CHANCELLERY OF THE SENATE

LEGISLATIVE OFFICE

Warsaw, 13 December 2022.

Opinion to the law on the abandonment of prosecution for certain acts related to the organisation of the election of the President of the Republic of Poland, ordered for 10 May 2020.

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I. Purpose and object of the Act

The law introduces an amnesty covering the remission of penalties for offences committed during the state of emergency involving the transmission of a register of electors to the Polish Post Office in connection with the election of the President of the Republic of Poland, ordered for 10 May 2020, and an amnesty meaning that proceedings in these cases are also not initiated and those initiated are discontinued.

It should be recalled that in the spring of 2020, in connection with the upcoming presidential elections, the ultimately unrealized legislative plans of the ruling majority included entrusting the Polish Post Office with the task of delivering ballots to voters and then transferring the completed ballots to the electoral commissions. The mayors of some municipalities handed over to the Polish Post Office, without legal basis, the personal data from the electoral register drawn up for the purposes of these elections. Meanwhile, regardless of the plans of the ruling majority, the transfer of personal data to unauthorised persons or entities constitutes a criminal offence. There has already been the first final court judgment in this kind of case; in this case, the criminal court conditionally discontinued the criminal proceedings (Judgment of the SO in Poznań of 28 July 2022, IV Ka 550/22). The majority of the mayors complied with the binding laws and considered that the decision of the President of the Council of Ministers of 16 April 2020 could not constitute a legal basis for the transfer of the electoral registers to the Post Office. The behaviour of these mayors was confirmed by an administrative court judgment stating that the decision of the President of the Council of

Ministers is invalid and that, in the context of the social and economic effects it caused, it was issued with a 'gross violation of the law' (judgment of the WSA in Warsaw of 15 September 2020, VII SA/Wa 992/20).

II. Course of legislative work

The parliamentary bill on the abandonment of prosecution for certain acts related to the organisation of elections for the office of the President of the Republic of Poland, ordered for 10 May 2020, was submitted to the Sejm on 29 November 2022. On the following day, the first reading was held at the Sejm and on the same day the Justice and Human Rights Committee presented its report, and on the following day the second reading was held and the Sejm passed the bill.

III. Specific comments

1. Amnesty and abolition laws are a controversial topic in criminology. These laws do not abolish the criminality of an act, nor do they change its negative legal and social assessment. They only stipulate that the punishment for certain acts committed at a certain time is remitted or mitigated (amnesty), or that proceedings for these acts are not initiated or are discontinued (abolition). In Poland, several such laws were issued in connection with events or changes of a political nature. They usually covered political opponents of the authorities (oppositionists during the People's Republic of Poland) or common criminals. Sometimes such laws were a means of correcting errors in penal policy (as they enabled the reduction of excessive numbers of inmates in penal institutions) (L. Gardocki, *Prawo karne,* Warsaw 2021, pp. 216, 217 and 192; J. Warylewski, *Prawo karne: część ogólna*, Warsaw 2020, pp. 630-
632). The last laws of this kind were passed in 1989, when, among other things, politically motivated offences were forgiven and let go (which seemed justified at the time), and the death sentence imposed was commuted to 25 years' imprisonment.

The amnesty and abolition proposed in the bill under review is therefore not a precedent in the history of Polish legislation. However, it is important to note a number of circumstances causing a fundamental difference between the amnesty and abolition under opinion and earlier ones.

2. As far as constitutional issues are concerned, firstly, this is the first amnesty and abolition to be introduced after the entry into force of the 1997 Constitution of the Republic of Poland. The 1997 Constitution of the Republic of Poland confirms the tri-partition of powers shaped in Poland after 1989 (Article 10 of the Constitution of the Republic of Poland). Systems of government (prime ministerial or presidential) differ in terms of the separation of legislative and executive powers. Regardless of the system of government, however, in modern democratic states these two segments of power are consistently separated from the judiciary. Both in terms of their ability to influence personnel on an ongoing basis - the ruling majority does not appoint judges and cannot remove judges; and in terms of their ability to influence court rulings - the ruling majority cannot change those rulings. Meanwhile, the amnesty proposed in the law nullifies the legal effect of a final court judgment and, in this sense, constitutes a violation of the principle of the tripartite authority.

Secondly, the 1997 Constitution of the Republic of Poland guarantees every citizen the right to have his or her case heard by a court (Articles 45, 173 and 175 of the Constitution). In the case of crimes, there is a victim alongside the offender. The abolition in the law under review, protects the offender and deprives the wronged party of the right to even a symbolic, but judicial determination of the fact that his or her right has been violated, that his or her personal data has been transferred without legal basis to an unauthorised entity.

Thirdly, the abolition-amnesty law under review is also special in relation to previous laws for another reason. So far, the abolition covered political offences or common offences. Even if one treats a civil servant offence as a common offence, it should be noted that in this case it is a criminal act committed by a particular civil servant - a person exercising public authority, a person holding a leading position in public administration. This time, therefore, the political power extends amnesty and abolition not to oppositionists or "serial" offenders, but to itself, to the members of the political executive. At the same time, two circumstances should be noted. The mayor is an organ of local self-government, i.e. that segment of public administration which, according to the Constitution, is supposed to be separate (independent) from the day-to-day influence of the government and its representatives (voivodes). Unlike the heads of local government offices, services, inspections and guards, who are supposed to act within the limits of the law and on the basis of the day-to-day instructions of the government and its representatives, local government bodies have the right to

and duty to act only on the basis of the provisions of generally applicable law: the Constitution, ratified international agreements, laws and regulations. An instruction from the Prime Minister or the Governor, even a written one, is not and cannot be binding on the mayor and other local government bodies. Moreover, even if the mayor, as a person to whom the regulations do not require any education or training in the tasks to be performed, would not himself be aware of whether he has the right (obligation) to hand over the registers of electors, he is served by a professional clerical apparatus, including a legal one, whose advice, among other things in order to avoid criminal liability, the mayor should take advantage of.

In short, the Constitution and laws guarantee (and even require) the mayor's independence from the government's day-to-day instructions, and the mayor is served by a professional clerical apparatus that is able to suggest what the mayor is allowed to do. In this context, the amnesty and abolition, which after all consists in depriving persons aggrieved by insights into their personalities by Post Office employees, even of the right to complain to the court about the actions of certain mayors, is not supported either by the more narrowly construed (Article 31(3)) or the more broadly construed (Article 2) principle of proportionality. The citizen's right to a court of law and sense of justice were sacrificed to ensure impunity for the few mayors who, without legal basis, carried out the instructions of the government administration aimed at bringing about last-minute postal elections that ultimately did not take place.

3. As regards the justification of the draft law, it should also be noted that the amnesty law under review was specifically justified on the grounds that the persons covered by the amnesty had not in fact committed a crime. The explanatory memorandum to the bill states that "The need and purpose of adopting the proposed solutions arises from the development of jurisprudential lines that are based on a reductive and formalistic interpretation made by provincial administrative courts and some common courts. These courts, without a clear legal basis for doing so, have ruled that the mayors, mayors and city presidents who handed over the register of voters in a given municipality containing the personal data of these voters to the operator appointed to perform technical activities in connection with the organisation of the 2020 election of the President of the Republic have exceeded their powers." In addition, it was stated in the justification that against Poczta Polska S.A. "a Decision of the President of the Council of Ministers dated 16 April 2020 was issued, in which the technical activities related to the preparation of the

2020 presidential election by postal ballot, in view of the prevailing Sars-CoV-2 virus outbreak and COVID-19 prevention".

However, it should be noted that amnesty is not an appropriate means to change the line of jurisprudence formed in court judgments. The line of jurisprudence, in particular when it is wrong, may be changed by the jurisprudence of higher courts, especially the Supreme Court and the Supreme Administrative Court. On the other hand, if the legislator came to the conclusion that the existing regulation is non-functional, it should limit itself to amending, repealing this regulation or introducing a new one. Meanwhile, neither in light of the law in force to date, nor following the enactment of the act under review, has it been and will it continue to be acceptable in the Polish legal system for a commune head to act without a legal basis, but only on the basis of an invalid decision issued by the Prime Minister.

Only a law can be the legal basis for the action of a mayor or other public administration body. Beyond any doubt, the legal basis for the action of the mayor cannot be a self-contained decision of the Prime Minister. The Prime Minister did not have the right to instruct the Polish Post Office to collect the electoral registers and process the data contained therein, as no provision of the law authorised the Post Office to do so. If the Prime Minister was considered to have the right to make similar decisions, he could just as well have designated any other entity to dispose of the personalities and addresses of voters - adult citizens of the Republic of Poland.

The legal basis for the mayor's action must be contained in generally applicable laws. It is true, Polish legal culture and principles of law-making allow certain conventional actions to be performed on the basis of laws which have not yet entered into force, but on the condition that such laws have already been promulgated in the Journal of Laws of the Republic of Poland. E.g. a minister may refer for promulgation a regulation issued on the basis of a law which has not yet entered into force, provided that the law has been promulgated in the Journal of Laws and that the regulation does not enter into force earlier than the law.

Laws planned by the Government or parliamentary majority (regardless of whether they are just an element of thought or are in one of the phases of the legislative process) are not a source of law in Poland (Article 87 of the Constitution of the Republic of Poland). After all, a bill which is the subject of legislative work may be (in particular, if it is inconsistent with the Constitution) rejected or amended by both the Sejm and the Senate,

and a law may be vetoed by the President, or even before it is promulgated, declared unconstitutional by the Constitutional Court, at the request of the President.

If the line of jurisprudence in the court judgments was, in the opinion of the applicant, wrong, and the intervention of the legislator was necessary to modify it, a provision should be introduced providing that, in exceptional cases, a public administration body may act without a legal basis and even commit an offence if it acts on the basis of a self-contained decision of the Prime Minister or on the basis of a bill, or providing that, during an epidemic, the self-contained decisions of the Prime Minister and bills are the source of law. Meanwhile, the Constitution does not provide for such a possibility even during a state of emergency. During a state of emergency in Poland, the universally binding law is also in full force, with the difference that it has the content intended for a given state of emergency (e.g. ordinances with the force of a statute may be issued). As a state of emergency was not introduced in Poland at that time, it is difficult to justify any deviation from the constitutional sources of law.

At the same time, the drafters refer in the explanatory memorandum to the 'necessity' of the actions taken, suggesting that we may be dealing with a 'state of necessity' in the case of the actions of some mayors. True, the 1997 Penal Code provides that "No offence is committed by anyone who acts in order to avert an imminent danger threatening any good protected by law, if the danger cannot be avoided otherwise and the good sacrificed represents a lower value than the good saved" (Article 26 § 1). If, according to the drafters, this was the case, it is up to the public prosecutor or the court to decide whether this was in fact the case. In a system based on the separation of powers, political power cannot replace the courts.

4. As regards the effects of the Amnesty and Abolition Act under review, it may suggest that whenever in the future a criminal act is the result of an order or suggestion by the government or parliamentary majority, the perpetrators of that act will be able to count on an amnesty or abolition. If, as a result of this law, such a belief becomes widespread, this could have negative consequences, inter alia, for freedoms and human rights.

On the other hand, it may also turn out that this will not be the last word of one or another ruling majority on the treatment of the acts in question involving the unlawful disposal of electoral registers. In fact, in the history of Polish legislation, there appeared a law (of 31 May 1996) on the exclusion of certain laws

on amnesty and abolition for perpetrators of certain crimes not prosecuted for political reasons between 1944 and 1989. Thus, if amnesty is a controversial issue in legal doctrine, this is particularly the case for public officials. It cannot be ruled out that, from their point of view, it would be more advantageous to undergo a ruling of

of conditional discontinuance today (it enjoys, once the condition is fulfilled, the principle of *res judicata*) than the uncertainty of whether the amnesty and abolition will not be cancelled in some time.

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