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Your Excellency,

Adopted Legislative Amendments - Threats Against Judicial Independence

The Law Society is the professional body representing more than 180,000 solicitors in England and Wales. Its concerns include upholding the independence of the legal profession, the rule of law and human rights throughout the world.

The Law Society is alarmed by recent amendments to the law on common courts, law on the Supreme Court, as well as certain other legislation in Poland. These amendments, adopted by Parliament in December 2019, undermine judicial independence and the separation of powers.

The amendments provide, among others, that any person appointed by the President is a lawful judge and that questioning such appointment constitutes a disciplinary offence. The amendments also introduce other new disciplinary offences and sanctions for judges and transfer some judicial competencies to committees of court presidents, who are appointed by the Minister of Justice. The Law Society was informed that these amendments were passed in an expedited procedure, without appropriate consultation (including with judicial bodies), and that Parliament had less than 24 hours to discuss them.

The European Commission for Democracy Through Law of the Council of Europe (“Venice Commission”), in its joint urgent opinion with the Directorate General of Human Rights and Rule of Law of the Council of Europe (CDL-PI(2020)002), stated that these amendments “diminish judicial independence and put Polish judges into the impossible situation of having to face disciplinary proceedings for decisions required by the ECHR, the law of the European Union, and other international instruments”.

These most recent amendments follow changes made in 2016 to the Act on the Constitutional Tribunal, as well as changes made in 2017 to the Act on the National Council of the Judiciary, as well as the Law on Common Courts Organisation. The Law Society expressed its concern about these previous legislative changes in our letter of July 2017 (see attached), as did the Monitoring Committee of the Parliamentary Assembly of the Council of Europe, the OSCE Office for Democratic Institutions and Human Rights, and the Venice Commission (in its Opinion CDL-AD(2017)031). The United Nations Special Rapporteur on the Independence of Judges and Lawyers stated regarding those amendments that: “The main effect — if not the main goal — of these measures has been to hamper

The professional body for solicitors

the constitutionally protected principle of judicial independence and to enable the legislative and executive branches to interfere with the administration of justice.”
(in his report after his country visit to Poland: A/HRC/38/38/Add.1)

Most recently, the Court of Justice of the European Union declared the application of the legislative measure to lower the retirement age for Supreme Court judges in Poland incompatible with EU Law, specifically Article 19(1) of the Treaty of the European Union (*Commission v Poland* (C-619/18)). The Court held that such application violated the principle of irremovability of judges that is essential to their independence.

The adoption of a legislative proposals since 2016 that undermine judicial independence in Poland reflects a systematic policy of the Polish Government and a conservative majority in Parliament to exert control over the judiciary. This negatively affects Poland’s international standing as a democratic nation. These measures severely restrict access to justice for all Polish citizens.

There are a number of international standards and obligations regarding the independence of the judiciary which are binding on Poland:

International Covenant on Civil and Political Rights, ratified by Poland on 18 March 1977

Article 14.1: "All persons shall be equal before the courts and tribunals. In the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law [...]"

European Convention on Human Rights, ratified by Poland on 19 January 1993

Article 6.1: "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law".

United Nations Basic Principles on the Independence of the Judiciary

"1. The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary.

2. The judiciary shall decide matters before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason.

10. [...] Any method of judicial selection shall safeguard against judicial appointments for improper motives [...].

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.

20. Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings".

Council of Europe, Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency, and Role of Judges

"Principle I - General principles on the independence of judges

1. All necessary measures should be taken to respect, protect and promote the independence of judges [...]

1.b. The executive and legislative powers should ensure that judges are independent and that steps are not taken which could endanger the independence of judges.

c. All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency. The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules (emphasis added). However, where the constitutional or legal provisions and traditions allow judges to be appointed by the government, there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above (emphasis added). These guarantees could be, for example, one or more of the following:

- i. a special independent and competent body to give the government advice which it follows in practice; or
- ii. the right for an individual to appeal against a decision to an independent authority; or
- iii. the authority which makes the decision safeguards against undue or improper influences.

d. In the decision-making process, judges should be independent and be able to act without any restriction, improper influence, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason. The law should provide for sanctions against persons seeking to influence judges in any such manner [...].

3. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office.

Principle VI - Failure to carry out responsibilities and disciplinary offences

2. Appointed judges may not be permanently removed from office without valid reasons until mandatory retirement. Such reasons, which should be defined in precise terms by the law, could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules.

3. Where measures under paragraphs 1 and 2 of this article need to be taken, states should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions

and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself. The law should provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements of the Convention, for instance that the case should be heard within a reasonable time and that they should have a right to answer any charges."

In light of these international standards and binding obligations on the Polish state, the Law Society respectfully urges Your Excellency and the relevant authorities, as applicable:

1. to take all necessary measures to reverse any adopted legislation and amendments that have already entered into force and that can negatively affect the independence of the judiciary and the rule of law;
3. to ensure that any revision of the amendments and the relevant Acts are in line with the international obligations and standards set out in this letter; and
4. to take no further actions, of whatever nature, that would undermine directly or indirectly the independence of the judiciary and the rule of law in Poland.

The Law Society will continue to monitor the situation and support the independence of the judiciary, as well as the legal profession as a whole, in Poland.

Yours sincerely,



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