-coalition-bans-europes-largest-patriotic-march (accessed: 10/12/2024).

215 Order of the Regional Court of Warsaw dated October 16, 2024, ref. II Ns 44/24.

216 Decision of the Court of Appeals in Warsaw dated October 18, 2024, ref. V ACz 2422/24.

217 *Greenlight for Poland's Independence March as Warsaw mayor bows to pressure*, October 28, 2024, https://en.ordoiuris.pl/civil-liberties/greenlight-polands-independence-march-warsaw-mayor-bows-pressure (accessed: December 10, 2024).

218 *Safely and in numbers – 15th Independence March passes through the streets of Warsaw. Ordo Iuris observers' report*, November 18, 2024, https://ordoiuris.pl/wolnosci-obywatelskie/liczny-i-bezpieczny-15-marsz-niepodleglosci-przeszedl-ulicami-warszawy (accessed: December 10, 2024).

219 Constitution of the Republic of Poland of April 2, 1997 (OJ 1997 No. 78, item 483, as amended).

220 *Bartosz Malewski: Independence March Association on the front lines of the fight for freedom of assembly*, October 19, 2024, https://ordoiuris.pl/komentarze/bartosz-malewski-stowarzyszenie-marsz-niepodleglosci-na-froncie-walki-o-wolnosc (accessed: December 10, 2024).

largest Polish and European patriotic demonstration of the 21st century, Warsaw's yearly Independence March. These actions were surprisingly in line with the demands formulated for the March by current Justice Minister Adam Bodnar when he was still Poland's Commissioner for Human Rights. This leads us to believe that trying to make the Independence March as difficult as possible may have been a matter of personal satisfaction for him. In the end, Rafał Trzaskowski bowed to enormous public pressure, and the 2024 Independence March went ahead legally, without controversy, mobilizing as many as a quarter of a million Poles. Nonetheless, the course of events described above shows that freedom of assembly and freedom of association in Poland after December 13, 2023 are not guaranteed by default, as they would be under the Constitution, but selectively, and entities that ideologically disagree with representatives of the ruling camp are sometimes forced to undertake a months-long struggle to secure these freedoms.

Bartosz Zalewski

9. Inadmissibility of revocation of countersignature by the Prime Minister

Main theses:

- The Prime Minister's signature on the official act of the President of the Republic (countersignature) is an act whose effects cannot be rescinded.
- However, a complaint was filed against his countersignature in one very specific case in order to create a seemingly legal justification for its withdrawal.
- The indirect effect was to create a legal ploy to circumvent the law and, in effect, allow a Polish prime minister to abrogate his own responsibility.
- The alleged revocation of the Prime Minister's countersignature was yet another example of his violations of constitutional provisions.

1. Introductory remarks

Among the numerous actions of Donald Tusk's government that raise legal questions, the question of the permissibility of rescinding the countersignature of the Prime Minister given under acts of the President of the Republic of Poland has been particularly controversial. The issue arose in connection with the Presidential Decision of August 17, 2024, No. 1131.18.2024 on the appointment of the chairman of the assembly of judges of the Civil Chamber of the Supreme Court. It was published in the Monitor Polski with a note on the signatures of the President and the Prime Minister.[221] In it, President Andrzej Duda appointed Krzysztof Wesołowski, unrecognized by some of the judges of the Supreme Court's Civil Chamber (because of his appointment based on a proposal by the reformed National Council of the Judiciary – see chapter on the National Council of the Judiciary for an explanation), as chairman of the assembly, and Donald Tusk countersigned the act, which drew criticism from parts of the legal community, as well as the left-liberal media. The Prime Minister initially did not speak publicly on the issue, and later claimed that he had signed under the influence of an error

221 Monitor Polski – Official Gazette of the Republic of Poland, August 27, 2024, item 799.

by an official of his chancellery who "failed to see the politicality" of the ¨President's decision. At the time, Donald Tusk still admitted that the signature could not be "undone" or "rescinded."[222]

The situation changed when two judges of the Civil Chamber of the Supreme Court – Dariusz Zawistowski and Karol Weitz – decided to challenge the President's decision. To this end, they filed two complaints with the Regional Administrative Court. One concerned the decision itself, while the other concerned only countersignature.[223] Finally, on a social media site, Prime Minister Donald Tusk stated that he had "decided to rescind the countersignature" he had made under President Andrzej Duda's decision to appoint the chairman of the assembly of judges of the Supreme Court's Civil Chamber.[224] This was to happen within the framework of a "self-audit." As Minister of Justice Adam Bodnar maintained, the Prime Minister made "a decision to rescind the countersignature" under "probably Article 54 of the Law on Proceedings before Administrative Courts."[225] This provision stipulates, among other things, that the authority whose action, inaction or protracted conduct of proceedings has been challenged may, within the scope of its jurisdiction, respond positively to the complaint in full within thirty days from the date of its receipt.

2. The problem of admissibility of a complaint to the administrative court against an official act of the President of the Republic

The first problematic issue is the admissibility of filing a complaint with the Regional Administrative Court against the decision of the President of the Republic of Poland on the appointment of the chairman of the assembly of judges of the Civil Chamber of the Supreme Court. Such an order, as already mentioned, is an "official act." It is based on the provisions of the Polish Constitution and the Law on the Supreme Court. In the Polish political system, the President has relatively broad powers. These include, among other things, the right to issue official acts, as stipulated in Article 144(1) of the Polish Constitution. From a systemic point of view, these acts can be divided into two groups – presidential prerogatives and countersigned official acts. While the President's prerogatives are strictly defined (thirty such prerogatives are listed in Article 144(3) of the Polish Constitution), countersignature is required for all official acts of the President not classified by the Constitution as prerogatives.[226]

The latter category of official acts includes the President's decision to appoint the chairman of the assembly of judges of the various chambers of the Supreme Court. This competence derives directly from the provisions of the Law on the Supreme Court. Although this law does not mention the powers of the Prime Minister, it is clear from the constitutional regulations that such a provision requires the countersignature of the Prime Minister. Indeed, Article 144(2) of the Polish Constitution stipulates

222 B. Zalewski, *"Repeal" of the countersignature – a precedent that will allow avoidance of responsibility?*, https://ordoiuris.pl/wolnosci-obywatelskie/uchylenie-kontrasygnaty-precedens-ktory-umozliwi-ucieczke-od (accessed: November 29, 2024).

223 D. Sitnicka, M. Yaloszewski, *Donald Tusk uchylił kontrasygnatę w sprawie neosędziego [Donald Tusk rescinds countersignature in matter of newly appointed judge]*, https://oko.press/donald-tusk-uchylil-kontrasygnate-w-sprawie-neosedziego (accessed: December 1, 2024).

224 *Tusk: I made a decision to rescind the countersignature*, https://tvn24.pl/polska/tusk-podjalem-decyzje-o-uchyleniu-kontrasygnaty-st8078430 (accessed: December 1, 2024).

225 *Bodnar points to the "only moment" when the Prime Minister could rescind the countersignature*, https://tvn24.pl/polska/donald-tusk-podjalem-decyzje-o-uchyleniu-kontrasygnaty-adam-bodnar-minister-sprawiedliwosci-i-prokurator-generalny-komentuje-st8078933 (accessed: December 1, 2024).

226 Cf. K. Kozlowski, commentary on Article 144, [in:] *Konstytucja Rzeczypospolitej Polskiej, T. II. Komentarz do art. 87-243*, [eds.] M. Safjan, L. Bosek, Warsaw 2016, margin number 20.

that "[o]fficial acts of the President shall require, for their validity, the signature of the Prime Minister who, by such signature, accepts responsibility therefor to the Sejm."

Thus, the legal literature assumes that countersignature in the Polish constitutional model includes three elements – [1] official acts of the President are subject to it, [2] it can only be done by the Prime Minister (and not, for example, by individual ministers), [3] by affixing his signature, the Prime Minister assumes responsibility before the Sejm, i.e. political responsibility.[227] With the countersignature, therefore, the official act of the President of the Republic becomes valid, paving the way for its insertion in the relevant publication.[228]

Administrative courts, by contrast, exercise the administration of justice by controlling the activities of public administration and resolving disputes of competence and jurisdiction between local government bodies, local government appeals colleges and between these bodies and government administration bodies. This is determined by Article 1(1) of the Law on the Organization of Administrative Courts. It is also worth recalling the more general constitutional regulation in this matter: "The Supreme Administrative Court and other administrative courts shall exercise, to the extent specified by statute, control over the performance of public administration. Such control shall also extend to judgments on the conformity to statute of resolutions of organs of local government and normative acts of territorial organs of government administration" (Article 184 of the Polish Constitution).

Although the President is neither part of the government administration nor a local government body, it is assumed that he can take actions that fall under the concept of public administration. In a resolution of 7 judges of the Supreme Administrative Court of November 9, 1998, ref. OPS 4/98 it was indicated, for example, that "the President, who is not a public administration body, may perform public administration to a certain extent." At the same time, in the same resolution, the Supreme Administrative Court stated that, even if only by issuing the act of granting Polish citizenship, the President does not perform public administration, since he acts "as the head of the Polish State, symbolizing the majesty of the State." On the same basis, the Provincial Administrative Courts reject complaints against the action of the President in cases of renunciation of Polish citizenship.[229]

Similarly, the Supreme Administrative Court ruled in 2012 regarding the case of judicial appointments as a presidential prerogative: "The appointment of judges by the President is not a power of public administration, but the application of constitutional norms providing for a creative competence that is not an administrative-legal relationship. The President is an executive branch of government, but cannot be considered a public administrative body in this matter. The appointment powers of the head of state demonstrate a special relationship between the President and the judiciary that does not fall within the exercise of administration. Assuming that the President, in shaping the composition of the judiciary, acts, as a public administration body, would clearly violate the principle of separation and balance of powers and the principle of a democratic state of law."[230]

227 R. Mojak, [in:] *Polskie prawo konstytucyjne*, [ed.] W. Wing, Lublin 2008, p. 312. Cf. also: A. Frankiewicz, *Kontrasygnata jako wyznacznik systemu rządów*, "Przegląd Prawa Konstytucyjnego" 2010, No. 2-3, p. 179.

228 See K. Kozłowski, *op. cit*., margin number 12.

229 See, for example, the decision of the Provincial Administrative Court in Warsaw of August 24, 2017, ref. IV SA/Wa 1274/17.

230 Order of the Supreme Administrative Court of October 17, 2012, ref. I OSK 1876/12.

The rationale for this order made one other important observation. Regarding the appointment of judges of common courts, the Supreme Administrative Court noted that "[t]here can be no doubt that the legal relationship in question is subject to the regulations of the constitutional law. Therefore, it is difficult to clearly qualify the matter of the appointment of judges to substantive administrative law."[231] Although the appointment of a judge is not the same as entrusting an already-in-office judge to preside over the assembly of judges of one of the chambers of the Supreme Court, both decisions certainly constitute a matter subject to the regulations of constitutional law, not substantive administrative law.

Whether a case belongs to the matter of administrative law also allows verification of the procedural rules to which it has been subjected by the legislator. This way of examining one's own competence is confirmed by the practice of administrative courts.[232] In the case of naming a judge to preside over the assembly of the Civil Chamber of the Supreme Court, the provisions of the Law on the Supreme Court, and therefore typical constitutional provisions, apply. It should also be emphasized that no provision of the Law on the Supreme Court provides a basis for applying regulations on administrative procedure to matters related to, for example, the election of the First President of the Supreme Court and the Presidents of the various Chambers.

These are serious arguments in favor of the thesis that, in accordance with Article 58.1.1 of the Law on Administrative Court Proceedings, the complaint against the President of the Republic dated August 17, 2024, No. 1131.18.2024 on the appointment of the chairman of the assembly of judges of the Civil Chamber of the Supreme Court should have been rejected on the grounds that the case does not fall within the jurisdiction of the administrative courts.

3. The problem of admissibility of a complaint to the administrative court against the countersignature of an official act of the President of the Republic itself and its possible "self-control" by the Prime Minister

While attempts to challenge official acts of the President of the Republic before administrative courts are quite common, an attempt to challenge the countersignature itself, in isolation from the countersigned act, is an unprecedented action. This procedure should be considered politically motivated, as the intention was only that the complaint be filed through the Prime Minister and not the President of the Republic.

An action that is only brought against the counter-signature itself is clearly inadmissible. This is due to the nature of countersignature as a constitutional institution. A lack of countersignature is instrumental in the official act having no legal effect.[233] However, it does not have an independent existence, and its legal significance cannot be analyzed in isolation from the countersigned official act. In essence, therefore, the complaint about the countersignature itself is an attempt to circumvent the law. It is similar to a situation where a complaint to the Provincial Administrative Court would concern the decision to publish the President's order in the Monitor Polski – this is an action that has a legal effect, but it cannot be considered in isolation from the act itself.

231 *Ibid.*
232 See, for example, the decision of the Provincial Administrative Court in Warsaw of January 24, 2019, ref. VI SA/Wa 2287/18.
233 See the judgment of the Supreme Administrative Court of September 21, 2021, ref. II GOK 13/18.

As indicated, the complaint about the countersignature itself was made solely to achieve a political goal. The idea was that the complaint would not be received by the Office of the President of the Republic of Poland, but by the Office of the Prime Minister. This is indicated by the already quoted statement by Minister of Justice Adam Bodnar, according to whom the Prime Minister made "a decision to rescind the countersignature" pursuant to "probably Article 54 of the Law on Proceeding before Administrative Courts".[234] This provision stipulates, among other things, that the authority whose action, inaction or protracted conduct of proceedings has been challenged may, within the scope of its jurisdiction, respond positively to the complaint in full within thirty days from the date of its receipt. However, this is not possible in the case of a countersignature, as this is an act of constitutional nature and not the performance of a public administration task. Countersignature – of course – results in the entry into force of an official act, and also leads to the Prime Minister assuming political responsibility before the Sejm. The decision on the appointment of the chairman of the assembly of judges of the Civil Chamber of the Supreme Court is nonetheless an official act of the President of the Republic of Poland, so even if one were to accept the competence of the administrative court to examine the legality of this act and the legitimacy of the judges to bring it, the possible party to the administrative court proceedings would be the head of state, not the Prime Minister. Any self-auditing would therefore be done by Andrzej Duda. This, however, is not permissible, as the provision in question does not fall within the scope of the exercise of public administration.

The alleged revocation of the countersignature would also be a kind of way for the Prime Minister to evade political responsibility for co-signed official acts. Allowing the Prime Minister to rescind his countersignature would set a dangerous precedent. Indeed, one would just need to find someone ready to complain about a countersigned official act to exonerate the Prime Minister should such an act raise constitutional doubts. On the one hand, it is a convenient instrument not only for Donald Tusk, but also for all his successors, while on the other hand, it is a danger to the systemic foundations of the Polish political system and a blow to the rule of law.

4. Summary

The ad hoc purpose of the complaint against the countersignature was to create an ostensibly legal justification for Donald Tusk's political actions related to the withdrawal of a decision, which had sparked outrage in circles that are the intellectual base of the Civic Coalition (KO) alliance led by his Civic Platform (PO) party. The far-reaching effects of such actions, however, are far more serious than simply preventing the appointment of a presiding judge in one of the Supreme Court's chambers. They are about creating a legal ploy to circumvent the law by invoking a completely inadequate provision that could allow each Prime Minister to abrogate his own responsibility, which is assumed by the Prime Minister when countersigning official acts of the President of the Republic under Article 144(2) of the Polish Constitution. In essence, this would mean that a law can change the constitutionally regulated political accountability, reversing the hierarchy of sources of law and the constitutional logic adopted in the Polish Constitution of 1997.

234 *Bodnar points to the "only moment" when the Prime Minister could rescind the countersignature*, https://tvn24.pl/polska/donald-tusk-podjalem-decyzje-o-uchyleniu-kontrasygnaty-adam-bodnar-minister-sprawiedliwosci-i-prokurator-generalny-komentuje-st8078933 (accessed: December 1, 2024).

The reality, however, is that the signing of an official act of the President of the Republic by the Prime Minister is an act whose effects cannot be annulled under the provisions on administrative or administrative court proceedings, since the decision itself is a constitutional act not subject to review by administrative courts. If the possibility of rescinding the countersignature existed, then it would have to be regulated at the appropriate level. Moreover, a constitutional act of a political nature such as the countersigning of an act by the Prime Minister cannot be qualified either as a quasi-administrative decision or as a specific declaration of intent within the meaning of civil law. Hence, it was nonsense to invoke the regulations of the Civil Code on error or other defects in a declaration of intent. The countersignature is a constitutional act of a political nature – much like, for example, the President's signature on a law. The alleged revocation of the countersignature was therefore another example of Prime Minister Donald Tusk's violation of constitutional provisions.

Jerzy Kwaśniewski

10. Ordering of termination of parliamentary mandates of Maciej Wąsik and Mariusz Kamiński despite presidential pardon

Main theses:

- The Regional Court in Warsaw sentenced MPs Maciej Wąsik and Mariusz Kamiński to two years' imprisonment for offenses committed by public servants, in a judgment dated December 20, 2023.
- The court convicted Maciej Wąsik and Mariusz Kaminski of acts for which they were pardoned by the President of the Republic of Poland in 2015, following their conviction by a court of first instance.
- According to the Constitutional Tribunal's jurisprudence, Article 139 of the Polish Constitution grants the President of the Republic an unlimited right of clemency, allowing him to erase the effects of a conviction both after a final verdict or after a first-instance court verdict.
- The Speaker of the Sejm prematurely issued orders declaring the termination of the mandates of Maciej Wąsik and Mariusz Kamiński, despite the fact that they were not listed as convicted persons in the National Criminal Register on the day those orders were issued.
- As a consequence, the Speaker of the Sejm unjustifiably suspended the voting rights of MPs Maciej Wąsik and Mariusz Kamiński. The Speaker of the Sejm's decisions to extinguish those two MPs' parliamentary mandates had previously been overruled by the Supreme Court's Extraordinary Control and Public Affairs Chamber, which was tantamount to declaring that Maciej Wąsik and Mariusz Kamiński had not lost their parliamentary seats.

1. Introduction

The subject of this chapter is an analysis of the legality of two decisions by the Speaker of the Sejm on December 21, 2023, to order the termination of the parliamentary mandates of Law and Justice

(PiS) MPs Maciej Wąsik and Mariusz Kamiński.[235] Speaker of the Sejm Szymon Hołownia's decision was controversial because it was issued due to the conviction of the two MPs for crimes related to their operational activities as heads of the Central Anti-Corruption Bureau (CBA) in the so-called "land scandal" case, for which they were pardoned by the President of Poland in 2015. The criminal courts, however, did not recognize the effectiveness of the act of clemency because it was granted after a conviction in the first instance, and in their view the President can only pardon someone after a final conviction. Consequently, between 2015 and 2023, the criminal trial of Wąsik and Kamiński continued until the court issued a final conviction at the end of 2023.

2. Grounds, control and effects of the decisions of the Speaker of the Sejm on the ordering of the termination of M. Wąsik's and M. Kamiński's parliamentary mandates.

Hołownia's order was issued on the basis of three provisions: Article 249 §1, Article 247 §1 item 2 and Article 11 §2 item 1 of the Election Code and Article 99 paragraph 3 of the Constitution of the Republic of Poland. The termination of the mandate of a deputy shall occur in the case of loss of the right to stand for elections or lack thereof on election day (Article 247 §1(2) of the Election Code). In turn, any person sentenced to imprisonment by a final judgment for an intentional indictable offence loses the right to be elected to the Sejm (Article 99(3) of the Polish Constitution and Article 11 §2(1) of the Election Code). If a deputy loses the right to be elected, the Speaker of the Sejm issues a decision ordering the termination of the mandate (Article 249 §1 of the Election Code).

In justification of both of the decisions of December 21, 2023, the Speaker of the Sejm determined that Mariusz Kamiński and Maciej Wąsik had lost their right to be elected as a result of the December 20, 2023 ruling of the Regional Court in Warsaw, ref. X Ka 613/23, which legally sentenced them to two years' imprisonment for offenses committed by public servants.

MPs Wąsik and Kamiński appealed against both decisions of the Speaker of the Sejm to the Supreme Court. As a general rule, the Extraordinary Control and Public Affairs Chamber is the one competent to hear such appeals (Article 26 §1(11) of the Law on the Supreme Court[236]), but since its status is disputed by the other chambers of the Supreme Court[237] and European courts,[238] the Speaker of the Sejm transferred the MPs' appeals and the case file directly to the Chamber of Labor and Social Security. Consequently, the appeals were heard in parallel by two chambers.

The Chamber of Extraordinary Control and Public Affairs upheld the appeals and revoked both decisions of the Speaker of the Sejm on the termination of M. Wąsik's and M. Kamiński's parliamentary mandates.[239] Meanwhile, the Chamber of Labor and Social Security ruled that the decision of the Chamber of Extraordinary Control and Public Affairs in M. Kamiński's case "is not a decision of the Supreme Court" and dismissed his appeal, upholding the decision of the Speaker of the Sejm confirming

235 Scans of both decisions are available at: https://www.sejm.gov.pl/sejm10.nsf/komżnikat.xsp?documentId=4E4F404D8E200C17C1258A8C0049DD47 (accessed: December 5, 2024).

236 Law of December 8, 2017 on the Supreme Court (OJ 2024, item 622).

237 See the resolution of a panel of the combined Chambers of Civil, Criminal and Labor and Social Security of the Supreme Court of January 23, 2020, ref. BSA I-4110-1/20.

238 See in particular the ECHR judgment of November 23, 2023, Walesa v. Poland, and the CJEU judgment of December 21, 2023, C-718/21, along with the case law cited therein.

239 Decisions of the Supreme Court of 4/1/2024, I NSW 1268/23 and of 5/1/2024, I NSW 1267/23.

the expiration of his mandate.[240] In a reversal, the Chamber of Extraordinary Control and Public Affairs declared the decision of the Chamber of Labor and Social Security as being "devoid of legal force."[241] For unknown reasons, the Chamber of Labor and Social Security declined to address the appeal of M. Wąsik.

The Speaker of the Sejm did not recognize the effect of the rulings of the Chamber of Extraordinary Control and Public Affairs, and considered his own decisions binding. Consequently, on January 5, 2024, the Head of the Chancellery of the Sejm decided to suspend the voting rights of MPs Mariusz Kamiński and Maciej Wąsik. At the same time, since January 25, 2024, i.e. since the fourth session of the Sejm of the 10th term, MPs Mariusz Kamiński and Maciej Wąsik have not been allowed into the Sejm buildings to exercise their parliamentary mandates, including taking part in the Sejm's legislative work.

3. Assessment of the legality of the decisions of the Speaker of the Sejm to order the termination of the parliamentary mandates of M. Wąsik and M. Kamiński

Ordering the termination of parliamentary mandates based on the conviction of a second-instance court issued despite the President's act of clemency after the first-instance court's verdict is a complex and precedent-setting issue. A sound legal evaluation requires numerous circumstances to be taken into consideration. First, there are four arguments that demonstrate the legality of the Speaker of the Sejm's action. Next, arguments will be identified that argue against the legality of the Speaker of the Sejm's actions and outweigh the arguments raised in favor of legality.

3.1. Arguments demonstrating the legality of the decisions

First, the Speaker of the Sejm did not have the right to ignore the ruling of the Regional Court in Warsaw on December 20, 2023, ref. X Ka 613/23. His authority to order the termination of a parliamentary mandate is of a binding nature, which means that he is under an absolute obligation to issue an order if one of the prerequisites listed in Article 247 of the Election Code is fulfilled: "may not refuse to order the termination of the mandate if he determines that there is a basis (prerequisite) for the termination of the mandate, as defined by law."[242] In other words, the termination of the mandate occurs *ex lege* with the occurrence of statutory prerequisites resulting in the expiration of the mandate.[243]

In the case of Mariusz Kamiński and Maciej Wąsik, the prerequisite for the termination of their mandates expressly provided for in Article 247 §1(2) of the Election Code, i.e. the loss of the right to be elected as a result of sentencing to imprisonment by a final judgment for an intentional indictable offence in the form of the judgment of the Regional Court in Warsaw on December 12, 2023, X Ka 613/23, was met. The termination of the mandate occurred by law, as a result of the conviction, and the role of the Speaker of the Sejm was only to confirm the occurrence of this circumstance. He had

240 Decision of the Supreme Court of 10/1/2024, II PUO 2/24.

241 Decision of the Supreme Court of 12/4/2024, I NSW 1267/23.

242 A. Kisielewicz, J. Zbieranek, remark 1 on Article 249, [in:] K. W. Czaplicki et al., *Kodeks wyborczy. Komentarz* [*Polish Election Code. Commentary*], LEX 2018.

243 As per D. Lis-Staranowicz, *Niepołączalność mandatu parlamentarnego w polskim prawie konstytucyjnym*, Warsaw 2005, p. 244; K. Kubuj, *W sprawie prawomocności i wykonalności postanowienia marszałka Sejmu stwierdzającego wygaśnięcie mandatu poselskiego*, "Przegląd Sejmowy" 2011, No. 6, p. 141; K. Skotnicki, *W sprawie prawomocności i wykonalności postanowienia marszałka Sejmu stwierdzającego wygaśnięcie mandatu poselskiego*, "Przegląd Sejmowy" 2011, No. 6, p. 147 et seq.

no jurisdiction to review the Regional Court's judgment for compliance with Article 139 of the Polish Constitution (presidential right of clemency).

Second, providing information in the National Criminal Register about a conviction is purely declaratory. It is not the information in the National Criminal Register that is the reason for the termination of the mandate, but the fact of the conviction itself, which can also be confirmed by a copy of the conviction. Article 248 §3 of the Election Code only imposes an obligation on the Minister of Justice to inform the Speaker of the Sejm of MPs' entries in the National Criminal Register, which does not mean that the Speaker of the Sejm cannot obtain information about convictions from an equally reliable source, such as the court that issued the conviction.

Third, the Regional Court in Warsaw, when issuing the conviction of M. Kamiński and M. Wąsik, had the right to disregard the November 16, 2015 decision of the President of the Republic of Poland on the application of the right of clemency, because it was bound by the legal view of the Supreme Court on its ineffectiveness. In its resolution I KZP 4/17 dated May 31, 2017, the Supreme Court ruled that:

> *I. The right of clemency, as a power of the President of the Republic of Poland set forth in the first sentence of Article 139 of the Constitution of the Republic of Poland, may be exercised only against persons whose guilt has been established by a final court judgment (convicted persons). Only with such a view of the scope of this right is there no violation of the principles expressed in the text of Article 10 in conjunction with Article 7, Article 42(3), Article 45(1), Article 175(1) and Article 177 of the Constitution of the Republic of Poland.*
>
> *II. The application of the right of clemency before the date of final judgment has no procedural effect.*

The resolution of the Supreme Court in the case I KZP 4/17 was, by virtue of Article 441 §3 of the Code of Criminal Procedure, binding on the three-member panel of the Supreme Court hearing the cassation from the judgment of the Regional Court of 30/3/2016, which discontinued criminal proceedings in the case of M. Kamiński and M. Wąsik due to the 2015 act of clemency. In a judgment of June 6, 2023, II CT 96/23, the Supreme Court revoked the order of discontinuance of March 30, 2016 due to the ineffectiveness of the act of clemency, and sent the case back to it for re-examination. In turn, the Regional Court, pursuant to Article 442 §3 of the Code of Criminal Procedure, was bound by the view of the Supreme Court expressed in the judgment II KK 96/23.[244] Consequently, the Regional Court had no choice but to hear the case on its merits. The aforementioned decision of the Constitutional Tribunal of 2/6/2023, Kpt 1/17 concerned a competence dispute between the Supreme Court and the President of the Republic of Poland, and was therefore not addressed to the Warsaw Regional Court. The Regional Court remained bound by Articles 441 §3 and 442 §3 of the Code of Criminal Procedure, the constitutionality of which was never challenged. Besides, one can debate the very legal validity of the Supreme Court decision, which was issued despite the absence of a real dispute of competence in the sense accepted in the doctrine of constitutional law[245] – this is because the Supreme Court did not usurp the authority to pardon anyone, but considered what legal effects an act of clemency has in criminal proceedings before a court of second instance.

244 Article 442 §3 of the Code of Criminal Procedure also applies before the appellate court in cases where, as a result of a cassation or resumption of proceedings, the decision of that court has been reversed and the case has been remanded to the appellate court for re-examination (Articles 537 §2, 518, 547 §2 and 545 §1) – see D. Świecki, rmk. 32 on Article 442, in: D. Świecki (ed.), *Kodeks postępowania karnego. T. 2. Komentarz aktualizowany*, LEX 2024.

245 P. Czarny, *Konstytucyjne spory kompetencyjne (wybrane zagadnienia)*, "Przegląd Prawa Konstytucyjnego" 2014, No. 2, p. 78.

Fourth, the Speaker of the Sejm had the right to ignore the rulings of the Chamber of Extraordinary Control and Public Affairs of the Supreme Court overturning its decisions. Firstly, the effects of the decision of the Chamber of Extraordinary Control and Public Affairs in M. Kamiński's case were nullified by the decision of the Chamber of Labor and Social Security, which dismissed his appeal in the same case. Secondly, regardless of the Labor Chamber's actions, the Control Chamber acted in clear excess of its authority. The competence of the Chamber of Extraordinary Control and Public Affairs is limited to verifying whether one of the circumstances proving the expiration of a mandate by law has actually occurred (Article 247 §1 in conjunction with Article 250 §2 of the Election Code). Whereas, the Chamber of Extraordinary Control and Public Affairs went a step further, conducting a review of the legality of the ruling X Ka 613/23 of December 20, 2023 of the Warsaw Regional Court. Assessment of the legality of a final judgment in a criminal case is possible only by way of a cassation review (Article 519 of the Code of Criminal Procedure), exercised by the Criminal Chamber of the Supreme Court, or by way of an extraordinary appeal (Article 89 of the Law on the Supreme Court), examined by the Chamber of Extraordinary Control and Public Affairs. However, the ruling in question by the Warsaw Regional Court was not successfully challenged by either a cassation or an extraordinary appeal. Until it is formally rescinded in an appropriate manner, it is binding. The Chamber of Extraordinary Control and Public Affairs was not entitled to ignore its implications.

3.2. Arguments showing the illegality of the decisions

First, the Speaker of the Sejm should have ignored the ruling of the Warsaw Regional Court of December 12, 2023, X Ka 613/23, because it was issued in violation of Article 139 of the Polish Constitution. This is because the court convicted Kamiński and Wąsik for acts for which they were pardoned by the President of the Republic of Poland already in 2015, after conviction by the court of first instance. According to the Constitutional Tribunal, Article 139 of the Constitution of the Republic of Poland grants the President of the Republic of Poland the unlimited right of clemency, allowing him to erase the effects of a conviction both after a final judgment and after the first instance court has issued a judgment (so-called individual abolition).[246] Contrary to the view expressed by the Speaker of the Sejm, the role of the state body is not to mechanically apply a legal provision, but to read the full legal norm, including after taking into account the totality of the circumstances of the case. This follows from both the constitutional principle of the rule of law and the specific principle of adherence to the law.

Second, the Speaker of the Sejm prematurely issued orders declaring the termination of the mandates of M. Wąsik and M. Kamiński, despite the fact that on the date of their issuance they were not listed as convicted persons in the National Criminal Register. The Speaker of the Sejm should have awaited information from the Minister of Justice on the entry of M. Wąsik and M. Kamiński into the National Criminal Register (in accordance with the procedure provided for in Article 248 §3 of the Election Code). Meanwhile, the Speaker of the Sejm relied on a mere copy of the conviction. This is an accessory argument, but in a situation where the Speaker of the Sejm himself limits his role to the mechanical application of a legal provision without taking into account the totality of the circumstances and the full legal situation, waiting for an entry in the National Criminal Register would be a logical and necessary step in determining the prerequisites for determining the expiration of the mandates of M. Wąsik and M. Kamiński.

246 Judgments of the CT of 17/7/2018, K 9/17 and 26/6/2019, K 8/17, and the decision of the CT of 2/6/2023, Kpt 1/17.

Third, the Warsaw Regional Court itself should have ignored the Supreme Court's ruling II KK 96/23 of June 6, 2023, ordering it to re-examine the case taking into account the Supreme Court's resolution of May 31, 2017, I KZP 4/17 stating the ineffectiveness of an act of clemency issued before a final conviction. The Supreme Court, in issuing its resolution in I KZP 4/17, "created the right to give presidential prerogative orders, supposedly generally valid and unchallengeable, a kind of judicial 'enforceability clause' in specific cases."[247] Furthermore, in issuing the judgment in the case II KK 96/23, the Supreme Court ignored the decision of the Constitutional Tribunal of June 2, 2023, Kpt 1/17, according to which "the right of clemency is an exclusive and uncontrollable competence of the President of the Republic of Poland that produces final legal effects" and "the Supreme Court has no authority to exercise control with legal effect over the exercise of the competence of the President of the Republic of Poland [regarding the right of clemency]." The CT ruling had precedence over the ruling of the Supreme Court, as an act interpreting constitutional law, so the Regional Court should take into account the former and disregard the latter.

Fourth, notwithstanding the above, both decisions of the Speaker of the Sejm were overruled by the Chamber of Extraordinary Control and Public Affairs of the Supreme Court, which was tantamount to recognizing that M. Kamiński and M. Wąsik did not lose their parliamentary mandates. Nonetheless, as of January 5, 2024, the Speaker of the Sejm suspended the voting rights of the two deputies, citing court orders that had previously been deemed invalid. The deputies were thus deprived of their parliamentary rights without legal basis.

4. The systemic consequences of the unlawful actions of the Speaker of the Sejm

As a result of the unlawful interference by the Speaker of the Sejm in the composition of the Polish Sejm of the 10th term, a doubt arose regarding the compatibility of the composition of the Sejm with the Polish Constitution, and consequently regarding the Sejm's ability to legislate.

This doubt is shared by the Constitutional Tribunal, which has consistently held that the Speaker of the Sejm has led to a defective formation of the composition of the Sejm, which under the provisions of the Constitution is composed of 460 Deputies (Article 96(1) of the Constitution), who are representatives of the Nation (Article 104(1) of the Constitution), as the supreme power in the Republic of Poland (Article 4(1) of the Constitution), resulting in a violation of the principle of adherence to the law (Article 7 of the Constitution).

As a result, by illegally limiting the composition of the Sejm, Speaker Hołownia deprived it of the characteristics of a constitutional legislative body (judgment of 19/06/2024,K 7/24; judgment of 10/09/2024, U 4/24; TK judgment of 26/11/2024, K 14/24).

247 D. Dudek, *The right of presidential clemency disapproved of by the Supreme Court*, "Dziennik Gazeta Prawna," June 13, 2023, https://serwisy.gazetaprawna.pl/orzeczenia/artykuly/8732158,prawo-laski-prezydenta-sad-najwyzszy.html (accessed: December 5, 2024).

5. Summary

1) The Regional Court in Warsaw sentenced MPs Maciej Wąsik and Mariusz Kamiński to two years' imprisonment for offenses committed by public servants, in a judgment dated December 20, 2023. The verdict has been criticized as politically motivated, and the case involved operational actions taken by them as heads of the Central Anti-Corruption Bureau in 2006-2007.

2) The court convicted Maciej Wąsik and Mariusz Kaminski of acts for which they were pardoned by the President of the Republic of Poland in 2015, following their conviction by a court of first instance. According to the Constitutional Tribunal's jurisprudence, Article 139 of the Polish Constitution grants the President of the Republic an unlimited right of clemency, allowing him to erase the effects of a conviction both after a final verdict or after a first-instance court verdict.

3) The Speaker of the Sejm prematurely issued orders declaring the termination of the mandates of Maciej Wąsik and Mariusz Kamiński, despite the fact that they were not listed as convicted persons in the National Criminal Register on the day those orders were issued.

4) The Warsaw Regional Court itself should have taken into account the applied right of clemency, regardless of the Supreme Court's ruling of June 6, 2023, which ordered a retrial taking into account the Supreme Court's resolution of May 31, 2017, stating the ineffectiveness of the act of clemency issued before the final conviction. And this is because the Constitutional Tribunal, in its decision of June 2, 2023, ruled that "*the right of clemency is an exclusive and non-controlled competence of the President of the Republic that produces final legal effects*" and "*the Supreme Court does not have the authority to exercise control with legal effect over the exercise of the powers of the President of the Republic [regarding the right of clemency]*."

5) As a consequence, the Speaker of the Sejm unjustifiably suspended the voting rights of MPs Maciej Wąsik and Mariusz Kamiński. The Speaker of the Sejm's decisions to extinguish those two MPs' parliamentary mandates had previously been overruled by the Supreme Court's Extraordinary Control and Public Affairs Chamber, which was tantamount to declaring that Maciej Wąsik and Mariusz Kamiński had not lost their parliamentary seats.

6) As a result of the unlawful interference by the Speaker of the Sejm in the composition of the Polish Sejm of the 10th term, a doubt arose regarding the compatibility of the composition of the Sejm with the Polish Constitution, and consequently the Sejm's ability to legislate. This doubt is shared by the Constitutional Tribunal, which has consistently held that the unlawful restriction of the composition of the Sejm of the Republic of Poland deprives it of the characteristics of a constitutional legislative body (judgment of June 19, 2024, K 7/24; judgment of September 10, 2024, U 4/24; TK judgment of November 26, 2024, K 14/24).

Nikodem Bernaciak

11. Double violation of the immunity of opposition MP Marcin Romanowski

Main theses

- On July 15, 2024, opposition MP Marcin Romanowski was detained on the order of a prosecutor acting under the authority of Adam Bodnar, ignoring the fact that he had not only immunity as a parliamentarian (which had previously been waived by the Sejm), but also separate immunity as a member of the Parliamentary Assembly of the Council of Europe (PACE).

- Minister Bodnar stated that "immunities cannot ensure impunity," but it was only on October 2 that the PACE lifted MP Romanowski's immunity, meaning that all previous actions by the Polish government in his case were unlawful.

- The Prosecutor's Office has also openly announced its intention to disregard the Supreme Court's resolution, which on September 27, 2024, stated that Dariusz Korneluk, who signed the motion for Romanowski's prosecution, was not in fact the National Prosecutor, and therefore the entire procedure was conducted in violation of the law.

1. Introduction

Among the numerous cases of the application of "transitional justice" and the principles of "militant democracy" by Donald Tusk's government in the period after December 13, 2023, special attention should be paid to the case of MP Marcin Romanowski. Article 105(2) of the Polish Constitution of April 2, 1997[248] stipulates that "from the day of announcement of the results of the elections until the day of the expiry of his mandate, a Deputy shall not be subjected to criminal accountability without the consent of the Sejm " (formal immunity). In turn, Article 105 (5) sentence 1 of the Constitution specifies that "a Deputy shall be neither detained nor arrested without the consent of the Sejm, except for cases when he has been apprehended in the commission of an offense and in which his detention is necessary for securing the proper course of proceedings." For this reason, on June 19, 2024, the Minister of Justice in Donald Tusk's government, Adam Bodnar, who is also

248 OJ 1997 No. 78, item 483, as amended.

Poland's Prosecutor General, forwarded to the Speaker of the Sejm, Szymon Hołownia, a motion for the Sejm to consent to the prosecution of M. Romanowski and his arrest and pre-trial detention,[249] and on July 12, 2024, the Sejm of the Republic of Poland, responding to the motion, passed 12 resolutions in succession between 14:28 and 14:37 p.m.[250] – 11 on consenting to the prosecution of MP Romanowski for the acts specified in the individual points of the motion of A. Bodnar[251] and 1 on consenting to his arrest and pre-trial detention.[252] On July 15, M. Romanowski was detained and brought to the National Prosecutor's Office.[253] On July 16, the prosecutor sent a request to the District Court for Warsaw-Mokotów in Warsaw for the pre-trial detention of Romanowski for three months.[254] The court then had 24 hours to decide on the prosecutor's request.

2. Ignoring the immunity of a member of the Parliamentary Assembly of the Council of Europe

On December 19, 2023, during its 14th session, the Sejm Bureau unanimously approved parity for all parliamentary groups in the composition of permanent international delegations – including the composition of the delegation to the Parliamentary Assembly of the Council of Europe (*Parliamentary Assembly of the Council of Europe*, PACE). The Law and Justice group, as the largest, was allocated 3 representative seats and 3 alternate representative seats. On January 18, 2024, M. Romanowski was elected to PACE as one of the alternate members of the delegation.[255]

As early as July 12, 2024, at 12:40 a.m., i.e. even before the parliamentary votes on waiving his immunity, an opinion by legal counsel Agata Bzdyń appeared on X (formerly Twitter),[256] in which she reminded that Marcin Romanowski is entitled not only to parliamentary immunity, but also, independently thereof, to the immunity of a PACE member. Article 15 of the General Agreement on Privileges and Immunities of the Council of Europe[257] stipulates, that during the sessions of the Consultative Assembly, representatives to the Assembly and their substitutes – whether they be members of Parliament or not – shall enjoy, on their national territory, the immunities accorded in those countries to members of Parliament. The PACE resolution of September 27, 2021, providing guidelines on the scope of immunity of PACE members[258] specifies in section 9.1 that "the term "during the sessions" covers the whole parliamentary year in view of the continuous activity of the Assembly and its bodies."

249 *Communiqué on the motion to waive the immunity of Marcin Romanowski*, 19/06/2024, https://www.gov.pl/web/prokuratura-krajowa/prokurator-generalny-adam-bodnar-przekazal-dzisiaj-do-marszalka-sejmu-rzeczypospolitej-polskiej-szymona-holowni-wniosek-o-wyrazenie-przez-sejm-rzeczypospolitej-polskiej-zgody-na-pociagniecie-posla-na-sejm-rp-marcina-romanowskiego-do-odpowiedzialnosci-karnej-oraz-jego-zatrzymanie-i-tymczasowe-aresztowanie (accessed: December 11, 2024).

250 *Motion of the National Prosecutor, dated June 19, 2024, for the Sejm to approve the prosecution and detention and pre-trial detention of MP Marcin Romanowski*, https://www.sejm.gov.pl/Sejm10.nsf/PrzebiegProc.xsp?nr=16597-z (accessed: December 11, 2024).

251 M.P. 2024, items 655-665.

252 M.P. 2024, item 666.

253 *Information on the detention of MP Marcin Romanowski*, July 15, 2024, https://www.gov.pl/web/prokuratura-krajowa/informacja-o-zatrzymaniu-posla-marcina-romanowskiego (accessed: December 11, 2024).

254 *Information about the referral of a request for pre-trial detention of suspect Marcin Romanowski*, July 16, 2024, https://www.gov.pl/web/prokuratura-krajowa/informacja-o-skierowaniu-wniosku-o-tymczasowe-aresztowanie-podejrzanego-marcina-romanowskiego2 (accessed: December 11, 2024).

255 *Communication from the Chancellery of the Sejm on the procedure for nominating members of the permanent delegation of the Sejm and Senate to the Parliamentary Assembly of the Council of Europe*, July 19, 2024, https://www.sejm.gov.pl/sejm10.nsf/komunikat.xsp?documentId=306034BB4631F89CC1258B5F003FCE05 (accessed: December 11, 2024).

256 A. Bzdyń, 12/07/2024, https://x.com/AgataBzdyn/status/1811713223214690419 (accessed: December 11, 2024).

257 General Agreement on the Privileges and Immunities of the Council of Europe, made at Paris on September 2, 1949, and Additional Protocol to the General Agreement, drawn up in Strasbourg on November 6, 1952 (OJ 2001 No. 23, item 270).

258 Resolution 2392, Guidelines on the scope of the parliamentary immunities enjoyed by members of the Parliamentary Assembly, September 27, 2021 (accessed: December 11, 2024).

The Polish National Prosecutor's Office said in a July 16 communiqué that Romanowski himself had "stated during the interrogation that both the detention and the action of presenting charges are unlawful due to the immunity protecting him as a member of the Parliamentary Assembly of the Council of Europe." On July 15, immediately after M. Romanowski's detention, his defense attorney Dr. Bartosz Lewandowski had filed a formal complaint with the PACE Chairman, citing precisely the existence of a second immunity.[259] He also quoted a relevant excerpt from an article by Prof. Jerzy Jaskiernia, former Minister of Justice from 1995 to 1996, according to which "immunity cannot be waived except by the Assembly at the request of the 'competent authority' of the Member State concerned." The competent authority is usually the judge presiding over the case, but it can also be the prosecutor or the Minister of Justice."[260] Also, Ireneusz Cezary Kamiński – a professor at the Institute of Legal Sciences of the Polish Academy of Sciences, specializing in public international law and human rights, and a judge at the European Court of Human Rights in Strasbourg from 2014 to 2016 – expressed his opinion on the matter, saying that "Marcin Romanowski is not only a member of the Polish parliament, but also a member of the Polish parliamentary delegation to the Parliamentary Assembly of the Council of Europe (PACE). In this second role, he is also entitled to immunity."[261]

On July 16, PACE Chairman Theodoros Rousopoulos addressed the Speaker of the Sejm, Szymon Hołownia, demanding that he ask the competent national authorities to suspend all actions taken so far in the case of M. Romanowski.[262] Accordingly, on the same day, the District Court for Warsaw-Mokotów in Warsaw issued a decision to disregard the request to use a preventive measure against M. Romanowski in the form of pre-trial detention.[263] The National Prosecutor's Office, responding to the order, said that the decision to detain and charge Romanowski was made on the basis of "independent legal opinions. At the request of the Minister, the preparation of the said opinions was commissioned by the Secretary of State – Arkadiusz Myrcha. After reviewing the contents of the opinions, the Minister of Justice decided to forward them to the National Prosecutor's Office as additional material to support the legal analysis conducted in the Prosecutor's Office regarding the case in question."[264] At the same time, Minister Bodnar stated that "immunities cannot ensure impunity."[265]

Rzeczpospolita journalists revealed on October 23, 2024, that these opinions, when submitted to the case file, did not bear signatures. The author of one of them, Dr. Joanna Juchniewicz, explained that she did not send the signed version of her opinion until a follow-up, "in late August or early September," while the author of the second one, Dr. Andrzej Jackiewicz, "promised to explain the lack of a signature," but according to journalists, ultimately failed to do so. Therefore, "in the opinion of the Tribunal, these documents did not have the value of an opinion at the time of adjudication."[266]

259 B. Lewandowski, July 15, 2024, https://x.com/BartoszLewand20/status/1812858850317349024 (accessed: December 11, 2024).

260 J. Jaskiernia, *Immunitet parlamentarny członka Zgromadzenia Parlamentarnego Rady Europy*, [in:] *Zagadnienia prawa konstytucyjnego. Księga jubileuszowa dedykowana Profesorowi Krzysztofowi Skotnickiemu w siedemdziesiątą rocznicę urodzin*, Vol. 1, Lodz 2023, p. 563.

261 *Prof. Kamiński: Romanowski is not only a member of the Polish parliament, but also a member of PACE. In this second role, he is also entitled to immunity*, July 16, 2024, https://wpolityce.pl/polityka/699113-prof-kaminski-o-romanowskim-przysluguje-mu-immunitet (accessed: December 11, 2024).

262 B. Lewandowski, July 16, 2024, https://x.com/BartoszLewand20/status/1813278881547448461 (accessed: December 11, 2024).

263 *Position in connection with the disregard of the prosecutor's request for preliminary detention*, July 17, 2024, https://www.gov.pl/web/prokuratura-krajowa/stanowisko-w-zwiazku-z-nieuwzglednieniem-wniosku-prokuratora-o-tymczasowe-aresztowanie (accessed: December 11, 2024).

264 *Legal opinions on the functioning of the immunity of the Parliamentary Assembly of the Council of Europe*, July 16, 2024, https://www.gov.pl/web/sprawiedliwosc/opinie-prawne-dotyczace-funkcjonowania-immunitetu-zgromadzenia-parlamentarnego-rady-europy (accessed: December 11, 2024).

265 *Statement by Minister of Justice Adam Bodnar*, July 17, 2024, https://www.gov.pl/web/sprawiedliwosc/oswiadczenie-ministra-sprawiedliwosci-adama-bodnara (accessed: December 11, 2024).

266 G. Zawadka, *Detention of MP Romanowski. Expertise without signatures*, October 23, 2024, https://www.rp.pl/polityka/art41333451-zatrzymanie-posla-romanowskiego-ekspertyzy-bez-podpisow (accessed: December 11, 2024).

On July 23, 2024, the prosecutor's office appealed the decision of the District Court to the Regional Court of Warsaw.[267] Subsequently, on September 27, the Regional Court in Warsaw upheld the appealed decision (ref. No. IX Kz 643/24).[268] Thus, on September 29, A. Bodnar sent a request to the chairman of the PACE to consent to the prosecution of M. Romanowski and to his detention and pre-trial detention.[269] On October 2, PACE passed a resolution stripping MP Romanowski of his immunity,[270] and on October 15 he was again charged.[271] The next day, another request was sent to the District Court for Warsaw-Mokotów in Warsaw to place him under temporary arrest.[272] M. Romanowski's defense attorney, however, filed a motion to discontinue the proceedings.

On November 28, the District Court did not decide in the case due to the MP's submission of a medical release. According to "Rzeczpospolita" journalists, "the prosecutor's office, however, fought hard to have its request for Romanowski's arrest, reviewed by the court in his absence," and "in doing so, the prosecutor invoked one of the articles of the Code of Criminal Procedure, which allows the application of a preventative measure in the absence of the suspect, if his questioning is not possible, among other reasons, due to his health, and there is a need for 'immediate application' of such a measure." This is likely to be Article 313 § 1a of the Law of June 6, 1997. – Code of Criminal Procedure[273] with this content, which was added to the Code of Criminal Procedure by Article 3, paragraph 11 of the amendment of July 7, 2023.[274] Arguably, this is why "after a heated exchange between the prosecution and the defense – the court ultimately did not share the prosecutor's argument."[275] Indeed, this regulation deals with a completely different issue – the announcement of the order to present charges and the immediately following interrogation of the suspect. On December 9, however, the District Court granted the prosecutor's request and decided to apply pre-trial detention.[276]

3. Lack of complaint by the legal National Prosecutor

Issued on the basis of the constitutional authorization of Article 105 (6), the Law of May 9, 1996 on the exercise of the mandate of deputy and senator[277] stipulates in its Article 7b that "a request for consent to prosecute a deputy or senator for a crime prosecuted by public indictment shall be submitted **through the Prosecutor General**."

267 *Information about the referral of a complaint against the Court's decision not to grant the prosecutor's request for pre-trial detention*, July 23, 2024, https://www.gov.pl/web/prokuratura-krajowa/informacja-o-skierowaniu-zazalenia-na-postanowienie-sadu-o-nieuwzglednieniu-wniosku-prokuratora-o-zastosowanie-tymczasowego-aresztowania (accessed: December 11, 2024).

268 *Communiqué dated September 27, 2024*, https://bip.warszawa.so.gov.pl/artykul/455/296/komunikaty (accessed: December 11, 2024).

269 *Communiqué on the request for waiver of the immunity of Marcin Romanowski by the Parliamentary Assembly of the Council of Europe*, 30/09/2024, https://www.gov.pl/web/prokuratura-krajowa/komunikat-w-sprawie-wniosku-o-uchylenie-immunitetu-marcinowi-romanowskiemu-przez-zgromadzenie-parlamentarne-rady-europy (accessed: December 11, 2024).

270 Resolution No. 2572, Request for waiver of the immunity of Mr Marcin Romanowski, October 2, 2024, https://pace.coe.int/en/files/33869 (accessed: December 11, 2024).

271 *Information on the presentation of charges and interrogation of Marcin Romanowski as a suspect*, October 15, 2024, https://www.gov.pl/web/prokuratura-krajowa/informacja-o-przedstawieniu-zarzutow-marcinowi-romanowskiemu-i-o-przesluchaniu-go-w-charakterze-podejrzanego (accessed: December 11, 2024).

272 *Information about the referral of a request for pre-trial detention of suspect Marcin Romanowski*, October 16, 2024, https://www.gov.pl/web/prokuratura-krajowa/informacja-o-skierowaniu-wniosku-o-tymczasowe-aresztowanie-podejrzanego-marcina-romanowskiego3 (accessed: December 11, 2024).

273 Consolidated text: OJ 2024, item 37.

274 OJ 2023, item 1860.

275 *Marcin Romanowski will be taken into custody? There is new information from the court*, November 28, 2024, https://www.rp.pl/prawo-karne/art41512051-marcin-romanowski-trafi-do-aresztu-sa-nowe-informacje-z-sadu (accessed: December 11, 2024).

276 *Arrest warrant issued for Law and Justice MP Marcin Romanowski*, December 9, 2024, https://www.pap.pl/aktualnosci/jest-areszt-dla-posla-pis-marcina-romanowskiego (accessed: December 11, 2024).

277 Consolidated text: OJ 2024, item 907.

According to Article 17 § 1 item 9 of the Code of Criminal Procedure (Kodeks Postępowania Karnego – KPK), "criminal proceedings shall not be initiated, and initiated proceedings shall not be instituted, or, if previously instituted, shall be discontinued, when there is no permission required for prosecuting the act, or no **motion to prosecute from a person so entitled**, unless otherwise provided by law." The occurrence of this circumstance, according to Article 439 § 1(9) of the Code of Criminal Procedure, constitutes one of the absolute grounds for appeal. This provides a basis for overturning any ruling that would have been issued against Romanowski by the court of first instance on the basis of the defectively signed applications.

In a resolution dated September 27, 2024 (ref. I KZP 3/24)[278] the Supreme Court ruled that the reinstatement of prosecutor Dariusz Barski and his appointment as National Prosecutor in 2022 – contrary to Bodnar's insinuations – had a binding legal basis and was effective, and therefore the National Prosecutor in 2024 is still Dariusz Barski, not Dariusz Korneluk. On September 27, the National Prosecutor's Office unjustifiably stated that the Supreme Court resolution "is not a resolution of the Supreme Court within the meaning of Article 441 of the Code of Criminal Procedure. This position has no legal effect because it was taken by unauthorized persons."[279] On November 27, the Supreme Court's Criminal Chamber refused to adopt separate resolutions in both the Korneluk case and that of his predecessor, Jacek Bilewicz (ref. I KZP 6/24[280] and I KZP 7/24[281]), "on the grounds that the questions asked by the Court of Appeals were poorly constructed. According to the Supreme Court, they were casuistic and aimed at the Supreme Court deciding a specific case, not a legal issue."[282] This means that – regardless of Bodnar's non-binding interpretations[283] – the September 27 resolution still stands. Also, the Constitutional Tribunal, in its judgment of November 22, 2024 (ref. SK 13/24[284]) confirmed the correctness of Barski's position.

Meanwhile, the motions to prosecute M. Romanowski were signed by Dariusz Korneluk, not Dariusz Barski. In connection with the Supreme Court resolution, on October 4,[285] a group of deputies of the Law and Justice Parliamentary group submitted to the Sejm a draft resolution to declare invalid all 12 resolutions passed by the Sejm on July 12, 2024 in the case of Marcin Romanowski.[286]

278 Supreme Court resolution of September 27, 2024, ref. I KZP 3/24, https://www.sn.pl/sites/orzecznictwo/orzeczenia3/i kzp 3-24-1.pdf (accessed: December 11, 2024).

279 *Statement of the National Prosecutor's Office on today's position expressed in the Supreme Court*, September 27, 2024, https://www.gov.pl/web/prokuratura-krajowa/oswiadczenie-prokuratury-krajowej-w-sprawie-dzisiejszego-stanowiska-wyrazonego-w-sadzie-najwyzszym (accessed: December 11, 2024).

280 I KZP 6/24, November 27, 2024, https://www.sn.pl/sprawy/SitePages/Zagadnienia_prawne_SN.aspx?ItemSID=1953-301f4741-66aa-4980-b9fa-873e90506a11&ListName=Zagadnienia_prawne (accessed: December 11, 2024).

281 I KZP 7/24, November 27, 2024, https://www.sn.pl/sprawy/SitePages/Zagadnienia_prawne_SN.aspx?ItemSD=1964-301f4741-66aa-4980-b9fa-873e90506a1&ListName=Zagadnienia_prawne (accessed: December 11, 2024).

282 *The Supreme Court has refused to adopt resolutions on the status of prosecutor Dariusz Barski. Ordo Iuris Institute participated in the proceedings*, November 29, 2024, https://ordoiuris.pl/wolnosci-obywatelskie/sad-najwyzszy-odmowil-podjecia-uchwal-w-sprawie-statusu-prokuratora-dariusza (accessed: December 11, 2024).

283 *Information about the written reasons for the Supreme Court's decisions in the cases of ref. I KZP 6/24 i I KZP 7/24 [Information about the written reasons for the Supreme Court's decisions in the cases of ref. I KZP 6/24 and I KZP 7/24*, December 4, 2024, https://www.gov.pl/web/prokuratura-krajowa/informacja-o-pisemnym-uzasadnieniu-postanowien-sadu-najwyzszego-w-sprawach-o-sygn-i-kzp-624-i-i-kzp-724 (accessed: December 11, 2024).

284 Judgment of the Constitutional Tribunal of November 22, 2024, ref. SK 13/24, https://trybunal.gov.pl/postepowanie-i-orzeczenia/wyroki/art/ograniczenie-do-dwoch-miesiecy-prawa-prokuratora-w-stanie-spoczynku-do-powrotu-na-swoj-wniosek-do-sluzby-3 (accessed: December 11, 2024).

285 R. Bochenek, https://x.com/RafalBochenek/status/1842243160065417540 (accessed: December 11, 2024).

286 Parliamentary draft resolution on the annulment of the resolution of the Sejm of the Republic of Poland of July 12, 2024 on the expression of consent by the Sejm of the Republic of Poland for the arrest and pre-trial detention of MP Marcin Romanowski and the resolutions of the Sejm of the Republic of Poland of July 12, 2024. on the Sejm of the Republic of Poland's consent to criminal prosecution of MP Marcin Romanowski, SH-021-116/24, https://orka.sejm.gov.pl/Druki10ka.nsf/Projekty/10-021-116-2024/$file/10-021-116-2024.pdf (accessed: December 11, 2024).

4. Summary

The procedural violations committed by individual officers and officials subordinate to Adam Bodnar in the Marcin Romanowski case go beyond the national scale, reaching all the way to the level of international conventions. Mr. Romanowski's immunity was violated in this case in two ways – first, his special status, which he held not only as a parliamentarian, i.e. a representative of the people *vis-à-vis* the executive branch, but also as a member of the Parliamentary Assembly of the Council of Europe elected on January 18, 2024, i.e. a representative of the people vis-à-vis the international institution, was ignored. Through his unlawful detention, the authority of PACE, which has already made clear since 2021 that the immunity of its members extends throughout the parliamentary year, has been violated. Secondly, the procedure for stripping him of his parliamentary immunity, carried out by the Sejm's resolutions of July 12, 2024, was initiated by an unauthorized person – prosecutor Dariusz Korneluk, who falsely, contrary to the law, presents himself as the National Prosecutor, while in fact the real National Prosecutor is still another person – Dariusz Barski. Without judging whether we were dealing here with a lack of due diligence or a deliberate display of brute force against political opponents, this case is symbolic because it shows the level of disregard the ruling camp in Poland has for existing procedures.

Nikodem Bernaciak

12. Violations related to the pre-trial detention of Father Michał Olszewski

Main theses:

- From March 26 to October 24, 2024, Father Michał Olszewski was put in pre-trial detention as a catholic priest who was the chairman of the Profeto foundation when this foundation received tens of millions of zlotys in funding from the government's Justice Fund for the construction in Warsaw of the Archipelag center for victims of violence.
- According to the accounts of both the detainee and his defense attorney, Father Olszewski repeatedly received terrible treatment from the authorities – it was made difficult for him to contact his lawyer, he was handcuffed without reason, food was denied for dozens of hours and the use of the restroom was impeded.
- Adam Bodnar's prosecutors also attempted to unlawfully deprive Father Olszewski of his self-appointed defense attorney Krzysztof Wąsowski by suggesting that the latter was a witness in the case, not a defense attorney.
- The conduct of the law enforcement agencies subordinate to Minister of Justice Adam Bodnar and Minister of Internal Affairs and Administration Marcin Kierwiński violated a number of guarantees set forth in applicable laws – the Constitution, laws and international agreements.

1. The course of the proceedings so far

On January 30, 2024, the National Prosecutor's Office announced that on that day a team of investigators was appointed to investigate the proper management and disbursement of funds from the so-called Justice Fund.[287] On February 19, an investigation was launched[288] into an act committed under Article 231 § 1 and 2 of the Criminal Code.[289]

287 *Information on the establishment of a team to investigate irregularities in the Justice Fund*, January 30, 2024, https://www.gov.pl/web/prokuratura-krajowa/informacja-o-powolaniu-zespolu-ds-zbadania-nieprawidlowosci-w-funduszu-sprawiedliwosci (accessed: December 9, 2024).

288 *Information on activities in the investigation of irregularities in the Justice Fund*, March 26, 2024, https://www.gov.pl/web/prokuratura-krajowa/informacja-o-czynnosciach-w-sledztwie-dotyczacym-nieprawidlowosci-w-funduszu-sprawiedliwosci (accessed: December 9, 2024).

289 Law of June 6, 1997 – Criminal Code, consolidated text: OJ 2024, item 17.

On March 27, the National Prosecutor's Office reported that arrests were made on March 26 and 27 (Holy Tuesday and Holy Wednesday – the eve of Maundy Thursday, which is the feast of priests in the Catholic liturgical calendar) against "four former or current Justice Ministry officials," including Fr. Michał Olszewski as chairman of the "Profeto" foundation (Profeto.pl Foundation – Sercański Sekretariat na rzecz Nowej Evangelizacji, based in Warsaw, KRS 0000494148). "The aforementioned persons were charged with the fact that, acting jointly and in concert, they facilitated the granting of financial support to the "Profeto" foundation, despite the fact that this foundation did not meet the formal and substantive conditions for obtaining a grant. Among other things, the suspects' actions were alleged to have been to certify untruths in the documentation as to the fulfillment of formal requirements, and, moreover, to inflate the scores for the fulfillment of requirements and substantive conditions."[290] On March 28, the District Court for Warsaw-Mokotów in Warsaw issued a decision on the application of a preventive measure in the form of a 3-month pre-trial detention. An appeal was filed against this decision,[291] but in a decision dated April 30, the Regional Court of Warsaw, IX Criminal Appeals Division, upheld the decision of the District Court, finding the appeal to be unfounded. The court at the same time postponed the drafting of the statement of reasons, which ultimately took place only in the second half of May.[292]

On June 4, Rev. Olszewski was charged with two new counts of "money laundering" under Article 299 of the Criminal Code,[293] in connection with which, on June 11, a request was made to the Regional Court to extend his pre-trial detention.[294] On June 20, the Regional Court granted the prosecution's request,[295] but the defense team of Rev. Olszewski filed an appeal against the decision. On July 10, Minister of Justice Adam Bodnar issued a statement, according to which Rev. Olszewski and others "acting jointly and in concert facilitated the granting of financial support to the aforementioned foundation, despite the fact that the foundation did not meet the formal and substantive conditions for obtaining a grant. The suspects' actions were said to have involved, among other things, certifying untruths in the documentation as to the fulfillment of formal requirements, and, moreover, over-scoring the fulfillment of substantive requirements and conditions. The evidence shows that the officials were fully aware that the foundation did not meet the required conditions, and moreover, they acted jointly and in concert with the applicant. These actions resulted in the infliction of damage in the total amount of more than PLN 66 million," as a result of which "a preventive measure in the form of pre-trial detention was applied against them, the application of which was subsequently extended. The courts applying and extending pre-trial detention against the aforementioned suspects indicated that there was a high probability that the suspects had committed the crimes they were charged with and, moreover, there was a real threat of severe punishment and a real fear of unlawfully influencing the course of the proceedings."[296]

290 *Information on the charges presented in the investigation of the Justice Fund]*, Mrach 27, 2024, https://www.gov.pl/web/prokuratura-krajowa/informacja-o-zarzutach-przedstawionych-w-sledztwie-dotyczacym-funduszu-sprawiedliwosci (accessed: December 9, 2024).

291 *Information on progress in the Justice Fund investigation*, April 9, 2024, https://www.gov.pl/web/prokuratura-krajowa/informacja-o-toku-sledztwa-dotyczacego-funduszu-sprawiedliwosci (accessed: December 9, 2024).

292 *Information on the decisions of the Regional Court in Warsaw on irregularities in the Justice Fund*, May 22, 2024, https://www.gov.pl/web/prokuratura-krajowa/informacja-o-postanowieniach-sadu-okregowego-w-warszawie-w-sprawie-nieprawidlowosci-w-funduszu-sprawiedliwosci (accessed: December 9, 2024).

293 *Information on supplemental charges against Michał O. in the investigation into irregularities in the Justice Fund*, June 5, 2024, https://www.gov.pl/web/prokuratura-krajowa/informacja-o-uzupelnieniu-zarzutow-michalowi-o-w-sledztwie-dotyczacym-nieprawidlowosci-w-funduszu-sprawiedliwosci (accessed: December 9, 2024).

294 *New charges in investigation into irregularities in the Justice Fund*, June 11, 2024, https://www.gov.pl/web/prokuratura-krajowa/nowe-zarzuty-w-sledztwie-dotyczacym-nieprawidlowosci-w-funduszu-sprawiedliwosci (accessed: December 9, 2024).

295 S. Białach, *Justice Fund scandal. Court decision on the arrest of Father Michał Olszewski*, June 20, 2024, https://wiadomosci.onet.pl/kraj/afera-w-funduszu-sprawiedliwosci-decyzja-sadu-w-sprawie-aresztu-ks-michala/hcxdnqy (accessed: December 9, 2024).

296 *Statement by the Minister of Justice on disinformation regarding the clarification of the Justice Fund scandal*, July 10, 2024, https://www.gov.pl/web/sprawiedliwosc/oswiadczenie-ministra-sprawiedliwosci-w-sprawie-dezinformacji-dotyczacej-wyjasniania-afery-funduszu-sprawiedliwosci (accessed: December 9, 2024).

On July 31, the Court of Appeals in Warsaw decided to shorten the detention period.[297] It was not until October 24 that the Court of Appeals upheld the complaint against the Regional Court's order,[298] and the very next day Rev. Michał Olszewski, along with two Ministry of Justice officials Ursula Dubejko and Karolina Kucharska,[299] left the detention center.[300] On November 15, the prosecutor excluded from the investigation into irregularities at the Justice Fund material related to Rev. Olszewski and 8 other suspects.[301] On December 9, the prosecutor of the National Prosecutor's Office, Piotr Wozniak, announced that an indictment would not be prepared until "late January/early February [2025]."[302]

On July 1, the portal wPolityce.pl published extensive excerpts from a letter by Rev. Michał Olszewski, written while in custody. Its contents show the clergyman, during the course of his arrest and the period of pre-trial detention, which lasted more than half a year, was subject to a whole series of violations of the criminal procedure.[303] On September 6, 2024, an amicus curiae opinion in this case was filed by the Ordo Iuris Institute.[304] Meanwhile, it was not until two and a half months later, on September 16, that the Warsaw-Mokotów District Prosecutor's Office opened an investigation for exceeding powers and failing to fulfill duties by using psychological violence against Father Olszewski and improper handling of an arrested person and then an detainee, aimed at deliberately tormenting him.[305]

2. Violation of Article 245 § 1 of the Code of Criminal Procedure

An excerpt from Fr. Olszewski's letter of July 1 reads: "Men in balaclavas rushed in and ran up the stairs to the attic, I sat up on my bed, was handcuffed with my hands behind my back, after which an ABW officer (I think he was in charge of the operation) identified himself, showed me an arrest warrant, and then placed a white A4 sheet of paper titled 'rights of a detainee' on my lap." One of the points was "immediate contact (from the content, I understood my direct contact) with an attorney." When I wanted to call a lawyer, I was told that the commanding officer would do so, not me," the clergyman reported. After an argument, I refused to sign the "rights" and pointed to my phone, which contained the number for Attorney Christopher Wąsowski. The officer in charge (that's what I'll call him) searched my phone and found the number. He called and informed my attorney that I had been detained. In answer to my attorney's question: "Where? he replied: 'In the Małopolska region' and then hung up."

297 *Court shortens the detention of Rev. Michał Olszewski*, July 31, 2024, https://www.pap.pl/aktualnosci/sad-skrocil-areszt-dla-ks-michala-olszewskiego-0 (accessed: December 9, 2024).

298 *Rev. Olszewski may be conditionally. Declarations have been made about paying his bail*, October 24, 2024, https://www.pap.pl/aktualnosci/ks-olszewski-moze-warunkowo-wyjsc-z-aresztu-sa-deklaracje-wplaty-kaucji (accessed: December 9, 2024).

299 The full names of all three suspects are being used publicly by their defense attorney, Adv. Krzysztof Wąsowski, which allows us to presume that they consented to their publication in accordance with Article 13(2) of the Press Law of January 26, 1984 (consolidated text: OJ 2018, item 1914). Cf. November 20, 2024, https://x.com/KaW1944/status/1859140213311779318 (accessed: December 9, 2024).

300 *Rev. Olszewski and two female officials, suspects in the investigation into the Justice Fund case, released from custody*, October 25, 2024, https://www.pap.pl/aktualnosci/ks-olszewski-oraz-dwie-urzedniczki-podejrzani-w-sledztwie-dot-funduszu-sprawiedliwosci (accessed: December 9, 2024).

301 *Information on the exclusion from the investigation into irregularities in the Justice Fund of materials relating to 9 suspects*, November 21, 2024, https://www.gov.pl/web/prokuratura-krajowa/informacja-o-wylaczeniu-ze-sledztwa-dotyczacego-nieprawidlowosci-w-funduszu-sprawiedliwosci-materialow-w-zakresie-9-podejrzanych (accessed: December 9, 2024).

302 *Prosecutor's office preparing an indictment in the Justice Fund case*, December 9, 2024, https://wiadomosci.wp.pl/prokuratura-przygotowuje-akt-oskarzenia-ws-funduszu-sprawiedliwosci-7101448205810304a (accessed: December 9, 2024).

303 *Threats, taunts, blasphemies from fellow inmates. WE DISCLOSE the entire letter from Fr. Olszewski! "Today you will not go home,"* July 1, 2024, https://wpolityce.pl/polityka/697371-ujawniamy-list-ks-olszewskiego-grozbybluzgi-wspolwiezniow (accessed: December 9, 2024).

304 *Fr. Olszewski's trial continues. Ordo Iuris files an amicus brief*, September 11, 2024, https://en.ordoiuris.pl/civil-liberties/fr-olszewskis-trial-continues-ordo-iuris-files-amicus-brief (accessed: December 9, 2024).

305 *Warsaw Mokotów District Prosecutor's Office in Warsaw has opened an investigation into the abuse of power and failure to comply with obligations to the detriment of Michał O.*, September 16, 2024, https://www.gov.pl/web/po-warszawa/prokuratura-rejonowa-warszawa-mokotow-w-warszawie-wszczela-sledztwo-w-sprawie-przekroczenia-uprawnien-i-niedopelnienia-obowiazkow-na-szkode-michala-o (accessed: December 9, 2024).

Whereas, according to Article 245 § 1 of the Code of Criminal Procedure,[306] "the arrested person, upon his demand, shall be given the opportunity to contact a lawyer by any means available, and also to talk directly with the latter. The person who made the arrest may reserve the right to be present when such a conversation takes place." The Decree on the Internal Security Agency (Agencja Bezpieczeństwa Wewnętrznego – ABW)[307] also stipulates that an officer of the Internal Security Agency shall, immediately after apprehending a person, inform the arrested person of his or her rights, in particular by giving him or her a written instruction on the rights of the arrested person in criminal proceedings, conforming to the model specified pursuant to Article 244 § 5 of the Code of Criminal Procedure, and shall, at the request of the apprehended person, take steps to realize his or her rights referred to in item 1.

In turn, the doctrine argues that: "Contact by a detained suspect under a reasonable suspicion of having committed a crime with a lawyer is crucial to ensuring the right to effective defense throughout criminal proceedings. Information obtained at the preliminary stage of criminal proceedings, i.e. even before charges are filed, can be crucial to the final determination of the detainee's case."[308] The Supreme Court also states, following another commentary, that "immediate contact with a lawyer should be made possible as soon after detention as is, technically, feasible."[309] Thus, it appears that Rev. Olszewski's right to direct contact with his attorney was violated in the case described and unlawfully restricted to indirect contact.

3. Violation of Article 11 of the Law on Direct Coercive Measures

According to Article 25(1) of the Act on the Internal Security Agency (ABW),[310] an ABW officer may use direct coercive measures – including handcuffs, as referred to in Article 12(1)(2) of the Law on Direct Coercive Measures[311] – or use these measures, only in the cases referred to in Article 11(1)-(6) and (8)-(14) of that law. These cases are necessary:

1) to enforce the legally required behavior in accordance with the authorized order;
2) to repel a direct, unlawful attack on the life, health or freedom of the authorized person or another person;
3) to counteract actions aimed directly at an attack on the life, health or freedom of the authorized person or another person;
4) to counteract violations of public order or security;
5) to prevent a direct attack on areas, facilities or equipment protected by the authorized person;
6) to protect order or security in areas or facilities protected by the authorized;
8) to counter the destruction of property;
9) to ensure the safety of the convoy or lead;
10) to capture a person, thwart his escape or pursue that person;

306 Law of June 6, 1997 – Code of Criminal Procedure, consolidated text: OJ 2024, item 37.
307 Decree of the Council of Ministers of January 7, 2020 on conducting and documenting certain activities by officers of the Internal Security Agency (OJ 2020, item 64).
308 K.T. Boratyńska, Article 245, [in:] *Kodeks postępowania karnego. Komentarz*, ed. A. Sakowicz, Warsaw 2016, p. 601.
309 Decision of the Supreme Court of October 13, 2011, III KK 64/11, https://www.sn.pl/sites/orzecznictwo/Orzeczenia1/III KK 64-11.pdf (accessed: December 9, 2024).
310 Law of May 24, 2002 on the Internal Security Agency and the Intelligence Agency, consolidated text: OJ 2024, item 812.
311 Law of May 24, 2013 on direct coercive measures and firearms, consolidated text: OJ 2024, item 383.

11) to detain a person, thwart his escape or pursue that person;
12) to overcome passive resistance;
13) to overcome active resistance;
14) to counteract acts intended to cause self-harm.

The doctrine stresses that "for assessing the proportionality of the use of handcuffs, the basic principle is the principle of adequacy (proportionality) of the use of direct coercive measures [referred to in Article 6 (1) of the Law on Direct Coercive Measures], and the principle of minimal harm [referred to in Article 7 (1-4) of that same Law]."[312] Meanwhile, none of the communications concerning Rev. Olszewski's case indicated that by his behavior he fulfilled any of the prerequisites provided for in the aforementioned Article 11 of the Law. Adam Bodnar himself in 2021, while still Commissioner for Human Rights, pointed out that when using direct coercive measures, including handcuffs, "three, basic principles for their use – subsidiarity, proportionality and minimization of harm – must be met."[313] In doing so, he cited his earlier position from 2020, according to which "the findings made by the staff of the National Mechanism for the Prevention of Torture (Krajowy Mechanizm Prewencji Tortur – KMPT) during visits to police places of detention indicate, however, that the principles discussed above are not observed in practice," and "in the vast majority of cases, by fastening handcuffs behind the detainee's back, the nature of the use of this measure is no longer preventive."[314] Thus, the handcuffing of Father Olszewski with his hands behind his back should also be considered unlawful as violating the rules on the use of direct coercion.

4. Violation of the prohibition of torture and inhuman treatment guaranteed by the Polish Constitution and conventions

Rev. Olszewski also wrote in his letter: "On the way I asked if I could use the toilet at a rest area. I heard that in a moment we would pull over at a gas station. I asked that it be at a rest area, since there are no people there, and I saw what joy the officers (especially the female officer) had at what had been going on since the morning in the media. So I realized that the operation is also for media effect and on a large scale. I wanted to avoid people. Unfortunately, my request was not granted. The convoy entered the Orlen [...] gas station with emergency sirens sounding. I was led in handcuffs to the station toilet, and after leaving the toilet, the ABW officers ordered hot dogs for themselves, while I stood handcuffed in the middle of the station store. People were taking pictures of me and of officers wearing balaclavas. [...] From 6 a.m., I remained in handcuffs all day (even when going to the toilet). My handcuffs were not removed, even for a moment. I heard that at this time of day there is neither dinner nor water. I begged for water and received half a bottle of tap water, which was brought in in a bottle and left standing in the cell. In the morning, when I asked to be taken to the toilet, I heard: "Pee into that."

312 *Police use of the right kind of handcuffs in connection with the detention of a person*, 2021, https://sip.lex.pl/komentarze-i-publikacje/komentarze-praktyczne/uzycie-przez-policje-wlasciwego-rodzaju-kajdanek-w-470154840 (accessed: December 9, 2024).

313 *Provide greater protection against torture in Poland. CHR asks the Speaker of the Senate to change the law*, June 30, 2021, https://bip.brpo.gov.pl/pl/content/zapewnic-wieksza-ochrone-przed-torturami-w-polsce-rpo-prosi-marszalka-senatu-o-zmiane-prawa (accessed: December 9, 2024).

314 *"Handcuffs are not a convenience for the police." The CHR writes to the Ministry of the Interior about their abuse in convoys and police stations*, January 22, 2020, https://bip.brpo.gov.pl/pl/content/kajdanki-nie-ulatwienie-dla-policji-o-ich-naduzywaniu-w-konwojach-i-na-komisariatach-rpo (accessed: December 9, 2024).

Meanwhile, Article 40 sentence 1 of the Constitution of the Republic of Poland[315] states that "no one may be subjected to torture or cruel, inhuman, or degrading treatment or punishment." A similar prohibition is also contained in Article 4 of the Charter of Fundamental Rights of the European Union,[316] Article 3 of the European Convention on Human Rights[317] and Article 7 of the International Covenant on Civil and Political Rights.[318] An entire separate Convention against Torture is also dedicated to this prohibition,[319] which defines torture as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, punishing him for an act he or a third person has committed or is suspected of having committed, or intimidating or coercing him or a third person, or for any reason based on discrimination of any kind, when such pain or suffering is inflicted by or at the instigation of or with the consent or acquiescence of a public official or other person acting in an official capacity." Article 41(4) of the Polish Constitution also mentions that "anyone deprived of liberty shall be treated in a humane manner." There is no doubt that the officers' refusal to allow Father Olszewski normal exercise of basic physiological functions met the hallmarks of inhuman (inhumane) or degrading treatment and should be treated in terms of violations of the Constitution and international agreements binding on Poland.

5. Attempting to question a defense attorney as a witness – violation of Article 178(1) of the Code of Criminal Procedure

As recently as March 26, Adv. Krzysztof Wąsowski, in accordance with Article 73 of the Code of Criminal Procedure, was appointed defense counsel by Father Michał Olszewski and Urszula Dubejko. Article 178(1) of the Code of Criminal Procedure establishes an absolute prohibition that a defense attorney or a lawyer acting under Article 245(1) of the Code, as to the facts of which he became aware while giving legal advice or conducting a case, may not be questioned as a witness. Meanwhile, in the case described above, there were multiple attempts by the investigators to transgress this prohibition. As early as April 11, Adv. Wąsowski received a summons from the Prosecutor's Office to testify as a witness, which he immediately notified the Dean of the Regional Bar Council and the Chairman of the Supreme Bar Council. On April 19, however, he appeared for questioning, only to remind the prosecutor that in order to question a lawyer as a witness, it is necessary to first issue an order of exemption from professional secrecy, which, however, can only be issued if it is necessary for the good of justice, and such a prerequisite, according to Adv. Wąsowski, did not exist in the present case.[320]

The Dean of the Regional Bar Council had already sent a letter to the National Prosecutor's Office on April 17, thus even before the date of the hearing, in which he unequivocally indicated that summoning Adv. Wąsowski as a witness constitutes an action aimed at violating the professional secrecy

315 Constitution of the Republic of Poland of April 2, 1997 (OJ 1997 No. 78, item 483, as amended).

316 Charter of Fundamental Rights of the European Union (OJ C 326, 2012, p. 396).

317 Convention for the Protection of Human Rights and Fundamental Freedoms drawn up in Rome on November 4, 1950, subsequently amended by Protocols Nos. 3, 5 and 8 and supplemented by Protocol No. 2 (OJ 1993 No. 61, item 284).

318 International Covenant on Civil and Political Rights opened for signature in New York on December 19, 1966 (OJ 1977 No. 38, item 167).

319 Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, adopted by the United Nations General Assembly on December 10, 1984 (OJ 1989 No. 63, item 378).

320 B. Aleksowska, *Lawyer forced to testify as a witness. "Attorney-client privilege used to be sacrosanct, now it is trampled under foot*," August 23, 2024, https://konfrontacja.com.pl/panorama/adwokat-przymuszony-do-zeznan-jako-swiadek-tajemnica-adwokacka-i-obroncza-byla-swietoscia-dzis-jest-deptana (accessed: December 9, 2024).

of defense counsel.[321] Meanwhile, over the following months, the prosecutor's office maintained its previous position, culminating in a letter from prosecutor Piotr Wozniak dated October 30, in which he suggested that since Adv. Wąsowski is a witness, not a defense attorney, and "[his] continued representation of the suspects ... raises negative procedural consequences for the named suspects."[322] Adv. Wąsowski stresses that the prosecutor's office has not been consistent in its actions. Indeed, at the very first procedural action at the National Prosecutor's Office, Wąsowski was allowed to act as a defense attorney (and not as a witness, who could not have access to the arrest files), and on November 15 he was notified by the National Prosecutor's Office of a date for access to the pre-trial files, in accordance with Article 321 § 1 of the Code of Criminal Procedure, and such access can also only be obtained by suspects and their defense attorneys, not witnesses.[323] In conclusion, Adam Bodnar's prosecutors are probably aware of the internal contradiction of their actions and the fact that in attempting to violate, directly or indirectly, the absolute prohibition of evidence under Article 178(1) of the Code of Criminal Procedure, they are ostentatiously breaking the law.

6. Summary

The actions carried out against Rev. Michał Olszewski by Adam Bodnar's prosecutors and by law enforcement officers subordinate to both Minister of Justice Adam Bodnar and Minister of the Interior and Administration Marcin Kierwiński (until May 13, 2024, he was the minister to whom the ABW is subordinate) violated a number of guarantees set forth in the provisions of applicable laws – the Constitution, the Code of Criminal Procedure, the Law on Direct Coercive Measures, the Law on the Internal Security Agency (ABW), the EU Charter of Fundamental Rights, the European Convention on Human Rights, the International Covenant on Civil and Political Rights and the Convention against Torture. Regardless of what will be eventually included in the indictment, the abuses carried out against Father Olszewski and his defense attorney clearly indicate that prosecutors do not care about obtaining reliable results, but rather about maintaining a psychological intimidating effect against all those involved in the Justice Fund until 2023.

321 B. Aleksowska, *The Bar Association reacts to material published by "Konfrontacja" on the case of Adv. Wąsowski. "Prosecutor's office violates professional secrecy of defense counsel, regulatory changes needed,"* August 29, 2024, https://konfrontacja.com.pl/panorama/adwokatura-reaguje-na-material-konfrontacji-o-sprawie-mec-wasowskiego-prokuratura-lamie-tajemnice-obroncza-niezbedne-sa-zmiany-w-przepisach (accessed: December 9, 2024).

322 W. Biedroń, *REVEALED. Bodnar's people want to get rid of Wąsowski! Strong response from Rev. Olszewski's defense attorney!*, November 4, 2024, https://wpolityce.pl/polityka/711954-ujawniamy-bodnarowcy-chca-pozbawic-ks-olszewskiego-obrony (accessed: December 9, 2024).

323 K. Wąsowski, https://x.com/KaW1944/status/1859140213311779318 (accessed: December 9, 2024).

Julia Książek, Marek Puzio

13. Failure to recognize judgments inconvenient to the authorities

Main theses:

- Government members recognize or do not recognize the rulings of the Constitutional Tribunal and the Supreme Court, as the case may be.
- Such practices violate the principles of the rule of law and the division and equality of legislative, executive and judicial powers expressed in the Polish Constitution.
- The actions of individual members of the government can be interpreted as an attempt to subordinate the judiciary to political interests.

1. Introduction

The recent cases of selective respect for the judgments of the Supreme Court and the Constitutional Tribunal by representatives of the authorities in Poland pose a serious threat to the foundations of the rule of law. A situation in which state bodies respect only those rulings that are in line with their political interests undermines citizens' trust in the independence of the courts and the effectiveness of the legal system. In particular, the Minister of Justice, Prosecutor General Adam Bodnar, who in the past respected the verdicts of the Constitutional Tribunal and the Supreme Court, now disregards those which are unfavorable to the political interests of the party he represents. Similarly, Speaker of the Sejm Szymon Hołownia questions the rulings of the Supreme Court's Chamber of Extraordinary Control and Public Affairs, considering it an unauthorized body,[324] while at the same time accepting other resolutions of the same chamber – for example, the resolution which confirmed the validity of the 2023 parliamentary elections, which led to his camp taking power power. It is worth reminding that no-one in the current governing coalition has ever challenged this chamber's resolution confirming the elections' validity.[325]

324 *Szymon Hołownia on the Supreme Court's decision in the Wąsik case: I am waiting for a response from another chamber*, https://www.rp.pl/polityka/art39656951-szymon-holownia-o-postanowieniu-sn-ws-wasika-nie-wiem-na-jakiej-podstawie-je-wydano, accessed: 5/12/2024

325 *Hołownia: I recognize the Supreme Court's ruling on the validity of the elections*, https://www.gazetaprawna.pl/wiadomosci/artykuly/1487588,holownia-ruch-trzaskowskiego-waznosc-wyborow.html (accessed: December 5, 2024).

2. Hypocrisy in the face of the law – the case of Adam Bodnar

The attitude of government officials toward court rulings raises serious doubts about their commitment to the rule of law. The most glaring example of this attitude is the behavior of the Minister of Justice, Prosecutor General Adam Bodnar. On the one hand, this minister has repeatedly publicly criticized court rulings that he believes were incorrect or unfavorable to his political allies. On the other hand, when he himself was the beneficiary of favorable rulings, he accepted and fully respected them without hesitation.

2.1. Judgment of the Constitutional Tribunal, ref. K 20/20

A particularly telling example of this attitude is the case involving the Constitutional Tribunal's ruling of April 15, 2021 (ref. K 20/20[326]). At the time, the Tribunal ruled that a provision allowing the Commissioner for Human Rights to serve out his term of office until a successor is elected is unconstitutional, but postponed the expiration date of the provision under review by 3 months (this refers to Article 3(6) of the Act on the Commissioner for Human Rights, which is inconsistent with Article 209(1) in conjunction with Articles 2 and 7 of the Constitution). Adam Bodnar, acting Commissioner for Human Rights at the time, unreservedly accepted the ruling and informed the public. In a communiqué from his office, he thanked all those who supported him, and assured that the institution he headed "will continue to work to protect the rights of citizens."[327] This shows that Adam Bodnar, as Commissioner for Human Rights, did not challenge the legality of the Constitutional Tribunal's 2021 verdicts, despite the fact that the verdict was given by judges Julia Przyłębska, Stanisław Piotrowicz, Justyn Piskorski (described by the current government as a "double" – illegitimate – appointee), Bartłomiej Sochański and Wojciech Sych. Meanwhile, already as Minister of Justice-Prosecutor General, he did not hesitate to question the legitimacy of the Constitutional Tribunal's activities with the following words: "[...] For the time being, every ruling of the Constitutional Tribunal is published in the OJ with a note that the verdicts were issued in violation of the basic principle concerning the election of judges, because the current Constitutional Tribunal is composed of an unauthorized person, so it is a body devoid of constitutional features."[328]

2.2. Protective orders of the Constitutional Tribunal concerning the dismissal of court presidents

An example of the undermining of Constitutional Tribunal rulings is the refusal of the Minister of Justice to recognize the Constitutional Tribunal's protective order[329] of February 1, 2024 (ref. Ts 19/24) concerning the dismissal of court presidents.[330] According to the protective order, the Minister of Justice cannot dismiss court presidents and deputy presidents without the approval of the National Council of the Judiciary until the Constitutional Tribunal has issued a judgment on the legislation

326 Judgment of the Constitutional Tribunal of April 15, 2021 ref. K 20/20, https://isap.sejm.gov.pl/isap.nsf/download.xsp/WDU20210000696/O/D20210696.pdf (accessed: November 12, 2024).

327 Communiqué issued by the Office of the Commissioner for Human Rights, 15/04/2021, https://bip.brpo.gov.pl/pl/content/rozprawa-przed-tk-mandat-rpo-odroczenie-13-kwietnia (accessed: November 12, 2024).

328 *Adam Bodnar on changes to the Constitutional Tribunal: I think the resolution is insufficient*, https://www.pap.pl/aktualnosci/adam-bodnar-o-zmianach-w-trybunale-konstytucyjnym-uwazam-ze-uchwala-jest (accessed: December 2, 2024).

329 *CT: Removal of court president without participation of the NCJ – unconstitutional*, https://www.prawo.pl/prawnicy-sady/odwolywanie-prezesow-sadow-wyrok-trybunalu-konstytucyjnego,527560.html (accessed: December 2, 2024).

330 *Bodnar on the CT's protective order on court presidents: I will not recognize that*, https://www.wnp.pl/parlamentarny/wydarzenia/bodnar-o-zabezpieczeniu-tk-ws-prezesow-sadow-nie-bede-tego-uznawal,831320.html (accessed: December 2, 2024).

intended to regulate these issues. In response to the Tribunal's ruling, Adam Bodnar said: "The Constitutional Tribunal can issue all sorts of rulings, but the question arises about their weight [...]," and when asked if he would recognize the Constitutional Tribunal's protective orders, which ruled that it could not dismiss court presidents, he replied: "I will not recognize that."[331]

Minister of Education Barbara Nowacka behaved in a similar manner after the Constitutional Tribunal issued a ruling suspending the application of her decree[332] amending the rules on the organization of religious instruction in schools. A communiqué published on the Ministry of Education's website said at the time that the CT's decision "has no legal effect."[333]

2.3. Supreme Court ruling on the inadmissibility of withdrawal of a request to decide a legal question on the determination of sex

The current incumbent Minister of Justice is also challenging some Supreme Court rulings. An example is the "non-recognition" of a ruling of the Supreme Court on the inadmissibility of the withdrawal of a request to decide a legal question on the determination of sex.[334] The case already has a long and convoluted history, dating back to September 2022, when Prosecutor General Zbigniew Ziobro filed a motion (ref. III CZP 143/22[335]) for the Supreme Court to decide the legal question of determining the circle of persons with passive standing to participate in a lawsuit for gender reassignment or gender determination, in particular to determine whether the plaintiff's undivorced spouse or children must appear on the side of the defendant in such a lawsuit, in addition to the surviving parents. Subsequently, in a decision[336] dated January 19, 2024, a panel of seven judges submitted a request for a resolution on the issue to a panel of the entire Civil Chamber, recognizing that this is supported by, among other things, the growing number of related proceedings in judicial practice. On January 29, 2024, Adam Bodnar, acting in his capacity as Prosecutor General, withdrew his motion to decide the legal question presented, and then – on June 7 – a panel of the entire Civil Chamber of the Supreme Court declared the withdrawal of the motion to be inadmissible [...]."[337]

The Supreme Court's decision can be interpreted as a firm statement that, once raised, a legal question concerning the constitutionality of a given provision or its interpretation cannot be arbitrarily removed from the agenda by the Prosecutor General. This, in turn, is an important part of the guarantee of the rule of law.

The National Prosecutor's Office, disagreeing with the Supreme Court's ruling, issued a communiqué,[338] in which it stated that: "the Supreme Court's failure to consider the Prosecutor General's withdrawal of the initiating motion should be considered an action without legal basis. The Supreme Court's

331 *Ibid.*

332 See the CT decision of August 29 (ref. U 10/24)

333 Position of the Minister of Education on the CT's protective order, 30/08/2024, https://www.gov.pl/web/edukacja/stanowisko-ministra-edukacji-ws-zabezpieczenia-tk (accessed: December 5, 2024).

334 Communication from the National Prosecutor's Office on gender recognition proceedings dated October 29, 2024, https://www.gov.pl/web/prokuratura-krajowa/komunikat-ws-postepowania-dot-uzgodnienia-plci2 (accessed: November 12, 2024).

335 Legal Issues, III CZP 143/22, https://www.sn.pl/sprawy/SitePages/Zagadnienia_prawne_SN.aspx?ItemSID=1760-301f4741-66aa-4980-b9fa-873e90506a11&ListName=Zagadnienia_prawne&Rok=2022 (accessed: Novmber 6, 2024).

336 III CZP 143/22, Decision of a panel of seven Supreme Court judges, January 19, 2024, https://www.sn.pl/sites/Serwis_WWW/SiteAssets/Lists/Zagadnienia_prawne/AllItems/iii czp 143-22.pdf (accessed: Novmber 6, 2024).

337 III CZP 6/24 SN, It is inadmissible to withdraw a motion to decide a legal issue, June 7, 2024, https://www.sn.pl/aktualnosci/SitePages/Komunikaty_o_sprawach.aspx?ItemSID=650-b6b3e804-2752-4c7d-bcb4-7586782a1315&ListName=Komunikaty_o_sprawach (accessed: Novmber 6, 2024).

338 Communiqué on gender recognition proceedings, dated October 29, 2024, https://www.gov.pl/web/prokuratura-krajowa/komunikat-ws-postepowania-dot-uzgodnienia-plci2 (accessed: Novmber 6, 2024).

continuation of the proceedings and eventual issuance of a decision, will be legally flawed."[339] Subsequently, the Minister of Justice, Prosecutor General Adam Bodnar, in a letter dated August 9, 2024, requested "the exclusion from the bench of the judges of the Supreme Court appointed at the request of the National Council of the Judiciary formed according to the procedure set forth in the provisions of the Act of December 8, 2017, amending the Act on the National Council of the Judiciary and Certain Other Acts (OJ 2018, item 3)."[340] The application was proceeded by referring it to the Supreme Court's Chamber of Extraordinary Control and Public Affairs. However, despite the lack of recognition of this request, Prosecutor General Adam Bodnar stated that he "fully maintains his position as to the lack of factual and legal grounds for the Supreme Court to issue a ruling in this case."[341]

2.4. Validation of the elections to the European Parliament (I NSW 44/24)

Prosecutor General Adam Bodnar's attitude toward the rulings, from the beginning of his political camp's assumption of power, raised doubts about his commitment to the rule of law. Recent events related to his boycott of a session of the Supreme Court's Chamber of Extraordinary Control and Public Affairs and his refusal to take a position on the validity of the 2024 elections to the European Parliament[342] reveal even deeper problems arising in the current Prosecutor General-Minister of Justice's relations with the CT and the Supreme Court. In a resolution dated September 3, 2024, adopted by the Chamber of Extraordinary Control and Public Affairs in plenary session, the Supreme Court declared the elections to the European Parliament to be valid.[343] Adam Bodnar, citing the judgments of European courts,[344, 345] questioning the independence of the Supreme Court's Chamber of Extraordinary Control and Public Affairs, refused to attend the meeting and present the position of the Prosecutor General. It should be mentioned that in the past, as Commissioner for Human Rights, Bodnar accepted the rulings of this chamber of the Supreme Court without hesitation. This includes, for example, the aforementioned resolution declaring the validity of the parliamentary elections after which the former left-liberal opposition took power after eight years of conservative rule. On January 11, 2024, the Supreme Court, acting in a plenary and open session of the Chamber of Extraordinary Control and Public Affairs, issued a resolution declaring the validity of the elections to the Sejm of the Republic of Poland and the Senate of the Republic of Poland held on October 15, 2023.[346] None of those currently in power challenged the resolution, despite the fact that, according to some, it was issued by a "non-court."[347]

339 *Ibid.*

340 *Ibid.*

341 *Ibid.*

342 *Supreme Court has recognized the validity of the elections to the European Parliament. Bodnar boycotts meeting of Chamber of Extraordinary Control and Public Affairs and challenges its legality. Żaryn: Political nihilism*, https://wpolityce.pl/polityka/704713-sn-uznal-waznosc-wyborow-do-pe-bodnar-bojkotuje-posiedzenie (accessed: December 2, 2024).

343 I NSW 44/24, Resolution of plenary session of the Chamber of Extraordinary Control and Public Affairs of September 3, 2024, https://www.sn.pl/sites/orzecznictwo/orzeczenia3/i nsw 44-24.pdf (accessed: December 2, 2024).

344 Judgment (Grand Chamber) of the Court of Justice of the European Union of December 21, 2023, https://curia.europa.eu/juris/document/document.jsf?text=&docid=280769&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=8220663 (accessed: December 2, 2024).

345 Judgment of the European Court of Human Rights of November 23, 2023, (*Application No. 50849/21*), Case of Wałęsa v. Poland, https://hudoc.echr.coe.int/eng?i=001-229366 (accessed: December 2, 2024).

346 I NSW 1237/23, Resolution of plenary session of the Chamber of Extraordinary Control and Public Affairs of January 11, 2024, https://www.sn.pl/sites/orzecznictwo/orzeczenia3/i nsw 1237-23.pdf (accessed: December 2, 2024).

347 *An unrecognized chamber of the Supreme Court has declared the recent parliamentary elections valid*, https://tvn24.pl/polska/wybory-2023-nieuznawana-izba-kontroli-nadzwyczajnej-sadu-najwyzszegouznala-waznosc-wyborow-st7717551 (accessed: December 2, 2024).

3. Summary

Representatives of the current government not only question the rulings of the Constitutional Tribunal, the Supreme Court or take actions contrary to them, but in fact recognize them or not depending on the situation. The consequences of such behavior are extremely serious. When constitutional ministers publicly declare that they will not respect the rulings of the Constitutional Tribunal or certain benches of the Supreme Court, they not only undermine the authority of these bodies, but question the principles of the rule of law and the division and equality of legislative, executive and judicial powers expressed in the Polish Constitution.

Failure to recognize the verdicts of constitutional judicial authorities is not only a legal problem, but also a political one. The cited actions of government representatives can be interpreted as an attempt to subordinate the judiciary to political interests. This is a clear signal that there are influential people in Polish political spheres who clearly want to limit the independence of the courts and subordinate them to their own interests.

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On December 13, 2023, a new government was formed in Poland by a coalition of the Civic Coalition, Poland 2050, the Polish People's Party and the Left. The new Polish government headed by Donald Tusk, acting on the basis of ad hoc resolutions of the parliamentary majority it controls, informal "guidelines" and the opinions of friendly lawyers, took numerous unlawful actions over the following months to eliminate the opposition from the public space. These activities were undertaken under the cover of the illegally and forcibly seized public media alongside private television groups friendly to the new government, as well as with the support of representatives of the European Union. These actions harm the foundations of the democratic state of law, creating a revolutionary order of "transitional justice," or as Donald Tusk himself called it, "militant democracy."

If we want to restore the constitutional order and the foundations of liberal democracy, we must act in terms of militant democracy. This means that more than once we will probably make mistakes or take actions that, according to some legal authorities, may not be in accordance with the letter of the law, but nothing relieves us of our duty to act.

Everything will be according to the law as we understand it.

Donald Tusk

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