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Prof. Dr Tomasz GRODZKI

Marshal of the Senate of the Republic of Poland

Strasbourg, 9 January 2020

Dear Marshal,

I am writing to you regarding the bill adopted on 20 December 2019 by the lower chamber of the Polish Parliament introducing a set of amendments to the Act on Common Courts, the Act on the Supreme Court, and certain other acts (*ustawa z dnia 20 grudnia 2019 r. o zmianie ustawy – Prawo o ustroju sądów powszechnych, ustawy o Sądzie Najwyższym oraz niektórych innych ustaw*). The bill, which marks the latest stage of Poland's reform of the judiciary, introduces a wide range of changes with far-reaching implications for the work of the common courts, the Supreme Court, the Supreme Administrative Court, military courts, the prosecution service, and the National Council for the Judiciary, as well as on the status of Polish judges.

Although the scope of the bill is very wide, I note in particular that it puts in place an entirely new and open catalogue of disciplinary offences by judges and prosecutors, accompanied in many cases by severe penalties. Further, it gives additional powers to the Minister of Justice and the Minister-appointed chief disciplinary attorneys, who act as public prosecutors in disciplinary proceedings. The bill also restructures and marginalises existing judicial self-government bodies by changing their composition and effectively divesting them of some of their prerogatives, such as the right to opine judicial candidates. It bans judicial self-government bodies from deliberating on "political matters" or adopting resolutions which could "undermine the proper functioning of the authorities" and Poland's constitutional bodies. The bill also prevents courts and judges from reviewing the legality of other judges, courts, tribunals and state bodies, creates a new definition of a judge and provides for the mandatory on-line disclosure of judges' and prosecutors' public activities, including membership in associations or foundations. Lastly, it sets new rules for the selection of candidates for the post of First President of the Supreme Court.

I consider the overall effect of these changes to be highly problematic from the standpoint of the standards of the Council of Europe. I particularly regret that the new bill does not address any of the key recommendations regarding the independence of the judiciary and the prosecution service I made in the report I published in June 2019 following my visit to Poland in March 2019 (a copy of which is included in this letter). These recommendations covered, among other things, the need to: find an urgent solution to the deadlock affecting the Constitutional Tribunal; bring the legislation governing the National Council for the Judiciary in line with the Council of Europe standards and the Polish Constitution; separate the functions of Minister of Justice and Prosecutor-General; ensure that disciplinary proceedings are not instrumentalised; and provide an explanation for the very high number of dismissals and demotions among Polish prosecutors. To the contrary, the bill seems to take a step further in expanding the already vast powers of the executive over Poland's judiciary by increasing the scope and severity of the disciplinary regime against judges and prosecutors, weakening judicial self-government, and limiting judges' and prosecutors' freedom of expression.

I am particularly concerned that the provisions of the new bill are designed to further silence dissent among critical judges and prosecutors and to curtail their independence. Since the beginning of my mandate, I have often reacted to reports of disciplinary proceedings being instituted against many Polish judges and prosecutors for speaking out in public about the government's reform. It should be stressed that in line with the case-law of the European Court of Human Rights, judges and prosecutors have the right to express their views on matters of public interest, including government reforms of the judiciary and the prosecution service, in a proportionate way, and their freedom to do so must be safeguarded. However, I note with concern that many of the proposed new types of disciplinary offences appear to be deliberately worded in vague terms, making them open to arbitrary interpretation or abuse, and raising serious questions about their predictability for those concerned. Other provisions of the bill make it a disciplinary offence to conduct the judicial review of the legality of appointment of other judges or public bodies, a task which the Polish judges and courts are inherently competent to perform, as it has been expressly confirmed by the recent ruling of the Court of

Justice of the European Union (CJEU) handed down on 19 November 2019. In respect of some of these new offences, the bill foresees dismissal from office as the default sanction, which raises serious questions about the respect for the principle of proportionality engrained in the 1998 European Charter on the statute for judges. The multiple and far-reaching restrictions imposed by the new bill on the freedom of expression of judicial self-government bodies and the introduction of the mandatory disclosure requirement for judges' and prosecutors' public activities, including membership in professional associations, also raise separate questions under Articles 8, 10 and 11 of the European Convention on Human Rights, which protect, respectively, the individual's right to privacy, freedom of expression and of association.

As regards the provisions affecting the Supreme Court, the present bill marks the ninth time that the Act on the Supreme Court is amended since that Act's promulgation in December 2017. While the provisions of the bill generally aim at increasing the role of the President of the Republic in the process of appointing the Supreme Court's First President, they do so at the expense of the powers of the General Assembly of the Supreme Court's judges. The bill also lowers the quorum required to select candidates for that post to just over one-fourth of the total number of the Supreme Court's judges in the event of several ineffective votes. I consider that the new changes risk widening further the existing rift within the Supreme Court, with possible negative ramifications for the legitimacy of the next First President of the Supreme Court elected according to the new rules, as well as for the Supreme Court's internal functioning and overall efficiency.

In my aforementioned report, I addressed the extremely divisive manner in which Poland's successive court laws have been enacted to date, leading to recurring protests by both the legal professions and the general public in Poland as well as serious concerns among Poland's international partners. I note that the last amendments have been equally negatively assessed by all key stakeholders, including the judges' and prosecutors' associations, the Supreme Court, the Supreme Administrative Court, the Bureau of Research of the Sejm, the Polish Ombudsman, the Polish Bar Council, the National Bar of Attorneys at Law, and numerous Polish and foreign members of academia, as well as the UN Special Rapporteur on the Independence of Judges and Lawyers, the President of the European Association of Judges, and the European Commission's Vice-President for Values and Transparency. Moreover, I followed with much attention the nationwide protests held parallel to the legislative process in the Sejm, and I understand that another protest march of representatives of the legal professions is to be held this weekend.

I was also taken aback by the pace of the proceedings in the lower house, which handled the bill in the fast-track legislative procedure circumventing the standard requirement of public consultation – a practice which has, regrettably, become rather customary in the past several years. Similarly to the enactment of court laws by the Sejm in December 2017, the current bill has been adopted shortly before the Christmas recess, in less than two days, including rushed late-night and early-morning votes held in committee. While the precise reasons for such haste are not immediately apparent, I have little doubt that proceeding in this way is at variance with my earlier recommendation that all draft legislation of systemic importance be carefully considered through the regular parliamentary procedure, in thorough consultation with the members of the judicial community and other relevant actors.

I was therefore gratified to hear your announcement, as the Marshal of the Senate, that the Senate would hold a broad and open debate around the bill and consult, as appropriate, with national and international stakeholders and experts. I especially welcomed the decision to request an urgent opinion from the European Commission for Democracy through Law (the Venice Commission).

It is with these thoughts in mind that I wish to ask you, in your capacity as the Marshal of the Senate, to convey to the esteemed Senate my recommendation to reject the bill adopted by the Sejm, and to ensure that any legislation passed is in full compliance with the relevant standards of the Council of Europe and in particular the relevant past and future recommendations of the Venice Commission. I would also be grateful if you could ensure that a copy of my letter is shared ahead of the plenary debate with all esteemed Members of the Senate. I look forward to continuing our constructive dialogue.

Yours sincerely,



Dunja Mijatović