

# Polish judiciary in the shadow of the ‘muzzle law’

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## I. Introduction.

In a ground breaking judgment of 19 November 2019, the ECJ agreed with the reservations of the Polish Supreme Court (SC) included in its request for preliminary ruling that the Polish new National Council of the Judiciary (neo-NCJ) and the Disciplinary Chamber of the SC may not satisfy the requirement of independence under EU law. The ECJ has simultaneously authorized Polish SC to determine whether judges appointed with the participation of the neo-NCJ are judges within the meaning of EU law and provided clear criteria according to which they are to assess the independence of these bodies.

Following the guidelines contained in the ECJ judgment of 19 November 2019 Polish SC:

- in its judgment of 5 December 2019 assessed that the Disciplinary Chamber is not a court both under Polish constitution and the EU law,
- in the Resolution of Joined Chambers of 23 January 2020 decided that rulings of ordinary courts would not be automatically squashed, but examined at the party's request by the appeal courts which would apply **independence test** in respect of judges of first instance appointed with participation of neo-NCJ.

## II. “The muzzle law” as the crowning achievement of the government's actions intended to politically subordinate the judiciary

The muzzle law which entered into force on 14 Feb 2020 constituted the legislative response of the Polish government to the ECJ ruling of 19 Nov 2019:

- introduced new types of disciplinary torts for judges (questioning the legal status of the neo NCJ, judges appointed with its participation or other constitutional bodies became a serious disciplinary offence, punishable by expulsion from the profession. It is striking that the obvious purpose of introducing this disciplinary tort is to prevent Polish judges from implementing the recommendations contained in the ECJ judgment of 19 November 2019);
- enabled the ruling party to take over the position of the First President of the SC when Małgorzata Gersdorf's term of office expired. Małgorzata Manowska was nominated the First President of the SC in May 2020, in breach of Polish Constitution and in spite of the fact that she only received 25 votes in support, while her independent counter-candidate received 50 votes. Just after her election Ms. Manowska expressed the need to revise the resolution of the joint chambers of the SC of 23 January 2020, showing her loyalty to the ruling camp.

## III. Disciplinary proceedings against judges who tried to follow the guidelines contained in the ECJ judgment of 19 Nov 2019.

After the ECJ judgment of 19 November 2020, literally every Polish judge who tried to implement it, was targeted with disciplinary proceedings. This applies to judges who:

- submitted requests for a preliminary ruling either to the ECJ or to the Polish SC regarding the legal status of the neo-NCJ, or judges appointed with its participation,
- tried to verify the correctness of appointment of the neo-NCJ, or only to determine whether the neo-NCJ took part in the appointment of a judge,
- drew attention in their official documents to doubts regarding the legality of neo-NCJ,
- questioned the legality of the appointment of individual judges by the neo-NCJ,
- conducted an independence test in respect of a judge of a first instance court - in line with the resolution of the joint chambers of the SC of 23 January 2020,
- hung posters in the court building questioning the legality of the neo-NCJ.

In total 21 judges have already been repressed. One of them (Paweł Juszczyszyn) has been unjustifiably suspended in his duties by the Disciplinary Chamber of the SC acting as a real firing squad, plus his salary was reduced by 40%. The Disciplinary Chamber may soon make the same decisions with respect to the next judges. Many disciplinary proceedings described above were instituted before the “muzzle law” came into force, thus in violation of the principle of *lex retro non agit*.

#### **IV. Lifting judicial immunities as a way to circumvent the ECJ's interim measure.**

The response of the EU bodies was an interim measure applied by the ECJ ruling of April 8, 2020, suspending the operation of the Disciplinary Chamber of the SC, and the initiation by the EC of infringement proceedings against Poland for the muzzle act on 29 April 2020.

Since the ECJ has frozen the activities of the Disciplinary Chamber of the SC, this authority, ceased examining typical disciplinary cases against judges. However, the Disciplinary Chamber adopted the interpretation that it may pursue cases for the waiver of judges' immunities, which then allows for criminal proceedings (in breach of interim measure as lifting immunity is connected with disciplinary measures as suspension of judge and reduction of salary).

In 2020 the State Prosecution Office pressed absurd charges against Judges Beata Morawiec, Igor Tuleya, and Irena Majcher of having committed criminal offences in connection with their judicial activity. Disciplinary Chamber revoked the immunity of judge Morawiec on 12 Oct 2020 after the hearing that grossly breached her right to a fair trial. The same happened with judge Tuleya on 18 Nov 2020. Both judges are seen to be leaders of the judicial resistance against the politicization of the judiciary.

In the judgment of September 2020 in the Disciplinary Chamber of the SC expressed the absurd view that the ECJ judgment of 19 Nov 2019 is not binding in the Polish legal system.

#### **V. Central disciplinary commissioners initiate collective disciplinary proceedings.**

While in previous years, unjustified and politically motivated disciplinary proceedings were directed by central disciplinary commissioners against selected judges, after the muzzle act entered into force, disciplinary proceedings were instigated against a larger groups of judges:

- a partially successful attempt to force local disciplinary commissioners to initiate disciplinary proceedings against 1,278 judges who signed a letter to OSCE expressing concern about the correct conduct of the presidential election planned for 10 May 2020,

- bringing disciplinary charges against 14 members of the Judges' Cooperation Forum board for alleged failure to comply with the obligation to disclose their membership in the Forum (in spite that the Forum is an informal group rather than a registered organization),
- bringing disciplinary charges against 10 members of the board of the Association of Polish Judges "Iustitia" due to the resolution adopted by them questioning the legal status of the Extraordinary Control and Public Affairs Chamber of the SC, and thus undermining the resolution adopted by this Chamber on the validity of the presidential election in 2020.

Collective disciplinary proceedings are an effective generator of a chilling effect among judges and at the same time an attempt to intimidate the boards of judges' associations.

#### **VI. The Constitutional Tribunal as an institution that legalizes violations of the Constitution by the government and Parliament.**

In Dec 2016, after the long legal battle, the ruling party took political control over the Constitutional Tribunal (CT) in a way of unconstitutional hostile takeover, by not admitting to the bench 3 legally elected judges and refusal of publication of 3 rulings of the "old" CT. Such a political subordination to the CT actually means that small L&J majority in Parliament is able to adopt any law, even unconstitutional and the CT was turned from the effective guardian of the Constitution into instrument of destruction of the rule of law in Poland.

Examples of harmful action of the politicized CT include the decision originally scheduled for 20 Oct 2020 on depriving Adam Bodnar of the ability to perform the duties of the Ombudsman until his successor is elected by the Parliament (the hearing was postponed).

On 22 Oct 2020, the Tribunal has revealed itself as the guardian of the Catholic-national vision of the world, finding that abortion in the event of irreversible damage to the fetus is inconsistent with the constitution. This means the introduction of a practically total ban on abortion in Poland (the decision covers 98% of abortions). The judgment of the CT in the case raises great doubts from the procedural point of view as 3 so-called judges-doubles (persons elected to places previously properly filled by the previous parliamentary term) were included in the bench. The critics of the ruling hold that the Tribunal did not even attempt to resolve the conflict of goods which, in the case of abortion, occurs between the right to life and the right to protection of family life, or the prohibition of degrading and inhuman treatment.

In its judgment of 20 April 2020 the CT found that the resolution of the joint chambers of the SC of 23 January 2020 is inconsistent with the constitution, EU law and ECHR. The CT exceeded its competence, as it may review the constitutionality of acts of law, and not court decisions.

#### **VII. Political subordination of the Public Prosecution Office.**

In April 2016 the ruling camp took political control over the Public Prosecutor's Office which was achieved by combining functions of the Minister of Justice and Prosecutor General, which has been accompanied by a significant increase of his investigative powers. The result is an image of the Public Prosecutor's Office as potentially entirely disposed to L&J party.

For this reason, the legitimacy of the actions of the prosecutors raises great doubts in the media and among the public, e.g. on 15 Oct 2020, former Deputy Prime Minister Roman Giertych, currently an active lawyer and a staunch critic of the ruling camp, who represents several opposition politicians in court proceedings, was arrested on a charge of allegedly committing economic crimes. These doubts became even greater when the court refused to apply pre-trial detention in this case, stating that the prosecutor had not substantiated that the suspect had committed the crimes. The prosecutor's office initiates proceedings with great enthusiasm against opponents of the current ruling camp, and on the other hand, behaves indulgently towards the perpetrators associated with the current power camp.

On 13 Oct 2020 the deputy of General Prosecutor Public, Mr. Bogdan Świączkowski sent an order to the prosecutors to treat with "special care" EAWs issued by the Netherlands as a retaliation for the court in Amsterdam suspending the enforcement of EAWs from Poland in connection with the question to the ECJ about the independence of Polish courts. Such application of the principle of reciprocity undermines the principles of mutual trust and mutual recognition of judicial decisions.

In April 2016 the **Internal Affairs Department of the State Prosecution Service (IAD)** at the very top of Public Prosecution Office was established to conduct preparatory proceedings against judges and prosecutors. It was established in whole by Minister of Justice-Prosecutor General Zbigniew Ziobro, is bound by his orders. It mainly employs young prosecutors temporarily posted there by Zbigniew Ziobro who may be degraded with one signature.

In the light of the opinion of Advocate General Bobek of 23 Sept 2020 establishment of such a special unit with exclusive jurisdiction for judges may be contrary to the EU law.

The Department of IAD showed its real political usefulness after the ECJ suspended the activity of the Disciplinary Chamber in April 2020. Therefore, it was the IAD, that pressed absurd charges against Judges Beata Morawiec, Igor Tuleya, and Irena Majcher and requested Disciplinary Chamber to waive their immunities (see chapter IV).

#### **VIII. The collapse of the NCJ as an authority safeguarding the independence of courts.**

The Chancellery of the Sejm published the so-called 'lists of support' for judges-members of neo-NCJ on 14 February 2020, after more than 2 years of hiding these lists from the public (when the "Muzzle law" introduced the possibility of removing from the profession judges who question the legal status of the neo-NCJ). Then it turned out that:

- the neo-NCJ was not validly elected, even in the light of the new, unconstitutional Law, as one of its judges-members (Nawacki) was lacking the required signatures of 25 judges,
- the process of collecting signatures of support was politically corrupted, as the vast majority of people who supported 11 out of 15 candidates received benefits in return in the form of promotions and various types of additional financial benefits
- election of neo-NCJ judges-members was substantially influenced by the Minister of Justice (10 of the 15 judge-members of the neo-NCJ would not have become its members, were it not for the support of judges delegated to the Ministry of Justice),

- according to media reports, 4 out of the 15 judge-members of the neo-NCJ were part of the so-called 'Troll farm at the Ministry of Justice', headed by former Deputy Minister of Justice Łukasz Piebiak.

To sum up: such a politically corrupt and morally compromised body, set up in breach of the new Act on the NCJ, cannot efficiently safeguard the independence of the judiciary.

**Neo-NCJ in practice** has become a façade institution which, instead of protecting the independence of the judiciary, is doing everything to subordinate it to the politicians by:

- rejecting judges who apply for promotion who are recommended by judge-inspectors and assemblies of local courts; instead the neo-NCJ promotes poor judges with, who guarantee loyalty to the newly nominated presidents of the courts
- rewarding judges loyal to the ruling camp with politically motivated and substantially unjustified quick promotions (examples: promotion of Deputy Disciplinary Commissioner Przemysław Radzik, the appointment of his wife to the Supreme Administrative Court (SAC), the promotion of Deputy Minister of Justice Anna Dalkowska to the SAC,
- promoting to the position of Judge of the Regional Court in Olsztyn candidate whose only advantage over the other applicants was that he paid approx. EUR 3,000 to the L&J party's election fund which gives the impression that he had bought himself the office of judge from the politicians, which clearly resembles medieval practices of selling offices.

## IX. Conclusions.

The essence of the pseudo-reform of the Polish judiciary can be reduced to the statement that two politicized committees were created in order to subordinate judiciary: neo-NCJ which is responsible for appointment and promotion of judges, and Disciplinary Chamber of the SC, which is responsible for legal harassment of defiant judges. The new mode of disciplinary proceedings combined with full control of the Minister of Justice over the Prosecutors' Office (including Department of Internal Affairs of the State Prosecution Service), his excessive administrative control over the judiciary, which is possible due to the lack of effective constitutional control of a new law constitute a real "chilling effect generator". Judges are exposed to constant attacks, including black PR campaign in public media.

After the muzzle act came into force, the government intensified its efforts to politically subordinate the judiciary by undertaking collective disciplinary proceedings against judges, political subordination of the First The President of the Supreme Court, or the continuation of the activities of the Disciplinary Chamber of the SC, despite its suspension by the CJEU. Interference from the CJEU and European Commission is not sufficient in order to hamper political subordination of the Polish judiciary.

The right of citizens, which now seems to be particularly threatened, is the right to a fair trial within the meaning of 6 of the ECHR and Art. 47 of the CFREU. Assuming that independent judiciary is a necessary and irreplaceable element of the democracy and the rule of law, Polish democracy is seriously endangered.

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