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THE RELATION OF THE JUDICIARY TO OTHER STATE POWERS: NECESSARY GUARANTEES INCLUDING FINANCIAL INDEPENDENCE

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I. Structure of the Judiciary

1. The first, indispensable and irrevocable feature of the judiciary is its independence. The issue of independence ought to be considered in two aspects: as independence of courts within the state authority system, and as independence of judges in keeping justice. The base premise ought to be provided by applying the principle of the division of powers to any state authority actions, and the principle of pluralism to the political organisation of the state, that is the freedom of action for political parties, and the freedom of the mass media. To date, it had not been possible to structure a truly independent judiciary in any state which had rejected the division of powers or political pluralism.

The essence of the position of the judiciary within the system is its total separation - in terms of personnel and competencies - from the remaining powers. The separation of competencies ought to be considered against the background of the right of an individual to a court recognised by international human rights protection instruments, and guaranteed by all democratic constitutions. Thus, the principle of wholeness in court judiciary ought be recognised: courts ought to have the possibility of granting a final decision in any case or dispute where at least one of the parties is an individual or other similar entity (association, business entity, legal entity in the light of private law). Such court jurisdiction does not always have to be of an exclusive nature (such as relates e.g. to crime trial); in many areas, it is quite sufficient for courts to have the possibility of controlling decisions made at earlier stages of their proceedings, and of passing an ultimate decision with regard to a specific case. In Poland, any related problems have taken place in particular with regard to administrative cases. In 1980, the Supreme Administrative Court was established for purpose of controlling the legality of individual decisions made by administrative authorities; since 1990, the Supreme Administrative Court jurisdiction is complete in nature, whereas any limitations in that jurisdiction have been recognised by the Constitutional Court as conflicting with the Constitution. In business cases, on the other hand, the arbitration authority system which formerly existed had been removed, with no separate arbitration courts to replace them. The responsibility of passing decisions in business cases, regardless of whether applying to a private or state-owned entity, lies with the general courts (with specialised commercial authorities founded within their structure).

2. In compliance with the division of powers principle, the judiciary consists of a separate state authority division. For a long time, Poland featured a court homogeneity structure - both the general courts [i.e. approximately 300 district courts, 44 voivodship (provincial) courts, and 10 appellate courts] and the special courts (i.e. military courts and the Supreme Administrative Court, since 1980) have been made subordinate to the decision superiority of the Supreme Court. Apart therefrom, the only sources of problems remained with the Constitutional Court (despite the opinions or even attempts of the early nineties to include the Constitutional Court in the Supreme Court structure), and the High Court of Impeachment. The new Constitution provided for the separate position of administrative courts, and granted an independent (equal) position of the Supreme Administrative Court against the Supreme Court.

3. A crucial guarantee of independence in court action is the founding of the judges' self-governing authority. In terms of general courts, all courts with the exception of district courts have general assemblies of judges with a membership of all judges within a specific court (in voivodship courts - representatives of district courts as well), and court collegiate authorities consisting of 4 to 10 judges elected by the general assembly. The fundamental tasks of the general assembly include the following: filing candidates for judges for a specific court with the National Council of the Judiciary; providing opinions as to the appointment and dismissal of the Court Chairman; election (for a term of office of 2 years) members of the court collegiate authority, and hearing and issuing

opinion on the information submitted by the Court Chairman as to court operation. Fundamental tasks of the court collegiate authority include the following: defining the division of action competence at court, defining the rules of case assignment to various judges (case assignment ranking); providing opinion on candidate judges to specific courts, providing opinion on candidate Court Deputy Chairmen; appointment and dismissal of chairmen of divisions at courts.

Within the court structure, disciplinary courts exist as well (elected by general assemblies of judges), relevant for decisions following cases of judges violating their duties; such courts may, for example, pass decisions to the effect of dismissing a judge from court service.

Competencies of the judges' self-governing authority at the Supreme, Supreme Administrative, and Constitutional Courts are somewhat different - for example, the Chairmen of those Courts are appointed by the President of the Republic, albeit always from among two candidates filed by the general assembly of judges.

4. In 1989, the National Council of the Judiciary was founded, as a constitutional authority of special importance, with a membership of representatives of all the three powers, and established for the purpose of passing decisions concerning the most important issues relating to the court system and operation.

The National Council of the Judiciary currently consists of 26 members: the First Chairman of the Supreme Court, the Supreme Court Chairman responsible for the Military Chamber, the Chairman of the Supreme Administrative Court, 15 judges elected by general assemblies of judges of the respective types of courts (2 Supreme Court judges, 11 general court judges, and one judge of the Supreme Administrative Court), 4 Members of Parliament, 2 senators, the Minister of Justice, and a representative of the President of the Republic. The term of office of the National Council of the Judiciary is four years.

The fundamental task of the National Council of the Judiciary is the "guarding the independence of courts and judged" (Article 186 of the Constitution). In implementing the task in question, the National Council of the Judiciary performs the following: considers candidate judges for various courts, and submits files candidate cases with the President of the Republic; considers and decides on motions concerning transfers of judges to different positions; consents to a further holding of office by judges over 65 years of age; provides opinion with regard to dismissals of judges; provides opinion on cases of professional ethics; hears information submitted by the First Chairman of the Supreme Court, by the Chairman of the Supreme Administrative Court, and by the Minister of Justice with regard to court operation; takes position with regard to proposals concerning changes in the court systems; acknowledges (provides opinion on) draft normative acts in the area of the judiciary; expresses opinions on other issues concerning judges and courts, among others with regard to determining remuneration rates for judges. National Council of the Judiciary operations are financed by the budget of the Office of the President of the Republic.

II. The Judiciary vs. the Legislative Power

1. Currently, there is no direct contact in Poland between the general judiciary and the legislative power. The role of the Parliament is very much limited to passing acts of law which - within a framework as defined by the Constitution - define the organisation of court and the position of judges, and determine the material and procedure-oriented foundations for jurisdiction. The Parliament, on the other hand, has no competence in the area of appointing judges, or filling

management vacancies at courts; neither can they maintain any supervision over court operation. The circumstances are similar for the Supreme and Supreme Administrative Courts.

The Constitution stipulates that "in holding their office, judges [...] shall be subject to the Constitution and Acts of Law only [...]". This formula is understood as a prohibition for general courts to pass any decisions with regard to the constitutional correctness of acts of law, and in particular, as a prohibition to apply an act of law, should the court conclude that it is in conflict with the Constitution. In such case, the court shall be obliged to apply with a so-called legal query to the Constitutional Court responsible for considering the constitutional conformity of acts of law. However, as the Constitution stipulates that judges are subject to the Constitution and Acts of Law "only", this means that any court may - in considering individual cases - decide whether legal regulations issued by governmental bodies (the so-called sub-legislative acts) conform with Acts of Law or with the Constitution. Should it be concluded that a normative act passed by the government or a specific minister shows discrepancy with an Act of Law or the Constitution, the court shall have the right to refuse to apply such an act (effective for a specific case only), or file an appropriate legal query with the Constitutional Court (resulting in a general annulment of the normative act). Court jurisdiction in the area is extensive, with such problems most frequently filed with the Supreme Administrative Court.

2. There is a closer connection, on the other hand, between the Constitutional Court and the High Court of Impeachment (which I shall be leaving out of this paper). The Sejm (Diet, lower House of the Polish Parliament) elects Constitutional Court judges for a 9-year term of office; the Chairman of the Constitutional Court submits a message to the Sejm and the Senate with regard to jurisdiction conclusions. Until recently, the Sejm could also (with a majority of 2/3 of votes) reject a Constitutional Court decision concerning the non-conformity of an Act of Law with the Constitution. This solution was introduced in 1985, and despite having been much criticised, had remained in force until the date of enacting the Constitution of 2 April 1997.

III. The Judiciary vs. the Executive Power

1. Certain competencies with regard to the judiciary have been granted to the President of the Republic; in particular, the President is responsible for appointing judges (with the exception of the Constitutional Court and the Supreme Administrative Court judges), determines the calculation formulae for remuneration provided to judges, and in terms of jurisdiction - holds the right of pardon. As shall be proven, however, the actual role of the President is very modest, as he/she cannot act on his/her own initiative.

2. In the executive power system, the Minister of Justice is the most serious partner for general courts. In Poland, the traditional judiciary structure has been retained, according to which the principle of court independence spells a full autonomy in jurisdiction, whereas it does not preclude the act of entrusting the Minister of Justice with the task of managing the so-called administrative operations of general courts.

Such administrative management is enforced by the Minister of Justice via the chairmen of the various courts. Court chairmen are appointed and dismissed by the Minister of Justice for periods of 4 years, with the same judge to be re-appointed as Chairman once only. The chairman has to be appointed from among judges of a specific court, following a consultation of opinion with the general assembly of judges at the court in question (the collegiate authority of a voivodship court provides opinion on general court judges). The general assembly has the right to object to a decision passed by the Minister - the Minister shall not appoint or dismiss the chairman of any court should

the general assembly pass a relevant resolution (an analogous right of objection has been granted to the collegiate authority of the voivodship court in terms of appointing or dismissing the chairman of a district court).

The role of the Minister of Justice with regard to courts is currently restricted in nature. On personnel issues, as shall be proven in the course of this paper, the right to file motions for appointment of judges remains with the general assemblies and the National Council of the Judiciary, while the role of the Minister has been restricted to providing opinion. In so-called administrative supervision cases, the Minister is responsible for organising court statistics, while not dealing with direct observation of court operations. Today, the so-called inspection visit form of operation has been limited to appellate courts, the judges of such courts being responsible for auditing operations of lower-instance courts (in particular in the area of proceedings efficiency - case recognition timeliness), with collective data only drafted at the level of the Ministry. In jurisdiction cases, the Minister of Justice has lost the right of filing so-called extraordinary appeals on valid court sentences, whereas he/she is entitled to file cassation cases with the Supreme Court, should the decision passed by a lower-instance court have been in violation of the law.

The Minister of Justice remains responsible for financial issues of general courts, as their budget belongs within the budget of the Ministry. The Minister of Justice then files a draft budget to the Ministry of Finance, with further decisions lying with the Ministry of Justice, the Council of Ministers, and - ultimately - the Parliament. Subsequently, within the framework of budgetary funds allocated to court operation (as provided for in the budgetary act), the Minister distributes such funds between the respective courts. The Minister co-operates with chairmen on the issue; ultimate decisions, however, are passed by the Minister only. In practice, this bears no relevance to the actual rate of judges' remuneration (this is determined in a different way, to be proven further), although the Minister does pass decisions with regard to the number of judge positions, the number of jobs in the area of support services (of even more major importance), as well as to the extent of providing for the material needs of courts (buildings, renovation works, equipment, computers, security, etc.). In the course of works on the new Constitution, suggestions have been made as to a guarantee of a separate budget for the judiciary; these suggestions, however, had not been supported, and the traditional system had been retained. Thus, the budgetary or financial independence of general courts is non-existent.

Moreover, the Minister of Justice plays a crucial role in the supervision of different authorities co-operating with courts, such bodies including court bailiffs, various court registers, as well as perpetual ledgers and the notary public sector.

3. Since 1989, the Ministry of Justice is also the Attorney General. During the former period of Polish history, the Soviet prosecution system had been adopted as a separate state authority division. Although the Polish prosecution system had never played any major political role (with system competencies in the area of so-called general supervision of particular minor importance), it had been concluded that the separation of the prosecution system is a solution not supportive of human rights protection. Hence the concept of blending the offices of the Ministry of Justice and the Attorney General had been returned to, thus including the prosecution system in the governmental agency structure, and recognising the accountability thereof to the Parliament. This solution, however, does not always bring general acceptance; opinions have been voiced that the current position encourages excessive politicising of the prosecution system, as the Minister of Justice is usually a constantly active politician. The currently valid Constitution dismisses prosecution system issues altogether; the task of defining any position and tasks of this authority had been left entirely to ordinary legislation bodies, which also proves the total lack of any consistent concept in the area.

The current tasks of the prosecution system focus on crime persecution, court trial, and supervision of court sentence enforcement. The prosecution system bears no authority in the area of so-called general supervision (supervision of law enforcement by other state authorities) in terms of individual acts of administrative organs (administrative decisions) - the prosecutor may only partake in Supreme Administrative Court proceedings, should a citizen file a case against a respective decision. The prosecutor still has the right, however, to question the legality or constitutional conformity of normative acts passed by other state authorities, with cases in the area filed with the Supreme Administrative Court, or the Constitutional Court. The Attorney General may file cassations on court decisions, such cassations to be considered by the Supreme Administrative Court or by appellate courts; identical rights, however, are carried by the Minister of Justice.

4. Administrative management of court operation by the Minister of Justice shall apply to general courts only, and - partly - to military courts. On the other hand, supreme organs of the judiciary - the Supreme Court, the Supreme Administrative Court, as well as the Constitutional Court and the High Court of Impeachment - are totally independent of the Minister.

First and foremost, they are entitled to budgetary independence - the Ministry of Finance and the Council of Ministers are obliged to include these courts in the draft budget in such format and part as defined by those courts. Any amendments may be introduced only at the stage of Parliamentary works; no serious disputes, however, have arisen against the background so far.

The Minister of Justice carries no authority related to the appointment of judges to the aforementioned courts; in the case of the Supreme Court and the Supreme Administrative Court - motions on the issue are filed by the general assemblies of the respective Courts, and subsequently by the National Council of the Judiciary, with the ultimate decision passed by the President of the Republic; for the Constitutional Court and the High Court of Impeachment - motions are identified by the Sejm.

The Chairman and the Deputy Chairman of the Constitutional Court, the First Chairman of the Supreme Court, and the Chairman of the Supreme Administrative Court are all appointed by the President of the Republic, albeit only from among candidates filed by general assemblies of these Courts.

IV. Judge Appointment Process, and the Rule of Non-Dismissal of Judges

1. Providing independence to courts and judges shall be possible only if the courts themselves are granted influence over both the decisions on judge appointment, as well as decisions concerning their dismissal from the position held. Dismissal from office, however, may take place in exceptional cases only, as the fundamental premise for the independence of a judge shall be the certainty that he/she can remain in office throughout his/her professional life.

The responsibility of judge appointment lies with the President of the Republic - only judges of the Constitutional Court and of the High Court of Impeachment are appointed by the Sejm. Decisions passed by the President do not require a counter-assignment of the Prime Minister. Legal regulations, however, considerably limit the role of the President, as he may only appoint a person submitted to him/her by the National Council of the Judiciary to office of judge.

As mentioned before, a candidate for a judge has to - first and foremost - acquire the approval of the general assembly of judges of the court he is to attend (the general assembly of the voivodship court in case of candidates for general court judges). The general assembly is obliged to propose two

candidates for each and every judge position vacancy (this does not apply to candidates for judges at district courts). Candidate suggestions are filed with the National Council of the Judiciary; the Minister of Justice has the right (but not the obligation) to provide an opinion as to each candidate. The Minister of Justice is entitled to file his/her own judge candidates with the National Council of the Judiciary. The National Council of the Judiciary in the course of a closed vote reverts approval for the candidate to be suggested to the President of the Republic who then gives the ultimate decision on judge appointment.

The same procedure is applied in promoting a judge to a higher-instance court, although the Minister of Justice does not have the right of opinion to any candidate judges to the Supreme or Supreme Administrative Courts.

2. Judges hold their office basically until 65 years of age, they then retire, with a concurrent right to retain 75% of their remuneration (such a solution being much more advantageous as compared with the general pension system). The National Council of the Judiciary may, however, consent to a judge remaining in office until 70 years of age (with a motion to that effect to be filed by a Court Chairman or by the judge involved) - this solution leads to controversy, and it is believed that leaving the decision as to the judge remaining in office to the National Council of the Judiciary is a threat to judge independence, and that a rigid age limit of 70 years ought to be established. The case is currently being considered by the Constitutional Court.

3. The judge may be removed from office in extraordinary circumstances only, and only by virtue of a court sentence, or a sentence of the disciplinary court. A judge shall be removed should he/she be convicted in a criminal case, should the court concurrently decide on the loss of public rights, should the court decide on the incapacitation of the judge, and should a disciplinary court decide on the judge to be removed from judiciary service.

The judge can also be dismissed from office by the President of the Republic, and at on motion of the National Council of the Judiciary under the following circumstances: the judge relinquishing office by him- or herself; the judge being considered by a medical commission as permanently unable to perform professional duties (or should a judge refuse to take a medical examination); the judge marrying a barrister or legal counsellor, should the person in question fail to leave the profession within a term of 3 months - the latter regulation has been questioned by the Constitutional Court, and is currently an issue under debate.

V. Judge Status and Remuneration

1. The Constitution and legislation usually provide for a number of guarantees of judge independence, the most important being the principle of the non-dismissal of judges. An important role is also attached to the following: prohibition to transfer a judge to a different court without his/her consent, judge immunity (the annulment of which to be applied by a disciplinary court only), and the procedure of disciplinary responsibility of judges. A more detailed description ought to be provided on the following: the principle of separation, and the determination of remuneration provided to judges.

2. The principle of separation bears a two-fold relevance: subjective and objective. In its objective orientation, the principle of separation means prohibition to join the office of a judge with any other state offices or functions. The judge may run for Member of Parliament, and shall then be granted leave for the term of the election campaign; should he be elected, however, he is obliged to relinquish the position of judge. It did, however, happen in practice, that a judge of the Supreme

Court had been appointed Minister of Justice; it was then concluded that leave of absence shall be fully sufficient, and that relinquishing office shall not be necessary. In the course of holding office, judges shall not belong to any political party or trade union; neither shall they partake in any other political activities.

In the subjective orientation, the principle of separation means a prohibition to take additional employment without a former consent of the Court Chairman, with the exception of taking a scientific or didactic position (which actually means academic employment). The judge shall not take any other position which could interfere with performing his/her professional duties, impact his/her dignity, or infringe on confidence in his/her impartiality.

The judge shall be obliged to file annual property statements with the Court Chairman, such statements to contain in particular information on monetary assets and real estate held, shares and stocks in Commercial Code companies, as well as on property acquired by him/her or his/her spouse from the State Treasury or from a state-owned or municipal entity, as well as on any business activities the judge (or his/her spouse) may be involved in, and on any positions held at Commercial Code companies or co-operatives.

3. In terms of remuneration, the basis principle provides for the base salary of judges at equal-ranking courts to be equal - there is no possibility for judges to be divided according to any grid or categories, or of remuneration to be differentiated on such a basis. This principle, adopted in 1989, has been recognised as a crucial guarantee of judges' independence.

Differences in remuneration may only result from the duration of employment (the basic salary is supplemented by an allowance calculated in respect of the time spent in office), and from positions held (Court chairmen and deputy chairmen as well as chairmen of divisions receive allowances for the functions performed).

The base salary is determined on the basis of so-called "budgetary sector average remuneration forecast" defined annually by virtue of the Budget Bill (and recognised as a starting point for calculating the base salaries throughout the budgetary sector). Remuneration paid to judges is calculated as follows: such "average remuneration" is multiplied by a coefficient determined for each and every group of courts (such coefficient currently reaching 5.7 for the Supreme and Supreme Administration Courts). The actual coefficient rate for the respective groups of courts is defined by the President of the Republic by virtue of an order requiring a counter-assignment of the Prime Minister to be issued. Albeit the actual remuneration paid to judges still leaves a lot to be desired, the system as described here eliminates any elements of discretion.

Appendix

Structure of the Ministry of Justice

Ministry

1. Political Office of the Minister
2. Office of the Minister
3. Department of Courts and Notaries
4. Department of Penalty and Criminal Prosecution Measures
5. Department of Human Resources and Training
6. Department of Family and Minors' Courts
7. Department of Foreign Liaison and European Law
8. Legislative and Legal Department
9. Department of Organisation and IT
10. Department of the Budget and State Treasury Property
11. Financial-and-Administrative Bureau
12. Court Registers Bureau
13. Press Office

National Prosecution Authority
Chief Penitentiary Services Board