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Поощрение и защита всех прав человека, гражданских, политических, экономических, социальных и культурных прав, включая право на развитие

Доклад Специального докладчика по вопросу о независимости судей и адвокатов о посещении им Польши

Записка Секретариата

Специальный докладчик по вопросу о независимости судей и адвокатов посетил Польшу с официальным визитом с 23 по 27 октября 2017 года. В ходе своей поездки Специальный докладчик встречался с самыми различными высокопоставленными государственными должностными лицами, Комиссаром по правам человека, судьями и магистратами судов различной инстанции, следователями, адвокатами, учеными, представителями международных и местных неправительственных организаций и представителями международных и региональных организаций. Цель поездки состояла в оценке законодательных и других мер по реформе судебной системы Польши, принятых партией «Право и справедливость» после ее победы на всеобщих выборах в октябре 2015 года.

Специальный докладчик признает, что Польша имеет право на проведение реформы судебной системы. В то же время он подчеркивает, что главным следствием, а возможно, и главной целью мер, принятых правящим большинством, стало ограничение независимости судебной власти, которая защищена Конституцией, и предоставление законодательной и исполнительной ветвям власти полномочий на вмешательство в процесс отправления правосудия.

Первой жертвой таких односторонних действий стал Конституционный суд, легитимность и независимость которого были серьезно подорваны вследствие принятия правительством ряда скоординированных мер, имеющих целью поставить Конституционный суд под свой контроль. На сегодняшний день Суд не в состоянии обеспечить независимый и эффективный надзор за конституционностью законодательных актов, принимаемых законодательным органом власти. Подобная ситуация вызывает серьезные сомнения относительно его способности защищать конституционные принципы и отстаивать права человека и основные свободы.

Успешно «нейтрализовав» Конституционный суд, правительство приступило к проведению широкой реформы судебной системы. В период с мая по декабрь 2017 года им были приняты три закона, предусматривающие серьезные изменения в составе и функционировании обычных судов (судов ординарной юрисдикции),

Верховного суда и Всепольского судебного совета. Каждый из этих законов вызывает целый ряд вопросов относительно его соответствия международно-правовым стандартам, а в совокупности они приводят к тому, что судебная власть оказывается под контролем исполнительной и законодательной ветвей власти.

Специальный докладчик приходит к выводу о том, что проведение этой реформы может заметно ограничить способность органов судебной власти обеспечивать соблюдение принципа сдержек и противовесов и выполнять свою главную функцию, которая состоит в поощрении и защите прав человека и отстаивании верховенства права. Он рекомендует Польше пересмотреть принятые меры с учетом международных норм и стандартов, касающихся независимости судебной власти и разграничения властных полномочий.

Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Poland*

Contents

* Circulated in the language of submission only.

I. Introduction

1. The Special Rapporteur on the independence of judges and lawyers, Diego García-Sayán, visited Poland from 23 to 27 October 2017 to assess the measures adopted by Poland to protect and promote the independence of the judiciary.

2. During his mission, the Special Rapporteur met with representatives of the Ministry for Foreign Affairs and the Ministry for Justice, the Commission on Human Rights, Law and Order and Petitions of the Sejm (lower house of parliament) and the Senate Commission of Justice and Human Rights, and the Chancellery of the President of the Republic. He also held meetings with members of the judiciary, including the Constitutional Tribunal, the Supreme Court and the Supreme Administrative Court, and representatives of the National Council of the Judiciary and the National Prosecutors' Council.

3. In addition to State officials, the Special Rapporteur met with a wide range of civil society representatives, including the Commissioner for Human Rights (the Ombudsman), non-governmental organizations, associations of judges, prosecutors and lawyers and academics, and with representatives of international and regional organizations, including the European Commission and the Office for Democratic Institutions and Human Rights of the Organization for Security and Cooperation in Europe (OSCE/ODIHR).

4. The Special Rapporteur wishes to reiterate his gratitude to the authorities of Poland, in particular the Minister for Foreign Affairs, for their invitation and cooperation, and to the United Nations Information Centre in Warsaw for the support it provided before and during the visit. He would also like to express his appreciation to all the judges, prosecutors, lawyers, academics and civil society activists who took the time to share their expertise and opinions with him.

II. Legal and institutional framework

A. International obligations

5. An efficient, independent and impartial judicial system is essential for upholding the rule of law and ensuring the protection of human rights and fundamental freedoms. The independence of the judiciary is enshrined in a number of international and regional human rights treaties to which Poland is a party, including the International Covenant on Civil and Political Rights and the Convention for the Protection of Human Rights and Fundamental Freedoms (European Convention on Human Rights). Both instruments provide that everyone is entitled to a fair and public hearing by an independent and impartial tribunal established by law. The country's adherence to these treaties means that it must, inter alia, adopt all appropriate measures to guarantee the independence of the judiciary and protect judges from any form of political influence in their decision-making.

6. As a member State of the European Union, Poland is also bound to respect and implement European Union treaties and the values they enshrine, including respect for the rule of law and human rights (art. 2 of the Treaty on the European Union). Article 47 of the European Union Charter of Fundamental Rights, which is binding on Poland, reflects fair trial requirements relating to an independent and impartial tribunal previously established by law.

7. The independence of the judiciary is an essential requirement of the democratic principle of separation of powers, which stipulates that the executive, the legislature and the judiciary constitute three separate and independent branches of Government. The principle of the separation of powers is the cornerstone of an independent and impartial justice system. According to this principle, the constitution, laws and policies of a country must ensure that the justice system is truly independent from other branches of the State. Within the justice system, judges, lawyers and prosecutors must be free to carry out their professional duties without political interference and must be protected, in law and in practice, from attack, harassment or persecution as they carry out their professional activities.

8. The requirement of independence refers, in particular, to the procedure for the appointment of judges; the guarantees relating to their security of tenure; the conditions governing promotion, transfer, suspension and cessation of their functions; and the actual independence of the judiciary from political interference by the executive branch and the legislature. The European Court of Human Rights has developed similar criteria to determine the independence of a tribunal.[1] In its general comment No. 32 (2007) on the right to equality before courts and tribunals and to a fair trial, the Human Rights Committee explained that a situation where the functions and competencies of the judiciary and the executive are not clearly distinguishable, or where the latter is able to control or direct the former, is incompatible with the notion of an independent tribunal.[2]

9. The Basic Principles on the Independence of the Judiciary spell out the measures that States must adopt to secure and promote the independence of judges and magistrates. According to the Basic Principles, the independence of the judiciary shall be enshrined in the Constitution or the law of the country, and it is the duty of all governmental and other institutions to respect and observe the independence of the judiciary (principle 1). The judiciary shall decide matters before them impartially, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason (principle 2). The Principles also provide guidance on a series of further requirements, including qualifications and selection of judges (principle 10), conditions of service (principle 11), security of tenure (principle 12) and disciplinary, suspension or removal proceedings (principles 17−20).

10. In accordance with the Constitution of Poland, international treaties constitute sources of universally binding law in Poland (arts. 9 and 87 (1)). Following the promulgation in the Journal of Laws of the Republic of Poland, duly ratified international agreements become part of the domestic legal order and can be applied directly, unless their application depends on the enactment of a statute (art. 91 (1)). International treaties take precedence over national legislation in case of conflicts with the provisions contained in ordinary law (art. 91 (2)).

B. Justice system

11. The Constitution of Poland enshrines the principle of separation and balance of powers (art. 10) and the independence of the judiciary (art. 173). Chapter II of the Constitution incorporates the human rights and fundamental freedoms of the person, including the right to a fair and public hearing before a competent, impartial and independent court (art. 45). Chapter VIII of the Constitution contains detailed provisions on the independence of the judiciary. Article 178 (1) provides that in the exercise of their functions, judges are independent and subject only to the Constitution and national legislation. Other constitutional provisions set out additional safeguards, including appropriate conditions of work and remuneration (art. 178 (2)), security of tenure (art. 179), non-removability from office (art. 180) and judicial immunity (art. 181).

12. According to the Constitution, the judicial system of Poland consists of the Supreme Court, the common (ordinary) courts, administrative courts and military courts (art. 175 (1)). The organization and functioning of these courts is regulated by ordinary legislation.

III. Challenges to an independent and impartial justice system

13. On 25 October 2015, the Law and Justice Party obtained an absolute majority in the parliamentary elections. The general elections were preceded by presidential elections in

[1] The Court held that in order to establish whether a judicial body can be considered "independent", regard must be had to four elements, namely (a) the manner of appointment; (b) the term of office; (c) the existence of guarantees against outside pressure; and (d) the appearance of independence. See, for example, *Campbell and Fell v. United Kingdom*, decision of 28 June 1984; *Findlay v. United Kingdom*, decision of 25 February 1997; *Incal v. Turkey*, decision of 9 June 1998; *Salov v. Ukraine*, decision of 6 December 2005; *Luka v. Romania*, decision of 21 July 2009; and *Pohoska v. Poland*, decision of 10 January 2012.

[2] See Human Rights Committee, general comment No. 32, para. 19.

May 2015, which the party's candidate, Andrzej Duda, won. Following the electoral victory, the national-conservative party has instigated "a series of contentious reforms that have undermined the country's democratic institutions, polarised public opinion and recast Poland's relationship" with the European Union.[3] The Government's actions have provoked large-scale protests at home and the threat of sanctions from the European Commission.

14. The Law and Justice Party considered that the election victory gave it a clear mandate to carry out a comprehensive reform of the judicial system, long regarded by the ruling majority as a mechanism by which the former communist elite was able to preserve its status and influence during and after Poland transitioned to democracy. The stated goal of the reform is to increase the efficiency of the court system, reduce delays in judicial proceedings, enhance the accountability of judges and combat the corporatism that, according to the ruling majority, affects the justice system and hampers its efficiency. According to the party, this large-scale reform is long overdue and necessary to restore public trust in the judiciary.

15. The reform, currently under way, consists of two distinct phases.[4] Short of a qualified majority that would enable it to change the Constitution, during the first phase the ruling majority put in place a coordinated set of actions aimed at bringing the Constitutional Tribunal under its control. During this phase, the Tribunal became "a besieged fortress",[5] the taking of which would pave the way to making far-reaching changes to the justice system without any regard to their compliance with the Constitution. After converting the Tribunal "into a politically pliant body",[6] the Government moved to the second phase of its reform programme, adopting a number of legislative acts to modify the composition and functioning of the main judicial institutions in the country: the common court system, the Supreme Court and the National Council of the Judiciary.

16. In sections B and C below the Special Rapporteur assesses the legislative and other measures adopted by Poland against existing international norms, standards and good practices related to the independence of the judiciary and the separation of powers. The following analysis builds upon — and should be read in conjunction with — the comprehensive review carried out by international and regional human rights mechanisms, including the Human Rights Committee (see CCPR/C/POL/CO/7, paras. 6−7), the Commissioner for Human Rights of the Council of Europe,[7] OSCE/ODIHR[8] and the European Commission for Democracy through Law (the Venice Commission),[9] as well as by the European Commission, which has adopted four recommendations to address the "systemic threat to rule of law" existing in Poland.[10]

[3] Economist Intelligence Unit, Country Report: Poland, 15 September 2017, p. 3.

[4] See the interview in the newspaper *Rzeczpospolita* (*The Republic*) with Jarosław Kaczyński, current leader of the Law and Justice Party, of 18 January 2016 (quoted by the Supreme Court in its memorandum of 6 March 2017 to the European Commission on the situation of the judiciary in Poland).

[5] D. Mazur and W. Żurek, "So called 'good change' in the Polish system of the administration of justice", October 2017, p. 5.

[6] Economist Intelligence Unit, Country Report, p. 3.

[7] Report of Commissioner Nils Muižnieks on his visit to Poland (9−12 February 2016), CommDH(2016)23, June 2016.

[8] Opinion on Draft Amendments to the Act on the National Council of the Judiciary and Certain Other Acts of Poland, JUD-POL/305/2017, 5 May 2017; and Opinion on Certain Provisions of the Draft Act on the Supreme Court of Poland, JUD-POL/315/2017, 13 November 2017.

[9] Opinion 833/2015 on Amendments to the Act of 25 June 2015 on the Constitutional Tribunal of Poland, 11 March 2016; Opinion 860/2016 on the Act on the Constitutional Tribunal, 14 October 2016; and Opinion 904/2017 on the Draft Act amending the Act on the National Council of the Judiciary, on the Draft Act amending the Act on the Supreme Court, Proposed by the President of Poland, and on the Act on the Organization of Ordinary Courts, 11 December 2017.

[10] See European Commission recommendations regarding the rule of law in Poland 2016/1374 of 27 July 2016; 2017/146 of 21 December 2016; 2017/1520 of 26 July 2017; and 2017/0360 of 20 December 2017.

A. Judiciary under attack

17. The independence of justice and institutional checks and balances are under threat in Poland. While the reform and modernization of judicial institutions is a legitimate objective, these processes should be undertaken with the goal of strengthening judicial independence and the rule of law as a whole.

18. The implementation of the proposed judicial reform has been accompanied by a large-scale propaganda attack against the judiciary, who are depicted by the ruling majority as a "caste", a "State within the State", an entirely self-governing corporation which aims solely at defending its interests and is not accountable to the society. Attacks on the independence and impartiality of the judiciary appear to be common on certain media, which at times have portrayed the judiciary as inefficient and corrupt, and made instrumental use of a few and isolated cases in which judges had been involved in illicit activities to demonize the judiciary as a whole.

19. The Special Rapporteur is particularly concerned at the "Fair Courts" campaign launched by the Polish National Foundation, established by the current parliament under the auspices of the ruling party and funded by 17 State-owned corporations with the official aim of promoting large-scale reform of the judiciary. The campaign, which sparked controversy due to the lack of transparency about its sponsor and budget, consists of billboards, advertisements on television and social media and a dedicated portal. It provides a distorted image of the judiciary, depicting judges as "the enemy" of Polish people and an evil in Polish society.[11]

B. Constitutional crisis

20. The Special Rapporteur is deeply concerned about the ongoing constitutional crisis, which has been developing at a fast pace since soon after the political elections of October 2015.

21. The crisis was born as a conflict of views between the new parliamentary majority and the outgoing governing political party over their right to appoint new constitutional judges. Following its election victory, the Law and Justice Party considered that no reform of the political system and Polish society would be possible without the "depoliticization" of State institutions and bodies, which in its view were dominated by, and therefore biased in favour of, the previous authorities. The Constitutional Tribunal, which had considerable legal powers to block or hinder its reform programme if it was not in line with constitutional provisions, then became the first "victim" of the new parliamentary majority.

22. The Special Rapporteur focuses here on three different aspects of the crisis: (a) the conflict over the appointment of constitutional judges; (b) the refusal to publish and implement the judgments of the Constitutional Tribunal; and (c) the adoption of a number of "remedial statutes" aimed at crippling the Tribunal's effectiveness.

1. Appointment of judges of the Constitutional Tribunal

23. There is no doubt that the "original sin" that provoked the crisis was committed by the previous parliamentary majority. On 25 June 2015, ahead of the general elections, the Sejm adopted the Act on the Constitutional Tribunal. The new Act introduced a new provision on the appointment of judges of the Constitutional Tribunal (art. 137), which allowed the outgoing legislature to fill all five positions on the Tribunal that would become vacant in 2015, including two that would become vacant only after the general elections. On 8 October 2015, the outgoing Sejm selected five judges — three to replace judges leaving on 6 November 2015 and two to replace those whose tenure would expire on 2 and 8 December

[11] The "Fair Courts" portal (www.sprawiedliwesady.pl) contains a section called "the privileged caste", containing articles about judges caught driving while intoxicated and accused of shoplifting and of starting bar fights. It also cites cases of real or alleged mistakes by courts, for example, a judge who released a recidivist paedophile from custody and a court that took 16 years to issue a final ruling on the brutal murder of an elderly woman.

2015. The President of the Republic, however, refused to accept the oath of the five new judges, who are often referred to as the "October judges".

24. On 19 November 2015, the new Sejm amended the Act on the Constitutional Tribunal through an accelerated procedure. The amendment repealed article 137 of the Act. On 25 November, the Sejm adopted a resolution invalidating the five nominations by the outgoing legislature, and on 2 December nominated five new judges (the "December judges"). The President of the Republic accepted the oath of these judges.

25. On 3 and 9 December 2015, the Constitutional Tribunal issued two judgments concerning the election of new judges by the previous and the incoming legislatures.

26. In the first judgment, the Tribunal held that the outgoing Sejm was entitled to nominate the three judges to replace the judges whose mandates expired before the end of the previous legislature, and that the President of the Republic was under an obligation to accept their oath. At the same time, the Tribunal found that the outgoing Sejm was not entitled to nominate the two judges to replace those whose terms expired in December.

27. In the second judgment, concerning the constitutionality of the amendments to the Act on the Constitutional Tribunal of 19 November 2015, the Tribunal invalidated, inter alia, the legal basis for the election by the new legislature of the three judges who had been nominated to replace the judges whose term expired in November. The Tribunal also clarified that the beginning of the constitutional judges' term of office is their appointment by the Sejm, and not the moment of the oath-taking before the President of the Republic.

28. The two judgments of the Constitutional Tribunal did not lead to the end of the crisis. The President of the Republic refused to execute the rulings of the Tribunal, while the President of the Constitutional Tribunal refused to admit to the bench the three judges appointed by the Sejm in December 2015. On 12 January 2016, the two judges duly appointed by the current Sejm were admitted to the bench. From that moment onwards, the Tribunal had 12 sitting judges instead of the 15 required by the Constitution.

29. The Special Rapporteur regrets that the judgments issued by the Constitutional Tribunal on 3 and 9 December 2015 have not been implemented. This constitutes a flagrant breach of the principles of judicial independence and the separation of powers, as well as a violation of the Polish Constitution.[12] The duty to respect and abide by the judgments and decisions of the judiciary constitutes a necessary corollary of the principle of institutional independence of the judiciary (see principles 1, second sentence, 3 and 4 of the Basic Principles). The jurisprudence of the European Court of Human Rights confirms that the principle of the independence of the judiciary requires national authorities that are not part of the judiciary to respect and abide by the decisions of national courts.[13]

2. Lack of publication and implementation of the Constitutional Tribunal's judgments

30. When it became evident to the parliamentary majority that it was not possible to take control of the Constitutional Tribunal quickly by filling most positions on it with the party's candidates, it enacted further legislative changes — often referred to as "remedial statutes" — aimed at paralysing the Tribunal.[14]

31. On 22 December 2015, following an accelerated procedure, the Sejm amended the Act on the Constitutional Tribunal. The amendments entered into force immediately, without *vacatio legis* (which would have enabled the Tribunal to decide on their constitutionality before their entry into force). They increased the attendance quorum for adjudicating cases in full bench (13 out of 15 judges), required a two-thirds majority to issue judgments by the

[12] According to article 190 (1), judgments of the Constitutional Tribunal are final and universally binding.

[13] In *Findlay v. United Kingdom*, for instance, the European Court stated that "it is a well-established principle that the power to give a binding decision which may not be altered by a non-judicial authority is inherent in the very notion of 'tribunal' and can also be seen as a component of the 'independence' required by Article 6, para. 1" of the European Convention on Human Rights (para. 77).

[14] Mazur and Żurek, "So called 'good change'", p. 6.

full panel of judges, introduced the "sequence rule" for the handling of cases in chronological order and set a minimum delay for hearings. According to the Venice Commission, the combined effect of these procedural changes would have seriously hampered the effectiveness of the Tribunal by rendering decision-making extremely difficult and slowing down the proceedings of the Tribunal.[15]

32. On 9 March 2016, the Constitutional Tribunal — sitting in a panel of 12 judges — declared the amendments of 22 December 2015 unconstitutional in their entirety. The Government contested the legality of this judgment, as the Tribunal did not apply the procedure foreseen in the amendments (which would have required a quorum of 13 out of 15 judges and a qualified majority of two thirds to reach a decision on the constitutionality of the amendments). As a result, the Polish authorities refused to publish the judgment, as well as the rulings issued after that date, in the Official Journal.

33. On 22 July 2016, the Sejm adopted a new Act on the Constitutional Tribunal, which repealed the Act of 25 June 2015. The new Act contained some improvements vis-à-vis the amendments of 22 December 2015. It lowered the quorum for plenary session from 13 to 11 judges, reintroduced the majority vote for the adoption of decisions, introduced exceptions to the "sequence rule" and reduced the minimum delays for hearings. However, the Act also introduced a number of problematic provisions, for instance those allowing the duly notified Prosecutor-General to block the consideration of politically sensitive cases with his/her absence and those concerning the postponement of a case for up to six months upon request by four judges. Both the Venice Commission and the European Commission expressed the view that the new Act raised concern regarding the effectiveness of constitutional review, the independence of the Tribunal and the rule of law.[16]

34. On 11 August 2016, the Constitutional Tribunal issued a judgment on the Act on the Constitutional Tribunal of 22 July 2016. Since the constitutionality of the Act had been assessed during the short *vacatio legis* of two weeks before its entry into force, the judgment was adopted on the basis of the Act of June 2015 and not on the basis of the new Act, without the amendments of 22 December 2015 (already found unconstitutional by the Tribunal in its judgment of 9 March 2016). The Tribunal ruled that several provisions of the new law infringed the independence of the judiciary and the principles of separation and balance of powers, and were therefore unconstitutional. As was the case with the judgment of 9 March 2016, the Polish authorities did not recognize the validity of this judgment and did not publish it in the Official Journal.

35. On 16 August 2016, the Polish Government published — pursuant to article 89 of the new Act of 22 July 2016 — 21 judgments "issued in breach of the provisions of the Act on the Constitutional Tribunal of 25 June 2015" in the period between 6 April and 19 July 2016. The judgments of 9 March and 11 August 2016, however, were not published by the Polish authorities, because those rulings concerned normative acts that had "ceased to have effect". In its judgment of 11 August 2016, the Constitutional Tribunal declared article 89 unconstitutional because of its inconsistency with the principles of the separation of powers and the independence of the judiciary. The Venice Commission shared this view, stating that it was neither for the executive nor for the legislative branch to "pick and choose which judgments of a court are to be published and which are not to be published".[17]

36. The Special Rapporteur is concerned that selected judgments handed down by the Constitutional Tribunal have not yet been published in the Official Journal. In particular, he rejects the justification that the executive would retain the power to control the respect of the procedural norms by the Tribunal.[18] The validity of the judgments of the Tribunal can in no case depend on the goodwill of the executive or the legislative branch. The fact of having

[15] See Venice Commission, opinion 833/2015, para. 88.

[16] See European Commission, recommendation 2016/1374, sect. 4.2; and Venice Commission, opinion 860/2016, para. 123.

[17] See Venice Commission, opinion 860/2016, para. 96.

[18] According to government officials, this power stems directly from the mandate that the Polish people entrusted to the ruling majority at the last election. It is the Government's duty, in its opinion, to exercise ultimate control over the legality of the Constitutional Tribunal's decision, as it has greater democratic legitimacy than judges by virtue of having been elected.

been elected does not give them a monopoly of legitimacy, nor does it grant them any right to exercise control over the court that, in accordance with the Constitution, guarantees appropriate checks and balances among the different State branches. In order to be able to operate independently and effectively, the Tribunal must have the exclusive authority to decide on the procedures to follow to adopt its decisions. Any interference with its judicial process constitutes a violation of principles 3 and 4 of the Basic Principles and a serious breach of the principle of the separation of powers.

37. The Special Rapporteur welcomes the publication on 16 August 2016 of the 21 judgments issued by the Constitutional Tribunal since 9 March 2016. However, he wishes to point out that article 89 of the Act of 22 July 2016 cannot be referred to as the legal basis for their publication, since the provision had already been declared unconstitutional in the judgment of 11 August 2016. Furthermore, the Special Rapporteur shares the view of the Venice Commission that "the public portrayal of the Tribunal's judgments as 'illegal' questions the position of the Constitutional Tribunal as the final arbiter in constitutional issues, and is an attack on the Tribunal's authority, contrary to the principle of loyal cooperation between State organs".[19]

3. The three acts of December 2016 and the creation of a "new" Constitutional Tribunal

38. At the end of 2016, when the term of office of the President of the Constitutional Tribunal was about to expire, the Sejm adopted three new acts on the work of the Tribunal:

(a) The Act of 30 November 2016 on the Legal Status of Judges of the Constitutional Tribunal;

(b) The Act of 30 November 2016 on the Organization of and Proceedings before the Constitutional Tribunal;

(c) The Act of 13 December 2016 implementing the Act on the Organization of and Proceedings before the Constitutional Tribunal and the Act on the Legal Status of Judges (the "Implementing Act").

39. The aim of these acts was, according to many commentators, to secure for the governing majority the chance to appoint the new President and to take control over the Tribunal. Key provisions of these acts entered into force without *vacatio legis*. According to article 3 of the Implementing Act, the Act of the Constitutional Tribunal of 22 July 2016 — which the Tribunal had already declared to be unconstitutional for the most part in its judgment of 11 August 2016 — ceased to exist.

40. Taken together, these three acts contain a number of provisions which affect the principles of the independence of the judiciary and the separation of powers, including:

(a) Article 5 of the Act on the Legal Status of Judges, according to which judges of the Tribunal take office from the moment they take the oath before the President of the Republic. This provision aims at enabling the unlawfully appointed "December judges" to take up their functions;

(b) Articles 24 ff. of the Act on the Legal Status of Judges concerning disciplinary proceedings against judges and retired judges of the Tribunal, which extend the types of behaviours that may give rise to disciplinary proceedings and give the power to initiate disciplinary proceedings to the President of the Republic on the motion of the Prosecutor-General;

(c) Article 10 of the Implementing Act providing the possibility of early retirement for Constitutional Tribunal judges, which constitutes an interference by the legislative branch with the independence of the Tribunal insofar as it aims at encouraging the current judges of the Tribunal to resign in advance of the end of their term of office.

41. However, the most problematic provisions are those relating to the appointment of the President, Vice-President and "acting President" of the Tribunal. The Implementing Act provides that if, on the date of publication of the Act, the General Assembly of the Tribunal

[19] See Venice Commission, opinion 860/2016, para. 101.

has not managed to meet or to present candidates to the President of the Republic, "the procedure for presenting candidates for the position of President of the Tribunal shall be carried out as prescribed in article 21 of this Act" (art. 16). Furthermore, it provides that when necessary to enact the procedure provided for in article 21, the President of the Republic shall select the judge to perform the duties of President of the Tribunal ("acting President") from among the judges of the Tribunal with the longest period of service in common courts or in central government posts involving application of the law (art. 17 (2)). Article 18 provides a wide range of powers to the "acting President", including enabling the unlawfully elected "December judges" to perform their duties as judge and carrying out the procedure set forth in article 21 of the Act.

42. Key provisions of the Implementing Act entered into force the day following the date of publication, i.e., on 20 December 2016, the day after the expiration of the term of office of the previous President of the Constitutional Tribunal. On that day, the President of the Republic appointed judge Julia Przyłębska, recently selected by the ruling majority during the current Sejm, as the "acting President" of the Constitutional Tribunal. Judge Przyłębska admitted the three judges appointed by the eighth (current) Sejm to take up their functions in the Tribunal and convened a meeting of the General Assembly for the same day. In view of the short notice, one judge was unable to participate and requested postponement of the meeting to 21 December. Following the refusal of the "acting President", eight other judges refused to participate in the General Assembly and only six judges — all appointed by the current Sejm — took part in the meeting. The following day, the President of the Republic appointed judge Przyłębska to the position of President of the Constitutional Tribunal.

43. The Special Rapporteur considers that the procedure set out in article 17 of the Implementing Act, which allows the President of the Republic to directly appoint an "acting President" of the Constitutional Tribunal, raises serious concerns in relation to the principles of the independence of the judiciary and the separation of powers. This procedure also raises concerns in relation to its constitutionality, since the Polish Constitution does not provide for the function of an "acting President" of the Tribunal and clearly states that the President and Vice-President of the Tribunal shall be appointed by the President of the Republic "from among candidates proposed by the General Assembly of the Judges of the Constitutional Tribunal" (art. 194 (2)). The criteria set out in article 17 (2) for the selection of the "acting President" of the Tribunal also appear to be arbitrary, "as someone with no meaningful experience in the judiciary but also in central government could be selected, while someone with a long experience in the Tribunal itself but not in ordinary courts could not be selected".[20]

44. The Special Rapporteur is also of the view that the procedure provided for in article 21 of the Implementing Act for the appointment of the new President of the Constitutional Tribunal raises serious concerns with regard to the principles of the independence of the judiciary and the separation of powers. The participation of judges unlawfully appointed by the current Sejm in the process constitutes a serious attack on the independence of the Tribunal which, in its judgment of 9 December 2015, had found the legal basis for their election unconstitutional. Similarly, the exclusion of the "October judges" from the process in breach of the Tribunal's judgment of 3 December 2015 also casts serious doubts over the legality of the process. Finally, the election of candidates for the position of President of the Tribunal by only six judges goes against the Tribunal's judgment of 7 November 2016, according to which article 194 (2) of the Constitution should be interpreted as requiring the President of the Republic to choose the President of the Tribunal from among candidates who have obtained a majority in the General Assembly of the Tribunal.

45. The participation of judges unlawfully elected by the current Sejm in the work of the Constitutional Tribunal — and, conversely, the exclusion of the "October judges" from its judicial activities — not only affects the legality of the appointment of the President of the Tribunal, but also casts serious doubts about the independence and legitimacy of the Tribunal as a whole. According to information received, a number of State institutions, including the National Council of the Judiciary and the Commissioner of Human Rights, currently refrain from submitting new legislative acts — some of which have extensive human rights

[20] See European Commission, recommendation 2017/146, para. 57.

implications — to the Tribunal. In the present circumstances, no effective review of the constitutionality of Polish legislation can be guaranteed.

C. Reform of the judicial system

46. In July 2017, the Government submitted a legislative package of three bills aimed at modifying the composition and functioning of ordinary courts, the Supreme Court and the National Council of the Judiciary. On 25 July, the President of the Republic signed the Act amending the Act on Common Courts Organisation into law but decided to veto the other two bills following the widespread public protests against the judicial reform package. In September, the President presented two new draft acts, on the Supreme Court and on the National Council of the Judiciary, to the Sejm. The two acts addressed some of the concerns voiced by national and international actors, but the general direction of the reform remained unchanged. The two acts were finally adopted by the Sejm on 8 December and signed into law by the President of the Republic on 20 December.

1. Act on Common Courts Organisation

47. The decision of the President to veto the bills on the Supreme Court and the National Council of the Judiciary overshadowed his decision to sign the remaining bill, which has significant adverse consequences for the independence of the judicial system in Poland. The common courts exercise jurisdiction over all matters that are not reserved, by law, to the competence of other courts (art. 177 of the Constitution). These courts decide, among other things, cases concerning criminal, civil, family and juvenile law, commercial law and labour and social security laws. The common court system consists of 321 district courts (first instance), 45 regional courts (first instance or appellate instance) and 11 courts of appeal (appellate instance).

48. The amendments to the Act on Common Courts Organisation introduce new rules for appointing and dismissing court presidents, who perform important managerial duties in addition to their judicial functions. According to article 17, the Minister of Justice acquires wide and discretionary powers to appoint and dismiss court presidents. During the six months after the entry into force of the amendments, the Minister of Justice is empowered to dismiss presidents and vice-presidents of the common courts and to appoint their replacements at his own discretion, and without any form of judicial review. Following this period, the Minister of Justice retains the power to dismiss court president at his discretion, and the National Council for the Judiciary can block the decision to dismiss a court president only with a qualified majority of two thirds of its members.[21] The amendments also introduce a new ground for dismissal which could easily be abused to remove judges at the Minister's discretion and provide to the Minister unfettered power to appoint new court presidents without any obligation to obtain the approval of the general assembly of the court concerned or the National Council of the Judiciary, as was the case under the previous Act.

49. This interference with the work of common courts and tribunals raises serious concerns in relation to the principles of independence of the judiciary and separation of powers. Taken together, these provisions make it easier for the Minister of Justice to exert pressure on court presidents, whose careers will now be dependent on maintaining good relations with that individual. As the European Commission noted, a president of the court responsible for issuing a judgment on a politically sensitive case may feel pressured to decide in favour of the State authorities in order to minimize the risk of being dismissed, while ordinary members of the court may be inclined in similar cases to uphold the Government's position in order to improve their chance of becoming court president in the future.[22] In both cases, the independence and impartiality of the judge are under threat, and the perception of his/her independence and impartiality is irremediably compromised.

[21] The Venice Commission observed that this threshold is very high, and it will become virtually impossible to achieve after the new Act on the National Council of the Judiciary enters into force. See opinion 904/2017, para. 106.

[22] See European Commission, recommendation 2017/5320, paras. 20−21.

50. The involvement of the Minister of Justice in the dismissal of court presidents is even more problematic because the Minister is allowed to take such decisions on the basis of overly broad criteria that do not provide minimum guarantees against arbitrary dismissal. The Basic Principles provide that judges can only be dismissed "for reasons of incapacity or behaviour that renders them unfit to discharge their duties", and only following proceedings conducted in accordance with established standards of judicial conduct (principles 18 and 19). They also provide that decisions in dismissal proceedings "should be subject to an independent review" (principle 20). The Human Rights Committee considers that "the dismissal of judges by the executive, e.g. before the expiry of the term for which they have been appointed, without any specific reasons given to them and without effective judicial protection being available to contest the dismissal is incompatible with the independence of the judiciary".[23]

51. The new retirement regime applicable to common court judges introduces a lower age of retirement for female and male judges, who will retire at 60 and 65 years of age, respectively. Until now, both female and male judges retired at the age of 67. These provisions undermine the principle of security of tenure, which requires that judges shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office (principle 12). The Human Rights Committee has also recognized on numerous occasions that the non-removability of judges constitutes an essential corollary of the independence of the judiciary.

52. The power of the Minister of Justice to decide, on a case-by-case basis and on the basis of vague criteria, the prolongation of the mandate of individual judges until the age of 70 is equally problematic, since it would allow the Minister to exert influence over individual judges, thereby undermining their independence. In particular, the lack of a time frame for the adoption of a decision allows the Minister of Justice to retain influence over the judges concerned for the remaining time of their judicial mandate.

2. Act on the Supreme Court

53. The Supreme Court is the highest judicial authority in Poland. According to the Constitution, it exercises judicial control over the decisions of all ordinary and military courts (art. 183 (1)), adjudicates on the validity of parliamentary and presidential elections (arts. 101 and 129), determines the validity of referendums (art. 125 (4)), and performs other activities specified in the Constitution and statutes (art. 183 (2)).

54. The new Act on the Supreme Court replaces the homonymous Act of 23 November 2002. According to the explanatory memorandum of the law, the aim of the reform is to restore the public trust in the Supreme Court by "decommunizing" it from judges who, supposedly, had been involved with the previous regime. To achieve this goal, the Act introduces a number of provisions which, as noted by a number of international and national bodies, pose serious threats to the independence of the judiciary and the separation of powers, especially when considered in combination with the simultaneous reform of the National Council of the Judiciary.

55. First of all, the Act lowers the mandatory age of retirement for Supreme Court judges from 70 to 65. The Special Rapporteur acknowledges that a State is in principle free to determine the mandatory retirement age of its judges. However, the application of this measure to all judges currently in office will result in the early retirement of approximately 40 per cent of current judges, including the First President of the Supreme Court, whose six-year term would end in 2020. The Venice Commission observed that this draconian measure undermines both the security of tenure of sitting judges and the independence of the Supreme Court in general.[24] The forced dismissal of a group of judges for general reasons not related to their individual capacity or behaviour also constitutes a flagrant breach of the principle of security of tenure of judges.

56. The Act provides that upon reaching the retirement age, judges who wish to remain on the bench may request the President of the Republic to extend their term. The effect of

[23] See Human Rights Committee, general comment No. 32, para. 20.

[24] See Venice Commission, opinion 904/2017, para. 48.

this provision is to allow the President of the Republic to exert influence over Supreme Court judges who are approaching the retirement age, in violation of the principles of the independence of the judiciary and the separation of powers. Furthermore, the discretionary power of the President of the Republic to decide whether to prolong the term of office of a judge is further increased by the lack of a time frame and clear and objective criteria that will guide the President's decision. As a result, a judge who has asked for an extension is "at the mercy" of the decision of the President of the Republic.[25]

57. The judges who leave the bench as a result of the lowering of the retirement age will be replaced by new judges, appointed by the President of the Republic upon recommendation of the newly constituted National Council of the Judiciary, which will be largely dominated by the political appointees of the current ruling majority. The Venice Commission noted that the newly appointed judges of the Supreme Court will likely be chosen along political lines, as has been the case with the appointment of new judges at the Constitutional Tribunal.[26] The Act also introduces a new ad hoc procedure for the temporary appointment by the President of the Republic of an acting First President of the Court and chamber presidents in case of the early retirement of the incumbent. The lack of involvement of the judiciary in the selection process, which provides the President of the Republic with unlimited discretion, constitutes prima facie infringement of the principle of separation of powers.

58. The Act increases dramatically the discretionary powers of the President of the Republic vis-à-vis the Supreme Court and its judges. The Head of State will now be able to choose the First President of the Court from among five candidates selected by the General Assembly of the Court (under the previous system, the President could only choose between two candidates), define the internal structure of the Court and adopt its rules of procedures. These vast competences conferred on the President of the Republic constitute an additional blow to the independence of the Supreme Court and the principle of separation of powers.

59. Finally, the Act provides for a far-reaching reorganization of the structure of the Supreme Court. It abolishes the Military Chamber[27] and establishes two new chambers: the Extraordinary Control and Public Affairs Chamber and the Disciplinary Chamber.

60. The President of the Republic will be able to determine almost completely the composition of the new chambers so as to ensure that they are wholly or mainly composed of newly appointed judges. As the Venice Commission noted, this would mean that judges appointed upon recommendation of the newly constituted National Council of the Judiciary "would decide on issues of particular importance, including the regularity of elections, which is to be decided by the Extraordinary Chamber". The risk is that the whole judicial system "will be dominated by these new judges, elected with the decisive influence of the ruling majority".[28]

61. The two newly created chambers will hear cases with the participation of lay members, who will be elected directly by the Senate for a four-year term. Both the Venice Commission and OSCE/ODIHR have observed that the involvement of lay members/jurors in the highest court of a country is unprecedented, taking into account that those instances adjudicate on questions of law, for which specialist knowledge is generally required. Furthermore, the method of their selection raises serious concerns from the point of view of judicial independence, since their election by the Senate risks politicizing the selection process and could also potentially endanger their impartiality.[29]

62. With regard to their *ratione materiae* jurisdiction, these new chambers will have special powers which put them "over and above the other chambers", leading to the

[25] See European Commission, recommendation 2017/9050, para. 14.

[26] See Venice Commission, opinion 904/2017, para. 90.

[27] The abolition of the Military Chamber will lead to the automatic retirement of all its judges with no opportunity for them to seek continuation in office or reinstatement. OSCE/ODIHR noted that the mass retirement of all judges regardless of age is "inherently incompatible with the principles of security of judicial tenure and of separation of powers protected by international standards" (see JUD-POL/315/2017, paras. 129−131).

[28] See Venice Commission, opinion 904/2017, paras. 43 and 92.

[29] See OSCE/ODIHR, JUD-POL/315/2017, paras. 76−77; and Venice Commission, opinion 904/2017, paras. 65−69.

establishment of "courts within the court".[30] The creation of the Extraordinary Chamber, which will have the power to review any final and judgment issued by Polish courts in the last 20 years and will also be entrusted with the examination of politically sensitive cases (electoral disputes, validation of elections and referendums, etc.), raises a number of serious rule of law concerns, some of which go beyond the scope of the Special Rapporteur's mandate.[31] The Disciplinary Chamber will also be given special status, since it will have jurisdiction over disciplinary cases of judges sitting in "ordinary chambers". The involvement of the President of the Republic in disciplinary proceedings against Supreme Court judges poses serious threats to the principles of judicial independence and separation of powers.[32]

3. Act on the National Council of the Judiciary

63. The main objective of the new Act on the National Council of the Judiciary is to amend the procedure for the selection of the judicial members of this institution, which is mandated by the Constitution to safeguard the independence of the judiciary (art. 186). According to the explanatory memorandum of the law, the changes aim at increasing the democratic legitimacy of the members of the Council appointed from among judges, bolstering transparency and allowing public debate on candidates.

64. The National Council of the Judiciary consists of 25 members, including "15 judges chosen from among the judges of the Supreme Court, common courts, administrative courts and military courts" (art. 187 of the Constitution). The Council also includes three ex officio members (the Minister of Justice, the First President of the Supreme Court and the President of the Chief Administrative Court) and seven members appointed by the executive and legislative branches (one individual appointed by the President of the Republic, four members chosen by the Sejm and two members chosen by the Senate). The term of office of the members of the National Council is four years.

65. The Constitution does not specify how the judicial members of the Council should be selected; it only provides that "the organizational structure, the scope of activity and procedures of work of the National Council of the Judiciary, as well as the manner of choosing its members, shall be specified by statute". Until recently, such procedure was laid down in the 2011 Act on the National Council of the Judiciary, which provided that the 15 judicial members of the Council were to be elected by different general assemblies of judges.

66. That procedure was fully in line with existing international standards and recommendations relating to the composition of national judicial councils.[33] The Special Rapporteur has stated on a number of occasions that judicial councils play a crucial role in guaranteeing the independence of the judiciary and should themselves be independent, i.e., free from any form of interference from the executive and legislative branches. In order to ensure that such a body discharges its functions in an objective, fair and independent manner, the judiciary "must have a substantial say with respect to selecting and appointing the members of such a body" (see A/HRC/11/41, para. 29).

67. The new Act introduces a new procedure for the appointment of judicial members of the Council, according to which the 15 judges sitting on the Council will be elected, in the first round, by the Sejm with a qualified majority of three fifths of the votes. According to the explanatory memorandum of the law, the recourse to a qualified majority means that in practice, judicial members of the Council will be appointed not only by the parliamentary

[30] See Venice Commission, opinion 904/2017, paras. 37−40.

[31] For a comprehensive analysis of the system of extraordinary appeals, see Venice Commission, opinion 904/2017, paras. 53−63; OSCE/ODIHR, JUD-POL/315/2017, paras. 22−64; and European Commission, recommendation 2017/0360, paras. 18−21.

[32] OSCE/ODIHR, JUD-POL/315/2017, paras. 118−121.

[33] See, for example, Council of Europe, Recommendation CM/Rec(2010)12 of the Committee of Ministers to Member States on Judges: Independence, Efficiency and Responsibilities, which provides that "[n]ot less than half the members of such councils should be judges chosen by their peers from all levels of the judiciary and with respect for pluralism inside the judiciary".

majority but also by the other groups, making their election the result of consensus between the different groups represented in parliament.

68. The Special Rapporteur does not share this view. According to the new selection procedure, 21 members of the Council will now be appointed by the legislative branch, and 1 by the executive. The fact that judges will no longer have a decisive role in the appointment of the 15 judicial members of the Council puts the new election method at odds with relevant international and regional standards. In this regard, the Special Rapporteur notes that while the National Council of the Judiciary is not a judicial authority per se and does not exercise judicial functions, its role of safeguarding judicial independence in Poland requires that it be independent and impartial from the executive and legislative branches.

69. The fact that the judicial members of the Council will be elected by a qualified majority does not alleviate this concern, as they will still not be chosen by their peers. The procedure for the nomination of candidates also raises serious concerns, since candidates for membership in the Council can no longer be presented only by the judiciary, but also by groups of at least 2,000 citizens. The Sejm is not obliged to select the candidates supported by their peers, and may opt for candidates who have minimal support among their colleagues.

70. The new Act also provides that the mandate of all judicial members of the National Council of the Judiciary will be terminated at the moment of the election of the new members. This early termination decided by the legislative branch constitutes an additional interference with the independence of the Council and a breach of the principles of separation of powers and security of tenure. Coupled with the early termination of all the judicial members of the Council, the implementation of the new Act will lead to the creation of a "new" National Council of the Judiciary dominated by political appointees, in contravention of existing standards on the independence of the judiciary and the separation of powers.

IV. Conclusions

71. Following the general elections of October 2015, the Law and Justice Party has undertaken a far-reaching reform of the judicial system, with the stated goal of increasing its efficiency, reducing the length of judicial proceedings and enhancing the accountability of judges. According to the party, this large-scale reform is long overdue and necessary in order to restore public trust in the judiciary.

72. The Special Rapporteur acknowledges that the Government of Poland is entitled to reform the judicial system in order to strengthen its effectiveness and accountability. However, he cannot but stress that the measures adopted by the ruling majority are not appropriate to achieve the declared goals. The main effect — if not the main goal — of these measures has been to hamper the constitutionally protected principle of judicial independence and to enable the legislative and executive branches to interfere with the administration of justice. As a result, the independence of justice and institutional checks and balances are now under threat in Poland.

73. The first victim of this unilateral approach has been the Constitutional Tribunal. Today, the Tribunal is still in place and its functions — as set out in the Constitution — have not been formally changed. Its legitimacy and independence, however, have been seriously undermined and the Tribunal cannot ensure, at present, an independent and effective review of the constitutionality of legislative acts adopted by the legislator. This situation casts serious doubts over its capacity to protect constitutional principles and to uphold human rights and fundamental freedoms.

74. After having successfully "neutered" the Constitutional Tribunal, the Government has undertaken a far-reaching reform of the judicial system. Between May and December 2017, the ruling majority has adopted three acts that introduce broad changes to the composition and functioning of ordinary courts, the Supreme Court and the National Council of the Judiciary. Each of these acts presents a number of concerns as to its compliance with international legal standards but, taken together, their cumulative effect is to place the judiciary under the control of the executive and legislative branches.

75. The Special Rapporteur warns Polish authorities that the implementation of this reform, undertaken by the governing majority in haste and without proper consultation with the opposition, the judiciary and civil society actors, including the Office of the Ombudsman, risks hampering the capacity of judicial authorities to ensure checks and balances and to carry out their essential function in promoting and protecting human rights and upholding the rule of law.

V. Recommendations

76. **The Special Rapporteur recommends that Poland reconsider its ongoing reform of the judicial system. Any reform of the judiciary should aim at strengthening the independence and impartiality of the judiciary, not at bringing the judicial system under the control of the executive and legislative branches. The reform should be the result of an open, fair and transparent process, involving not only the parliamentary majority and the opposition, but also the judiciary itself, the Office of the Ombudsman and civil society actors.**

77. **The reform of the judiciary should be carried out in accordance with existing norms and standards relating to the independence of the judiciary, the separation of powers and the rule of law, as enshrined in the Polish Constitution and in a vast array of international and regional treaties to which Poland is a party. The recommendations made by a number of international and regional bodies, such as the Human Rights Committee, the Venice Commission, OSCE/ODIHR and the European Commission, should be taken into account in the development and implementation of legislative and other measures to strengthen the effectiveness and impartiality of the judiciary.**

78. **The way out of this critical juncture and of the current severe threat to the independence of the judiciary is to restore the primacy of international standards on independence of the judiciary and to promote a process of democratic and transparent dialogue among all the parties concerned based on those standards and on the need to reaffirm checks and balances.**

A. Attacks against the judiciary

79. **The Special Rapporteur deplores the ongoing public campaign against the judiciary that has accompanied the implementation of the proposed judicial reform. The negative and unfair rhetoric against judges that has been generated by the Government hampers public trust and confidence in the judiciary as an institution, and undermines the capacity of the judiciary to decide the matters before it impartially and in accordance with the law. He urges members of the executive and legislative branches to refrain from any negative rhetoric against judges or the judiciary as a whole. Any attack on the judiciary as an institution constitutes a flagrant breach of the principle of judicial independence and is not acceptable in a democratic State governed by the rule of law.**

B. Constitutional Tribunal

80. **The Special Rapporteur urges all political forces to work together to restore the independence and legitimacy of the Constitutional Tribunal as guarantor of the Polish Constitution. Loyal cooperation among the various State institutions is a necessary precondition for achieving a durable solution to the constitutional crisis. Any political solution should build upon previous rulings of the Constitutional Tribunal, in particular those of 3 and 9 December 2015.**

81. **The Special Rapporteur urges the Polish authorities to refrain from any interference with the work of the Constitutional Tribunal. Decisions of the Tribunal are binding under Polish constitutional law, and the national authorities must respect and abide by them. Under no circumstances can the publication of judgments of the Tribunal be dependent on a decision of the executive or legislative branch. In this**

regard, the Special Rapporteur calls on the national authorities to publish with no additional delay, and implement fully, the judgments issued by the Tribunal on 9 March 2016, 11 August 2016 and 7 November 2016.

82. **Any future reform of the composition and functioning of the Constitutional Tribunal should be carried out in accordance with the recommendations outlined in paragraphs 76 and 77.**

C. Act on Common Courts Organisation

83. **The Special Rapporteur recommends that the Act on Common Courts Organisation be amended to bring it into line with the Constitution and international standards relating to the independence of the judiciary and the separation of powers. In particular, the Special Rapporteur recommends:**

(a) **Removing the discretionary power of the Ministry of Justice to appoint and dismiss court presidents;**

(b) **Amending the new retirement regime applicable to common court judges so as to apply it only to judges who have taken up their functions following the entry into force of the law;**

(c) **Removing the discretionary power of the Minister of Justice to prolong, on a case-by-case basis, the mandates of individual judges until the age of 70.**

D. Act on the Supreme Court

84. **The Special Rapporteur recommends that the Act on the Supreme Court be amended to bring it into line with the Constitution and international standards relating to the independence of the judiciary and the separation of powers. In particular, the Special Rapporteur recommends:**

(a) **Amending the new retirement regime applicable to common court judges so as to apply it only to judges who have taken up their functions following the entry into force of the law;**

(b) **Removing the discretionary power of the President of the Republic to decide, on a case-by-case basis, the prolongation of the mandate of Supreme Court judges;**

(c) **Removing the additional discretionary powers conferred on the President of the Republic vis-à-vis the Supreme Court and its judges, particularly in relation to his/her power to choose the First President of the Court among five candidates elected by the General Assembly of the Court, define the internal structure of the Supreme Court and adopt its rules of procedures;**

(d) **Removing the provisions concerning the automatic retirement of all judges of the Military Chamber and providing for the reassignment of the judges currently sitting in the Chamber, with their consent, to another chamber of the Supreme Court;**

(e) **Eliminating the provisions concerning the participation of lay judges in proceedings before the Supreme Court concerning extraordinary appeals and disciplinary cases;**

(f) **Reviewing the vast *ratione materiae* jurisdiction of the Extraordinary Chamber and the Disciplinary Chamber in line with the recommendations of the European Commission, the Venice Commission and OSCE/ODIHR.**

E. Act on the National Council of the Judiciary

85. **The Special Rapporteur recommends that the Act on the National Council of the Judiciary be amended to bring it into line with the Constitution and international standards relating to the independence of the judiciary and the separation of powers. In particular, the Special Rapporteur recommends:**

(a) **Removing the provisions concerning the new appointment procedure for the judicial members of the National Council of the Judiciary and ensuring that the 15 judicial members of the Council are elected by their peers;**

(b) **Removing the provisions concerning the early termination of the mandates of all the current judicial members of the National Council of the Judiciary.**