

Polish Judiciary - Still far from the Turning Point

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Abstract:

In countries respectful of the rule of law the disciplinary system for judges is meant to uphold standards and prevent abuse. It does not do so in Poland. No other European democracy has a system like the Polish one. Nowhere else is there such a concentration of powers in the hands of one man - Minister of Justice.



Rezumat:

În țările care respectă statul de drept, sistemul disciplinar pentru judecători este menit să susțină standardele și să prevină abuzurile. Nu se întâmplă acest lucru în Polonia. Nicio altă democrație europeană nu posedă un sistem precum cel polonez. Nicăieri în altă parte nu există o astfel de concentrare a puterilor în mâinile unui singur om – Ministrul Justiției.

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On 19 October 2018 Court of Justice of the European Union, acting upon the request of the European Commission, applied interim measure in respect of new law on Polish Supreme Court¹⁰⁰. This way, 22 Supreme Court judges (including the First President) were rescued from the forced early retirement. Many commentators described it as a turning point in the struggle for independence of the Polish judiciary. Unfortunately, if we take a closer look at

the overall situation of the system of administration of justice in Poland at the moment there is still no ground for such optimism. So let's take a closer look at the current situation of institutions such as the Disciplinary Chamber of the Supreme Court, the National Council of the Judiciary, the Constitutional Court, and solutions such as the new mode of disciplinary proceedings in respect of judges and subordination of the prosecutor's office to the Minister of Justice.

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¹⁰⁰ Case C-609/18 R, https://www.curia.europa.eu%2Fjcms%2Fupload%2Fdocs%2Fapplication%2Fpdf%2F2018-10%2Fcp180159en.pdf&usg=AOvVaw2rkq5FV8-R_7qXw39P3fYO,

First of all, we must remember that the interim measure sustains only the continuity of the “old” part of the Supreme Court and it does not interfere with two newly created chambers of the Supreme Court, which are the Disciplinary Chamber and Chamber of Extraordinary Claim and Internal Affairs¹⁰¹. These new chambers are crucial for political subordination of the judiciary and taking control over future parliamentary elections by the ruling camp¹⁰². Judges of two new chambers were chosen by the new politicized National Council of the Judiciary. In fact, the Disciplinary Chamber constitutes a separate court, not provided by the Constitution, with its own president, office and budget, just acting under the auspices of the Supreme Court. It is the second instance court for disciplinary cases of judges of the ordinary courts and members of other legal professions (prosecutors, attorneys and notaries). Judges-members of the Disciplinary Chamber are granted an unwarranted by the workload, very high 40 percent bonus to their salary, which is obviously aimed at corrupting them to be ready to pursue politically-motivated proceedings against their colleagues. Half of the judges of the Disciplinary Chamber were chosen from among public prosecutors who have been not long ago directly subordinated to the Minister of Justice – General Prosecutor Public and who are not used to judicial independence.

Creation of the Disciplinary Chamber is accompanied by introduction of the

entirely new mode of disciplinary proceedings¹⁰³ with main features as follows:

- judges of the first instance disciplinary courts are elected by Minister of Justice, who is at the same time the General Prosecutor Public and the member of the political party forming parliamentary majority,

- the new law grants even more extensive powers in matters of disciplinary proceedings to the Minister of Justice, who can appoint a disciplinary prosecutor for a particular judge. Such disciplinary prosecutor can be appointed not only from among judges, but also from among public prosecutors, to whom the minister gives personal instructions,

- the Minister of Justice is also empowered to file an objection to a decision of a Disciplinary Prosecutor on a refusal to initiate disciplinary proceedings. Such objection is binding for the Disciplinary Prosecutor who is also bound by Minister's instructions in respect of the further steps in the disciplinary proceedings; in this way a particular judge can become a perpetual suspect,

- it is permissible to carry out a hearing in disciplinary proceedings in justified absence of a judge or her/his counsel, which undermines the right to defence,

- the new law explicitly allows to apply evidence obtained without judicial control and in violation of laws, including evidence obtained as a result of operational control of telephone conversations,

¹⁰¹ <http://themis-sedziowie.eu/wp-content/uploads/2018/07/Revolution-within-the-Polish-Supreme-Court-final-1.pdf>.

¹⁰² Creation of Chamber of the Extraordinary Claim and Internal Affairs gives the executive power control over legal scrutiny of elections and referendums, as well as over energetic and telecommunication sectors, which causes direct

endangerment for preserving democracy and the rule of law in Poland. This raises serious question if the next parliamentary elections in October-November 2019 are going to be free or rather politically controlled.

¹⁰³ http://themis-sedziowie.eu/wp-content/uploads/2019/04/Judges_under_special_supevision_second-publication.pdf .

- the new law provides for possibility to repeal a judge's immunity under the accelerated and simplified 24-hours mode of procedure,

- the new law eliminates application of the prohibition of *reformatio in peius* within appellate disciplinary proceedings. Contrary to classical criminal proceedings, this means that a person who was acquitted by the first instance disciplinary court can be found guilty by the Disciplinary Chamber of the Supreme Court without the possibility of the remedy in a the normal course of the proceedings.

The solutions described above result in introduction of an inquisitional model of disciplinary proceedings against judges and representatives of other legal professions, which politicized these proceedings as well as restricted procedural rights of the defendants.

What is also important is that in 2016 the governing camp took political control over the public prosecutor office which was achieved by combining functions of the Minister of Justice and Public Prosecutor General¹⁰⁴. This solution has been accompanied by a significant increase of his investigative powers. Currently, the Public Prosecutor General has, in particular, the power to request, in a specific case, the carrying out of inquiry procedures directly related to the on-going investigation (in terms of surveillance of the content of correspondence or mail or use of telephone tapping) and also become acquainted with the

materials gathered during such activities; however, the Act on the Public Prosecutor's Office does not provide any permissibility requirements for this kind of action, which raises the risk of abuse. The Public Prosecutor General has also the right to issue binding commands, including the commands regarding the content of particular procedural steps in each individual case, to overrule or change a decision of a subordinate prosecutor¹⁰⁵ and the right to take over the cases conducted by subordinate prosecutors.

Taking political control by the ruling camp over the public prosecutor's office and the new mode of disciplinary proceedings, has already resulted in a significant number of politically motivated preliminary disciplinary investigations and even pre-trial criminal proceedings concerning judges. These actions were instigated, among others, in respect of judges who referred preliminary questions to the Court of Justice of the European Union, as well as those who issued judgements not in favour of the members of "Law and Justice" party, or who protested against violations of the Constitution or political subordination of the judiciary. Sadly, preliminary disciplinary investigations are also commenced in respect of judges who teach school children about the constitution or independence of the judiciary¹⁰⁶.

The National Council of the Judiciary is a collective body which has essential

¹⁰⁴ 'Act on the Public Prosecutor's Office' of 28 January 2016, published in the Official Journal of Laws (Dziennik Ustaw) of 2016, position no. 177, dated 15 February 2016.

¹⁰⁵ It has been legitimately pointed out in literature that equipping the Public Prosecutor General with such wide capabilities to directly influence the course of pending proceedings makes him a 'super-prosecutor' equipped with broad investigatory powers, as a result of which the position of the current Minister of Justice and the

Public Prosecutor General, Zbigniew Ziobro, who is also a deputy in the Polish Parliament, violates Article 103 § 2 of the Polish Constitution, which states that a public prosecutor cannot be at the same time a member of the Parliament.

¹⁰⁶ An exhaustive list of disciplinary proceedings with respect to judges and prosecutors is included in the report of the Justice Defence Committee (KOS) entitled 'A country that punishes. Pressure and repression of Polish judges and prosecutors', http://komitetobronysprawiedliwosci.pl/app/uploads/2019/02/Raport-KOS_eng.pdf.

Due to the wide scope of political control over the Public Prosecution Office, the National Council of the Judiciary as well as the new mode of disciplinary proceedings the ruling camp is able to decide who will become a judge, which judge is going to be promoted or just the opposite – which judge is going to suffer persecution such as disciplinary or even criminal proceedings.

significance regarding protecting the independence of judges and courts in Poland. It consists of 25 members: 15 judges, 4 members of lower house of Parliament and 2 Senate members chosen by the lower chamber of Parliament and the Senate, the President of the Supreme Court, the President of the Supreme Administrative Court, the Minister of Justice and a representative of the President. The Council has rights guaranteed by the Constitution, which include, among others, the right to choose candidates for judges and present them to the President for approval, the right to set out the rules of professional ethics for judges as well as the right to express its opinion with regard to legal acts concerning judiciary and to challenge them to the Constitutional Court. The

council also prepares opinions about the candidates for the positions of presidents of the courts. Unfortunately, in March 2018, this body was taken over by the ruling party by changing the mode of election of the judges-members of the Council. Before that, the judges-members were elected by the judges' self-government bodies from among the judges, now they are elected from among judges by the Parliament¹⁰⁷ in which "Law and Justice" has an absolute majority. Currently Law and Justice controls 14 votes¹⁰⁸ in the 25-member Council, which adopts resolutions with absolute majority of votes. This means taking political control over the process of appointment and promotion of judges by the ruling party.

Another step in subordinating of the ordinary courts was the amendment of the Law on Ordinary Courts of August 2017¹⁰⁹ which gave the Minister of Justice-General Prosecutor Public exclusive power to appoint Presidents of all levels of common courts. The new law also enabled him to dismiss, in an arbitrary manner, all presidents and vice-presidents of ordinary courts within 6 months from the moment of entering into force¹¹⁰. Moreover, the new law extended the scope of Minister's administrative supervision over the courts which was achieved at the expense of limitation of competences of the judicial self-government.

Last but not least, in December 2016, the ruling party took political control over the Constitutional Court which was

¹⁰⁷ According to most of high-profile scholars the legal act enabling election of judges-members of NCJ by Parliament is contrary to the art. 187 of the Constitution which explicitly stipulates that only 6 members of the NCJ shall be elected by the Parliament.

¹⁰⁸ Law and Justice is "represented" in NCJ by 9 judge-members who have been elected with the support of this party, 2 MPs who are members of

Law and Justice party and 2 senators – Law and Justice party members, as well as the Minister of Justice, Zbigniew Ziobro, who is a member of the party which is Law and Justice's coalition partner.

¹⁰⁹ Published in the Journal of Laws (Dziennik Ustaw) of 2017, position no. 1452.

¹¹⁰ On the basis of this transitional regulation about 160 presidents and vice-presidents of courts were dismissed.

achieved in violation of law¹¹¹. This institution was turned from the effective guardian of the Constitution into one of the main instruments of destruction of the rule of law in Poland in the hands of governing party and the Polish legal system was deprived of an effective constitutional control¹¹².

Due to the wide scope of political control over the Public Prosecution Office, the National Council of the Judiciary as well as the new mode of disciplinary proceedings the ruling camp is able to decide who will become a judge, which judge is going to be promoted or just the opposite – which judge is going to suffer persecution such as disciplinary or even criminal proceedings. Such solutions obviously undermine the independence of the judiciary. If we take into consideration lack of effective constitutional control we find the system of legal protection in Poland as profoundly compromised. Fortunately, it does not mean that the situation is hopeless. Interim measure of 19 October 2018 showed a way how to improve things. What is even more optimistic, there are some pending cases before CJEU instigated by preliminary requests of Polish Supreme Court, Supreme Administrative Court and common courts

as well. This preliminary reference proceedings regard:

- the possible breach of institutional equilibrium in situation in which the members of the National Council of the Judiciary, which is a body choosing candidates for Supreme Court judges, were elected by the Parliament,

- question whether the new Disciplinary Chamber of the Supreme Court may be regarded as a “court” according to autonomous interpretation of a EU law.

The date of a hearing before CJEU concerning the legal status of the NCJ has been appointed for 19 March 2019¹¹³. Moreover, on 3 April 2019 the European Commission launched a new infringement procedure, by sending a Letter of Formal Notice to Poland¹¹⁴. The initial assessment of the Commission is that the new disciplinary regime undermines the judicial independence of Polish judges by not offering necessary guarantees to protect them from political control. Many Polish judges believe that expected judgements of CJEU can effectively stand up against devastating pseudo-reform of the Polish system of administration of justice, which undermines preserving of the rule of law in Poland. Fortunately, hope is the last thing to die.

¹¹¹ Among others, Polish government refused to publish three judgements of the Constitutional Court, President Andrzej Duda refused to swear in the three judges of the Constitutional Tribunal who had been duly elected, and Polish Parliament dominated by “Law and Justice” elected three judges on posts which were previously legally occupied.

¹¹² The process of subordination of the Constitutional Court has been described in details: <https://www.jura.uni-bonn.de%2Ffileadmin>

[%2FFachbereich_Rechtswissenschaft%2FEinrichtungen%2FLehrstuehle%2FSanders%2FDokumente%2FGood_change_-_7_October_2017_-_word.pdf&usg=AOvVaw3kHxF3KckXBCKZ5m52N5Bx](https://www.jura.uni-bonn.de%2Ffileadmin%2FFachbereich_Rechtswissenschaft%2FEinrichtungen%2FLehrstuehle%2FSanders%2FDokumente%2FGood_change_-_7_October_2017_-_word.pdf&usg=AOvVaw3kHxF3KckXBCKZ5m52N5Bx).

¹¹³ The case was examined by the CJEU on 19 March 2019, it is still pending. Opinion of Advocate General is expected on 23 May 2019.

¹¹⁴ http://www.europa.eu%2Frapid%2Fpress-release_IP-19-1957_en.htm&usg=AOvVaw3RC1yCIMw1SY-tCYS3lvAG.