



Public Statement

The Law Society of Upper Canada expresses grave concern about the reforms threatening the independence of the judiciary and the rule of law in Poland

Toronto, ON — The Law Society of Upper Canada expresses grave concern about the reforms threatening the independence of the judiciary and the rule of law in Poland.

Background

On October 27, 2017, at the conclusion of his official mission to Poland, the United Nations Special Rapporteur on the independence of judges and lawyers, Mr. Diego García-Sayán, released his preliminary observations and recommendations on the independence of the judiciary in Poland. Mr. Diego García-Sayán emphasized that an independent and impartial judiciary plays an essential role in protecting and promoting human rights and fundamental freedoms, as well as upholding the rule of law. He also emphasized that the judicial system is an essential check and balance on the other branches of government, ensuring that laws adopted by the legislative power and the acts of the executive power comply with international human rights and the rule of law.

Mr. Diego García-Sayán concluded that the independence of Poland's judicial system and other crucial democratic standards like the separation of powers are under threat. While the reform and modernization of judicial institutions is a legitimate objective for the Government to pursue, such reform must be aimed at strengthening, not undermining, the independence of the justice system.

Mr. Diego García-Sayán noted attacks on the independence and impartiality of the judiciary in the media. He was concerned about a communication campaign by the Polish National Foundation that depicted judges as “the enemy” of the Polish people and an evil in Polish society. The National Foundation is apparently funded by State-owned corporations.

After the political elections held in October 2015, a coordinated set of actions were put in place and a vast array of legal amendments to the legislation that regulates the functioning of the judiciary were adopted. Individually, each of these laws present a number of concerns as to compliance with international legal standards relating to the independence of the judicial system. Taken together, the various legislative acts and measures adopted or proposed by the executive and legislative powers appear to be parts of a policy that has the effect of severely undermining the independence of the judiciary and eroding the possibilities of checks and balances between crucial institutions of the State.

A number of legislative acts have been adopted or proposed with the aim of modifying the composition and functioning of multiple judicial institutions including the Supreme Court, ordinary courts, the National Council of the Judiciary and the prosecution service. These reforms, both adopted and proposed, have caused serious concerns among lawyers across Europe.

Act on the Common Court Organisation

The *Act on the Common Court Organisation* is a new Act adopted as part of the recent reforms. In accordance with Article 17.1 of the Act, the Minister of Justice has the power to dismiss presidents of the courts and appoint new presidents of his or her choice without any explanation as to the rationale behind such a decision. Furthermore, no judicial review is available against a dismissal decision from the Minister of Justice. This provision was passed despite the fact that the Legislation Office of the Polish Sejm declared it unconstitutional.

Act on the Prosecution Service

The *Act on the Prosecution Service* has had recent amendments, including the merging of the positions of the Minister of Justice and Prosecutor General and the attribution of new powers to the latter. The attribution of extensive powers to the Prosecutor General/Minister of Justice without the establishment of corresponding safeguards poses a risk to the principle of separation of powers. It also exposes the prosecutors' work to significant political influences that may undermine the independence of the prosecution service.

Law on the Supreme Court

According to information received by the Special Rapporteur, a new draft of the *Law on the Supreme Court* is currently being revised by the President and the leader of the majority party. Mr. Diego García-Sayán has emphasized that the fact that the text of such an important law is being discussed behind closed doors is a source of serious concern, and he urged open and transparent debate. In particular, the Court itself should be given ample opportunity to make comments and suggestions, as should other relevant institutions such as the Commissioner for Human Rights and the National Council of the Judiciary.

Despite revision, a number of provisions of this new law continue to pose serious threats to the independence of the judiciary and the separation of powers. Of particular concern is the reduction of the mandatory retirement age for Supreme Court judges. Until now, female and male judges retired at the age of 67. This new Act introduces a lower age of retirement for female and male judges, who would have to retire at 60 and 65 respectively. This would constitute a breach of the principle of non-removability of judges and result in the forced retirement of 40 percent of the members of the court, including its president. Furthermore, introducing different mandatory retirement ages for female and male judges goes against efforts towards gender equality.

As well, in light of this new legislation, there are concerns regarding the possible creation of two new chambers of the Supreme Court: the Chamber of Extraordinary Control and Public Affairs as well as the Disciplinary Chamber. The establishment of both chambers would raise a number of rule of law concerns, particularly regarding the principles of the independence of the judiciary, separation of powers and *ne bis in idem*.

Act on the National Council of the Judiciary

Also of concern is the *Act on the National Council of the Judiciary*. This new Act would end the term of all fifteen judicial members currently serving in the Council and provide the Sejm with the authority to select all judicial members of the Judicial Council. This would allow the legislative power to have significant influence over the selection and appointment of judges, consequently allowing undue political interference in the overall administration of justice. This contravenes the

international principle of independence of the judiciary, which is also confirmed in Article 178(1) of the Polish Constitution.

The Rule of Law and Poland's Obligations

The *Constitution of the Republic of Poland* states that Poland is a democratic state ruled by law. This means that the political system is based on the separation and equilibrium of the legislative, executive and judicial powers. The reforms to the judiciary considered above dilute the independence of judicial power and subordinate the judiciary to those in positions of political power. This poses a serious threat to the independence of judges as well as to the rule of law.

The requirement to abide by the standards guaranteeing the autonomy of courts and independence of the judiciary is provided for by the United Nations' *Basic Principles of the Independence of the Judiciary*, the *International Covenant on Civil and Political Rights*, the *Convention for the Protection of Human Rights and Fundamental Freedoms* and the *Constitution of the Republic of Poland*.

Compliance with these standards is a prerequisite for the protection of the individual rights of citizens and the stable functioning of the State. Lawmaking and the practical application of law by a democratic state ruled by law warrants autonomy and freedom of the judicial branch, as well as inviolability of the independence of the judiciary. Only when the judiciary functions in such a manner can it guarantee that the individual rights of citizens are protected and that trust in the State is built.

Violating or threatening the autonomy and independence of courts is not only an internal problem for Poland, but also has consequences for the international legal community. The Law Society values and upholds the independence of lawyers and judges as well as the rule of law both in Canada and across the globe.

The Law Society is deeply concerned about these reforms to the judicial system in Poland and urges Your Excellency to comply with international human rights law and the rule of law, including the standards provided for by the United Nations' *Basic Principles of the Independence of the Judiciary*, Article 14.1 of the *International Covenant on Civil and Political Rights*, Article 6.1 of the *Convention for the Protection of Human Rights and Fundamental Freedoms* as well as the *Constitution of the Republic of Poland*.

Article 1 of the *Basic Principles of the Independence of the Judiciary* states:

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.

Article 4 states:

There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.

Article 11 states:

The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

Article 18 states:

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

Article 19 states:

All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.

Furthermore, Article 20 provides:

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.

Article 14(1) of the *International Covenant on Civil and Political Rights* states:

...everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law...

Article 6(1) of the *Convention for the Protection of Human Rights and Fundamental Freedoms* states:

...everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law...

Article 178(1) of the *Constitution of the Republic of Poland* states:

Judges, within the exercise of their office, shall be independent and subject only to the Constitution and statutes.

Articles 180(1) and (2) state:

- (1) Judges shall not be removable.
- (2) Recall of a judge from office, suspension from office, transfer to another bench or position against his will, may only occur by virtue of a court judgment and only in those instances prescribed in statute.

Furthermore, Article 186(1) provides:

The National Council of the Judiciary shall safeguard the independence of courts and judges.

The Law Society urges the Government of Poland to:

- a. respect and protect the principle of the independence of the judiciary;
- b. respect and protect the principle of separation of powers, including by refraining from inappropriate or unwarranted interference with the judicial process, particularly in relation to the appointment, dismissal and promotion of members of the judiciary;
- c. ensure that any modification of the mandatory retirement age does not adversely impact the security of tenure of judges, and does not go against efforts towards gender equality;
- d. promote a fair, open and transparent reform process involving the parliamentary majority, the opposition, the judiciary, the Office of the Ombudsman and civil society actors;
- e. ensure that any reform of the judiciary has the aim of strengthening, not undermining, the independence of the justice system and all its actors;
- f. ensure that any reform of the judiciary is guided by the principles of the independence of the judiciary, the separation of powers and the rule of law; and
- g. ensure in all circumstances respect for human rights and fundamental freedoms in accordance with international human rights standards and international instruments.