

## **Report on the ‘Pegasus’ spyware**

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### **I. Introduction.**

The Law and Justice party (PiS), led by Jarosław Kaczyński, won the Parliamentary elections in Poland in October 2015 under the official slogan of “Good Change” – reforms and improvements in a number of areas of public life neglected so far because of an alleged post-communist pact (the official version). The real objective was to create an authoritarian and centralized state, preserving facades of democratic institutions. Previously independent bodies, such as the Constitutional Tribunal and the National Council of the Judiciary, have been brought under firm political control. The independence of the judiciary in Poland has also been systematically dismantled over the last six years. From the point of view of introducing an autocratic system, the political subordination of the prosecutor’s office and the secret services is equally important.

### **II. Assumption of political control over the prosecutor’s office and secret services.**

The ruling camp assumed political control over the public prosecutor’s office in April 2016 by combining the functions of the Minister of Justice (MoJ) and Prosecutor General, which was accompanied by a significant increase in his investigative powers, including:

- the power to issue binding orders, including with regard to the content of particular procedural steps in individual cases;
- the power to overrule or change a decision of a subordinate prosecutor;
- the power to take over cases from subordinate prosecutors;
- the MoJ arbitrarily appoints the superior prosecutors (instead of the competition procedure that was applied before), which was accompanied by a replacement of the top prosecutors under the pretext of a reorganization.

The result is an image of the Public Prosecutor's Office as potentially entirely subordinated to the ruling camp. According to Act on the Prosecutor's Office, one of the public prosecutor's functions is to be the "representative of the public interest" which is understood as being a guardian of the rule of law. After these changes, the public prosecutor became a representative of PiS. This makes it possible to initiate groundless criminal proceedings against people who are critical of the ruling coalition and to discontinue proceedings against people connected with the ruling camp.<sup>1</sup>

Also, all specialized central services and investigative bodies (secret services), such as the Central Anti-Corruption Bureau, the Internal Security Agency, the Central Bureau of Investigation and the Military Counterintelligence service were staffed with people closely related to the ruling coalition.

We would like to emphasize that the headquarters of all of these secret services are located in Warsaw and, therefore, it is the Criminal Courts in Warsaw (the Regional Court in the first instance and the Court of Appeal in the second instance) that have the territorial jurisdiction to hear requests for applying operational techniques in the most serious cases involving the political connections of the suspects. **In this context, there is extreme concern about the accelerated process of replacing experienced judges with many years of experience with poorly qualified so-called "neo-judges"**<sup>2</sup> (who were incorrectly appointed to new positions with the involvement of the neo-National Council of the Judiciary, created in conflict with the Polish Constitution). It is highly likely that the replacement of independent judges in these courts with judges who have reasons to be loyal to the current Minister of Justice, to whom they owe quick and often undeserved career progression, **has the objective of gaining political control over court decisions, particularly in cases related to operational control.**

Furthermore, the system of automatic random allocation of cases is not used in the allocation of cases regarding the court's consent for the use of operational techniques. The court presidents, who are appointed by the Minister of Justice, decide which judge will hear a case. For example, in Warsaw, the President of the Court of Appeal is Piotr Schab, who was appointed by the Minister of Justice and who is also the central disciplinary commissioner for judges known for the unjustified repression of independent judges. This gives rise to the potential possibility of politically sensitive cases being assigned to judges who guarantee loyalty to the ruling camp.

A matter that is equally disturbing took place in 2016. Mariusz Kamiński was appointed minister-coordinator of the secret services, having been sentenced to 3 years' imprisonment in 2015 for abuse of the use of operational techniques during the first PiS rule in 2005–2007, when he was the head of the Central Anti-Corruption Bureau.<sup>3</sup> His appointment to this function was

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<sup>1</sup> See the report prepared by ODF Foundation: 'Polish Public Prosecutor's Office: Selected Cases of Malicious Prosecution and Dereliction of Duties', <https://en.odfoundation.eu/a/190999,polish-public-prosecutors-office-selected-cases-of-malicious-prosecution-and-dereliction-of-duties/>

<sup>2</sup> One of such situations is described in the "Themis" resolution of 8 September 2022, <http://themis-sedziowie.eu/wp-content/uploads/2022/09/Position-of-Themis-on-harrasment-of-Warsaw-Court-of-Appeal-judges.pdf>

<sup>3</sup> In fact, in 2007, when PiS ruled for the first time, the Central Anti-Corruption Bureau, led by Mariusz Kamiński, carried out a sting operation against the leader of a coalition party, *Samoobrona* (in English: Self-defence), which was supposed to lead to controlled bribery. In the justification of the verdict regarding this case, the court held that the Central Anti-Corruption Bureau had incited corruption while there were no legal or factual grounds for starting such an anti-corruption operation (such action

possible because President Andrzej Duda, who is closely associated with the ruling camp, arbitrarily pardoned him in breach of the law.

### **III. Changes in the scope of judicial control of the admissibility of taking evidence in criminal proceedings**

Amendments to the provisions of the Criminal Procedures Code entered into force in 2016, essentially allowing the use of illegally obtained evidence in criminal proceedings (Article 168a), and significantly limiting judicial control over operational activities in the form of intercepting telephone calls and wiretapping, which extended the powers of the prosecutor's office (Articles 168b, 237a).

What is particularly bizarre from the point of view of protection of human rights, is the change regarding the admissibility of evidence introduced by Article 168“a” of the Criminal Procedures Code.<sup>4</sup> This provision almost totally removes the rule of *fruits of the poisonous tree* from Polish criminal procedures. According to this regulation, evidence gathered illegally (even as a result of an offence) is admissible in criminal proceedings except for cases in which “*it was collected by the public official on duty as a result of a murder, intentional bodily harm or deprivation of freedom*”. This can include a wide range of behaviours that could be classified as tortures according to the case law of the ECtHR, but which are not included in the narrow scope of application of the exclusionary rule stipulated in Article 168“a” (for example the use of physical violence not causing bodily harm not being excessive). Both academics and judges assess this controversial regulation as highly unconstitutional.

According to Articles 168b and 237a,<sup>5</sup> the power to grant “subsequent consent”<sup>6</sup> for the use of materials in the form of the recordings (tapping) of phone calls in criminal proceedings, which has been subject to the jurisdiction of the courts to date, has now been granted to the Public Prosecutor's Office. Moreover, insofar as the term “initial consent” with regard to the recording of telephone conversations is only permitted for the list of very serious criminal and tax offences, which are fully and precisely defined in the Act, the phrase “subsequent consent”, with regard to the interlocutor of the person with respect to whom the “initial consent” was given is possible for any type of crime. Furthermore, the decision to use that evidence in criminal proceedings is not subject to any time limitation. In this situation, it is not surprising that the Ombudsman has reported this amendment to the Criminal Procedures Code to the Constitutional Tribunal, claiming that it breaches the right to privacy guaranteed by the Constitution (Article 47 of the Constitution) and the right to freedom and protection of the secrecy of communication (Article 49 of the Constitution), as well as the prohibition to obtain

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is described as “entrapment” according to the ECtHR case law, which classifies such evidence as inadmissible [for example see cases *Ramanauskas v. Lithuania* or *Bannikova v. Russia*].

<sup>4</sup> Article 168“a” entered into force on 14 April 2016 [Journal of Laws of 2016, item 437].

<sup>5</sup> These were introduced on the basis of Article 1(35 and 42) of the Act on the Amendment of the Criminal Procedures Code and certain other acts of 11 March 2016 [Journal of Laws of 2016, item 437],

<sup>6</sup> What is referred to as “subsequent consent” allows the use in criminal proceedings with regard to telephone records against other people who talked to the people with regard to whom the Court previously authorized operational control in form of recording telephone calls, at the request of the Public Prosecutor.

and collect information on citizens that is not necessary in a democratic country ruled by law (Article 51 § 2 of the Constitution).

Similarly, Article 115c to the Act on the Structure of Ordinary Courts<sup>7</sup> introduced the ability to use unlawfully obtained evidence and evidence obtained without the court's control during disciplinary proceedings against judges.

#### **IV. Legality of the “Pegasus” spyware**

In the situation of the above assumption of political control by PiS over the Prosecutor's Office and the secret services, and simultaneously limiting judicial control over operational techniques and extending the admissibility of illegally obtained evidence in criminal proceedings, the use of any operational techniques in Poland can currently give rise to doubts from the point of view of preserving the standards of protection of civil rights and freedoms. The use of such an offensive spying tool as “Pegasus” must be all the more questionable. The system was purchased in such a way that it was hidden from the public, according to information obtained by the independent media, mainly with the use of funds earmarked for helping victims of crime, which are at the disposal of the Ministry of Justice. These funds were illegally<sup>8</sup> allocated to the purchase of the “Pegasus” system, but currently – because of the political subordination of the prosecutor's office and the secret services – it is not possible to conduct an effective investigation into this matter.

For this reason, the Association of Judges “Themis” has been calling for the formation of an inquiry commission in the Sejm (lower house of parliament) from the beginning,<sup>9</sup> in accordance with Article 111 of the Constitution, in order to clarify the “Pegasus” scandal. Unfortunately, as PiS has the majority in the Sejm, it is not currently possible to appoint such a commission. The commission of the Senate (the upper house of parliament) appointed in this case on 12 January 2022 only has limited investigative powers and is therefore unable to fully clarify the matter.

In the opinion of the Association of Judges “Themis”, the use of the “Pegasus” system is illegal in the light of the operational control legislation currently in force in Poland. Indeed, the court's decision to approve operational control should specify what the control is to apply to (examining the content of correspondence, inspecting the content of parcels, the use of technical means enabling information and evidence to be obtained and recorded secretly, including, in particular, content (images), telephone conversations and other information transmitted via telecommunications networks), specify the type of technical measure to be applied and the period during which it is to be applied. Meanwhile, Polish courts are not informed that

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<sup>7</sup> Article 115c of the Act of 27 July 2001 (Journal of Laws 2001, item 52 as amended) entered into force in 2017.

<sup>8</sup> The illegality of the purchase of the “Pegasus” spyware is based on the fact that the purchaser of the software was the Central Anti-Corruption Bureau, the activities of which – according to the law – can only be financed from the state budget. Meanwhile, of the PLN 33 million spent on the purchase of the software, as much as PLN 25 million did not come from the state budget, but from the Victims' Support Fund.

<sup>9</sup> See: “Position of the Board of the Association of Judges ‘Themis’ of 4 January 2022 on media information about the ‘Pegasus’ system”, <http://themis-sedziowie.eu/materials-in-english/position-of-the-board-of-the-association-of-judges-themis-of-4-january-2022-on-media-information-about-the-pegasus-system/>

operational control will be conducted with the use of the “Pegasus” system, which, after all, makes it possible not only to constantly intercept telephone and Internet connections, but also to review the entire contents of the memory of the tapped device (even from the distant past, i.e. from the period before the operational control was ordered), as well as, for example, to continuously wiretap or record images from the tapped device, not to mention the possibility of interfering with the content of the recorded materials. Essentially, therefore, it is not so much a surveillance system as a spy system, which makes its use impossible under current legislation (such as the Criminal Procedures Code or the Act on the Police). Indeed, in a state governed by the rule of law, it is difficult to imagine the permissibility of using this type of system for purposes other than combating terrorism.

## **V. “Pegasus” in the context of the breach of the right to free elections.**

### **A. Foreword.**

It is not the case that, whenever a leader or a party with autocratic tendencies comes to power, it must end in the destruction of democracy for the country in question. This happened, for example, several years ago in Austria with Mr. Jorg Heider, after which this popular politician lost the elections.

The real problem arises when a party or a leader of this kind consolidates its power for many years, enabling it to systematically destroy the foundations of the democratic system over a long time. The best example is Putin’s rule in Russia, who, by temporarily swapping seats with Prime Minister Medvedev, became President once again.

In Poland, the political formation currently in power does not appear to intend to ever relinquish its power and has introduced a number of systemic changes and has taken a number of actions in the electoral system enabling it to achieve this.

### **B. A set of means to an end.**

Of these only the five most characteristic will be mentioned, which are:

#### 1) The use of the “Pegasus” spyware against opposition party leaders.

Of the cases of surveillance of individuals revealed so far, as many as three are directly related to the course of the electoral process. This applies in particular to:

- the surveillance of Senator Krzysztof Brejza at the time that he was the chief of staff of the parliamentary campaign of largest opposition party during the elections to the Sejm in 2019;
- surveillance of prosecutor Ewa Wrzosek during the period when she decided to open an investigation into the so-called “envelope elections”;
- surveillance of Michał Kołodziejczak, leader of the peasant group “Agrounia”, who intended to register a political party in the period immediately preceding the 2019 election campaign.

There is no authoritative information about any of these people possibly having committed a crime, which suggests that the only reason for their surveillance was their connection with the electoral process.

- 2) The attempt to take control of the largest independent television channel TVN.

This happened recently in an attempt to push a bill through the Sejm, at the time that the Polish Government received information from the USA that Russia would attack Ukraine, and despite the fact that it is owned by an American company and the USA is the guarantor of Poland's security.

- 3) Politicization of the National Electoral Commission.<sup>10</sup>
- 4) Assumption of control over the heads of the local electoral commissions.

It should be pointed out that there has been a nationwide purge of the heads of election commissions, as the ordinary court judges who had held these positions for a number of years were replaced by political appointees of the ruling camp, mainly neo-judges.

- 5) Control over the legality and correctness of the electoral process in Poland by the Supreme Court's Chamber of Extraordinary Control and Public Affairs.

The legality of all general elections (including parliamentary, presidential and European Parliament elections) is controlled by the Supreme Court's Chamber of Extraordinary Control and Public Affairs, which is fully staffed by the politically corrupt neo-NCJ and consists exclusively of neo-judges, and is illegal under European law. It also controls the funding of political parties.

### **C. Conclusion.**

To sum up, a situation in which special services 100% controlled by the ruling camp may have a decisive influence on the results of both general elections, thanks to the use of illegal spyware, undermines the foundations of the democratic electoral process. This concern is further exacerbated by the fact that control over the legality and correctness of the electoral process has been politically corrupted at both local and central levels.

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<sup>10</sup> <https://tvn24.pl/tvn24-news-in-english/polish-parliament-changes-rules-of-choosing-electoral-commission-members-ra993154-2603294>