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www.themis-sedziowie.eu e-mail: stowarzyszenie@themis-sedziowie.eu

Alarming revolution within the Polish Supreme Court.

1. General remarks.

After the subordination of the Public Prosecution Office, the Constitutional Court and the National Council of the Judiciary to the political factor, the Supreme Court became the last standing independent organ of widely understood legal protection in Poland. However, it is going to change soon. The scope of changes introduced by the new Law on the Supreme Court, which is going to enter into force in its full scope on 3 of July, constitutes a real revolution within the highest level of the Polish judiciary which would directly undermine the independence of judges of the ordinary courts as well as the guarantees of free elections and would enable full political control over telecommunication, energetics and railway transport sectors.

The main features of the above-mentioned revolution cover:

- forced retirement of judges who exceeded 65 years, and who didn't ask President for extension up to 70, or whom the President refused extension¹ (enters into force on 3 July). It is estimated that it can concern approximately 40% of the total number of judges (27 of total number of 74 judges),
- forced retirement on 3 of July concerns also the current First President of the Supreme Court Ms Małgorzata Gersdorf who is 65 and whose 6-years long term of office, which is directly guaranteed by the Constitution², in normal circumstances shall finish in 2020,
- dismissal of the First President of the Supreme Court. The new President is going to be nominated by the President of Poland from among 5 candidates elected by

¹ Regulated by art. 111 para. 1 and art. 37 of the new Law on the Supreme Court, accessible under the link: <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20180000005/T/D20180005L.pdf>,

² Art. 183 p. 3 of the Constitution: *The First President of the Supreme Court shall be appointed by the President of the Republic for a 6-year term of office from amongst candidates proposed by the General Assembly of the Judges of the Supreme Court.*

General Assembly of the Judges of the Supreme Court³. After the changes, the person elected on this position will preside over 3 Chambers: Civil, Criminal, Labor and Social Security, which would consist partially of the old and partially of the new judges of the Supreme Court. Two remaining chambers (Disciplinary one and Chamber of Extraordinary Claims and Public Affairs) are going to be independent from the rest of the Supreme Court,

- change of the method for allocation of cases between judges of the Supreme Court. Contrary to the ordinary courts, where the cases are allocated at random by the electronic system, in the Supreme Court they are allocated by the President of the Court. The example of “reformed” Constitutional Court clearly shows that such a solution in the politicized institution enables political control over the sensitive cases and leads to numerous abuses. In the Constitutional Tribunal the newly elected President appoints “proper” (i.e. newly elected) judges for sensitive cases and often changes the members of the jury just before the hearing without any rational reason. The “old” judges are prevented from participation in the sensitive cases,
- creation of two entirely new Chambers which members are going to be chosen by the new politicized National Council of the Judiciary⁴ (the only one requirement to become a member is 10 years of experience in any legal profession, so the candidate for the judicial position in the Supreme Court do not have to be a judge):
 - Disciplinary Chamber,
 - Chamber of Extraordinary Claims and Public Affairs,
- separation of the two chambers from the rest of the Supreme Court. In practice, the two new chambers (Disciplinary and Extraordinary Claims and Public Affairs) are going to be separate courts (Disciplinary Chamber with separate president, office and budget), acting only under the auspices of the Supreme Court,
- introduction of participation of lay judges in both newly created chambers, who are going to be elected by absolute majority in the upper house of the Parliament (Senat) where Law and Justice has 60 % of votes⁵,
- an increase of a total number of judges of Supreme Court from 81 to 120. If we sum up the number of judges newly engaged to replace those who will be forced to retire after 65 and those who are going to be nominated on the newly created positions in two new chambers we come to the conclusions that entire Supreme Court is going to

³ Art. 12 of the new Law on the Supreme Court .

If we take under the consideration that General Assembly would consist in 60-70 % of judges newly appointed by the politicized (see footnote 3) National Council of the Judiciary, and the new judges are to be chosen not only from among the judges, but also from among the representatives of other legal professions we can conclude that we can take the dependence of the General Assembly from the political influence for granted.

⁴ Since the amendment of Law on the National Council of the Judiciary (NCJ) which entered into force in April 2018, 15 judges-members of the NCJ are elected by parliamentary majority (previously they were elected by judges). In practice the number of professional and personal connections of present judges-members of the NCJ to the Ministry of Justice is so high, that the newly-created body constitutes another organ of the executive power. If we add to that 6 members elected by the Parliament, the representative of the President and the representative of the Minister of Justice it turns out that 23 of 25 members of the NCJ are going to be either elected or appointed by the politicians,

⁵ Art. 61 para. 2 of the Law on the Supreme Court,

consist of between 60 and 70 % new judges, all of them elected by the new politicized National Council of the judiciary,

- attribution of a wide scope of competences in respect of organization of the Supreme Court to the President of Poland Andrzej Duda, who is a “Law and Justice” nominee⁶. He was entitled to issue internal rules of the Supreme Court which regulate, among others: the total number of judges (not less than 120), number of judges in particular chambers and internal rules of the organization of the Supreme Court⁷.

All in all, the ‘new’ Supreme Court would consist of the new First President, two new Chambers dealing with the most politically sensitive cases and between 60 % and 70 % of the new judges, who have not been elected so far.

2. Disciplinary Chamber.

The Disciplinary Chamber is going to be an entirely new body established on the basis of the new Law on Supreme Court. According to Ordinance of the President of Poland of 30 March 2018⁸, the Disciplinary Chamber will consist of 16 judges. It is designed to adjudicate as⁹:

- the second instance court for disciplinary cases of judges of the ordinary courts and members of other legal professions (prosecutors, attorneys and notaries). In this category of cases the Disciplinary Chamber acts in a panel consisting of two professional judges and one lay judge,
- the first instance disciplinary court for disciplinary cases of the judges of the Supreme Court adjudicating in a panel of two professional judges and one lay judge,
- the second instance court for disciplinary cases of the judges of the Supreme Court adjudicating in a panel of three professional judges and two lay judges¹⁰,
- the second instance court recognizing appeals from resolutions of the National Council of the Judiciary¹¹.

This Chamber has a separate President (completely independent in the scope of competences and not subordinated to the First President of the Supreme Court)¹², separate

⁶ Art. 4 of the Law on the Supreme Court ,

⁷ In this respect the President issued an Ordinance of 30 March 2018, accessible under the link: <http://www.dziennikustaw.gov.pl/du/2018/660/D2018000066001.pdf>

⁸ Para. 39 p. 5 of the Ordinance of the President of Poland of 30 March 2018, see footnote 6,

⁹ Art. 27 of the Law On the Supreme Court,

¹⁰ Art. 73 para. 1 of the Law on the Supreme Court.

¹¹ Among others from decisions on nomination of candidates for judges’ and assessors’ (apprentice judges) positions.

¹² Art. 20 of the Law On the Supreme Court.

budget¹³ and separate office. Judges-members of the Disciplinary Chamber of the Supreme Court 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 pursue politically-motivated proceedings against their colleagues¹⁴. The government also secured a large budget for this special Chamber.

Creation of the Disciplinary Chamber in the Supreme Court is accompanied by introduction of the new mode of disciplinary proceedings. Main features of the new mode of disciplinary proceedings in respect of judges and members of other legal professions are as follows:

- members of first instance disciplinary courts (situated at the level of Appellate Courts) are elected by Minister of Justice, who is at the same time the General Prosecutor Public (furnished with broad investigative powers) and the member of the political party forming parliamentary majority¹⁵,
- the judge appointed for a position in the disciplinary court is obliged to take up this position even if it is against his/her will¹⁶ and does not have any remedy against such an appointment,
- 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 defence¹⁷,
- the new law explicitly allows to apply evidence obtained without judicial control and in violation of laws in respect of judges, including evidence obtained as a result of operational control of telephone conversations¹⁸,
- the new law grants extensive powers in matters of disciplinary proceedings to representative of the executive power, i.e. 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 who are directly subordinated the Minister of Justice who is at the same time the General Prosecutor Public, to whom the minister gives personal instructions¹⁹,

¹³ According to art. 7 para 4 of the Law On the Supreme Court: „In respect of executing of the Supreme Court budget concerned with functioning of the Disciplinary Chamber, the President of the Disciplinary Chamber of the Supreme Court is furnished with competences of the Finance Minister”.

¹⁴ Art. 48 para 7 of the Law on the Supreme Court.

¹⁵ Art. 110a. para 1 of the Law on the System of Ordinary Courts, accessible under the link: <http://prawo.sejm.gov.pl/isap.nsf/download.xsp/WDU20010981070/U/D20011070Li.pdf>

¹⁶ Art. 82 “c” of the Law on the System of Ordinary Courts. In his written statement of 4 July 2018 Polish Ombudsman Adam Bodnar stated that such solution is contrary to the provision of art. 180 p. 2 of the Polish Constitution which stipulates: “Recall of a judge from office, suspension from office, transfer to another bench or position against his will, may only occur by virtue of a court judgement and only in those circumstances prescribed in statute”.

¹⁷ Art. 115.a para 3 of the Law on the System of Ordinary Courts.

¹⁸ Art. 115.c of the Law on the System of Ordinary Courts.

¹⁹ Art. 112 b. para. 2 of the law on Law on the System of Ordinary Courts.

- the Minister of Justice²⁰ 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,
- the new law provides for possibility to repeal a judge's immunity under the accelerated and simplified 24-hours mode of procedure²¹,
- the new law eliminates application of the prohibition of *reformatio in peius*²² within appellate disciplinary proceedings. Contrary to classical criminal proceedings²³, this change 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 proceedings²⁴.

The solutions described above result in an introduction of an inquisitional model of disciplinary proceedings against judges and representatives of other legal professions, which will politicize these proceedings and at the same time it will restrict procedural rights of the defendants.

3. Chamber of Extraordinary Claims and Internal Affairs.

It is going to be an entirely new body established on the basis of new Law on Supreme Court. It will consist exclusively of new judges-members who are going to be chosen by reorganized and politicized National Council of the Judiciary and lay judges who are elected by the upper house of the Parliament (Senat) where Law and Justice has 60 % of seats. According to Ordinance of the President of Poland of 30 March 2018²⁵ the Chamber of Extraordinary Claim and Internal Affairs will consist of 20 judges. In each single case the panel consists of two judges and one lay judge.

Its scope of competences covers²⁶:

- possibility to set aside final court judgements reached in the past two decades, which massively undermines the principle of legal certainty and finality of Polish legal

²⁰ art. 114 para 9 of the Law on the System of Ordinary Courts.

²¹ art. 55 para 2 of the Law on the Supreme Court, art. 106 zd. para 6 'a' of the Law on the System of Ordinary Courts.

²² Art. 121 para 3 of the Law on the Supreme Court.

²³ According to Art. 454. para 1 of the Polish Code of Criminal Proceedings: "The appellate court shall not be allowed to convict the accused who has been acquitted in the first instance proceedings, or with regard to whom the proceedings in the first instance has been discontinued or conditionally discontinued".

²⁴ In the mode of disciplinary proceedings there is no possibility of extraordinary remedy which, in classical criminal and civil proceedings is called "cassation". It is replaced by so called "horizontal remedy" to the another adjudicating panel of the same Disciplinary Chamber – art. 122 para 1 and 2 of the Law on the System of Ordinary Courts.

²⁵ Para. 39 p. 4 of the Ordinance of the President of Poland of 30 March 2018, see footnote 6.

²⁶ Art. 26 of the Law on the Supreme Court.

system²⁷. One of the authorities empowered to file an extraordinary claim is the General Prosecutor Public – Minister of Justice who is a very engaged politician of a governing coalition, so one can expect reopening of criminal or civil cases against political opponents by application of extraordinary claim,

- deciding upon validity of election (parliamentary, Presidential, to European Parliament) and referendum (general and Constitutional),
- examining the election protests,
- examining cases concerning protection of competition,
- examining cases concerning control of energetics, telecommunication and railway transport.

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 elections are going to be free or rather politically controlled. The institution of an extraordinary claim can become a kind of universal multifunctional device in the hands of politically motivated General Prosecutor Public – Minister of Justice who can reopen both civil and criminal cases in order to target political opponents, independent media or NGOs criticizing the governmental policy. The Venice Commission assessed that “In this respect the proposed system is even worse than its Soviet predecessor”²⁸.

4. Reaction of the judiciary.

In the term provided by the new law 9 Justices of the Supreme Court asked the President for extension up to 70, enclosing medical certificates confirming their ability to adjudicate, required by the new law. The President has not issued any decision in this respect yet. However, seven other Justices (among them the President of Criminal Chamber Stanisław Zawłocki) submitted written statements revoking Constitutional principle of irremovability of judges (art. 180 p. 1 of the Constitution) as their ground for further judicial activity which shall not be undermined by the lower-ranking legal act.

The President of the Supreme Court Małgorzata Gersdorf publicly announced that she is not going to ask President for extension of her term of office as well as she is not going to retire

²⁷ An amendment of the Law on the Supreme Court adopted on 10 May 2018 extended the Supreme Court’s discretion in adjudicating cases initiated by lodging an extraordinary complaint, indicating that one of prerequisites for the admissibility of the complaint is the general clause of art. 2 of the Constitution, which essentially expands the potential field of application of an extraordinary complaint.

²⁸ “Poland Opinion on the draft act amending the act on the National Council of the Judiciary, on the draft act amending the act on the Supreme Court, proposed by the President of Poland, and on the act on the organisation of ordinary courts,” Venice Commission, December 11, 2017.

[http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD\(2017\)031-e](http://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD(2017)031-e)

after 3 July. Just the opposite, she is going to perform her duties up to the end of her term of office guaranteed by the Constitution which is April 2020.

On 28 July 2018 the General Assembly of Judges of the Supreme Court adopted two very important resolutions. According to the first resolution²⁹, a Justice of the Supreme Court, Professor Małgorzata Gersdorf, shall remain (according to Art. 183 section 3 and Art. 8 of the Constitution) the First President of the Supreme Court up to 30 April 2020. The second resolution³⁰ provides that Justices of the Supreme Court who have begun their service on the Supreme Court before the new law on the Supreme Court came into force, should continue their service until the age of 70 without any additional conditions; the opposite regulation adopted in art. 111 para. 1 of the new Law on the Supreme Court is in breach of Art. 180 of the Constitution.

Following the above-mentioned resolutions, Ms Małgorzata Gersdorf and some other judges who are going to be forced to retire on 3 July on the basis of unconstitutional regulations of the new law, declared an intention of continuing their professional activity after 3 July and to report for duty on the 4 of July at 8.30 at the premises of the Supreme Court in Warsaw. In this critical moment they are going to be supported by members of associations of judges, representatives of other legal professions, NGOs and ordinary citizens who support the independence of the judiciary. The question arises if they will be admitted to the building or rather prevented from by usage of coercive measures.

Unfortunately, the recent activity of the President of Poland, who on 29 July announced 44 vacancies in the Supreme Court³¹, indicates possibility of forceful solution.

General assemblies of many Polish courts (among others in Warsaw, Łódź, and Kraków) adopted resolutions calling on the European Commission to send the Act on the Supreme Court to the Court of Justice of the European Union together with the motion to suspend the implementation of the Act.

5. Closing remarks.

The solutions described in sections devoted to Disciplinary Chamber and the new mode of disciplinary proceedings result in an introduction of an inquisitional model of disciplinary proceedings against judges and representatives of other legal professions, which will politicize these proceedings and at the same time it will restrict procedural rights of the defendants in such a manner that their position will be significantly worse than the position of defendants in classical criminal proceedings. If we add to it politicization of the

²⁹ <http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/EditForm/2018.06.28%20-%20Resolution%20-%20First%20President.pdf>

³⁰ <http://www.sn.pl/aktualnosci/SiteAssets/Lists/Wydarzenia/EditForm/2018.06.28%20-%20Resolution%20-%20SC%20Justices.pdf>

³¹ http://doc.rmf.pl/rmf_fm/store/obieszczenie_MP.pdf

Prosecutor's Office carried out by a Law enacted in 2016, we are presented with a picture of 'technological sequence' enabling the executive and legislative powers repressions of 'inconvenient' judges and members of other legal professions by means of criminal and disciplinary proceedings. An obvious result of the new mode of disciplinary proceedings will be a 'chilling effect' on the work of the judges, especially in cases that will have a political or media character."

Chamber of the Extraordinary Claims and Internal Affairs gives the executive power control over legal scrutiny of elections, as well as over energetic and telecommunication sectors, which causes direct endangerment for preserving democracy and the rule of law. Situation of granting the governing camp political control over electoral procedures and over the media market would undermine both free elections and freedom of expression. It is a kind of an "insurance policy" for the ruling camp in case they do not get the votes they need.

According to common perception, the main factor of the revolution which is negatively assessed by international bodies is a wide scope of dismissal of judges caused by the intertemporal provisions of the new law. However, according to the author of this article, the factor which is probably even more dangerous, from the point of view of preserving of the rule of law in Poland, is the establishment of the two entirely new Chambers which are granted control of the very sensitive areas of public life. If we take under the consideration such factors as politicized way of election of the judges-members of this new chambers, their wide scope of independence from the remaining part of the Supreme Court, unprecedented at this level of the judiciary element of participation of social factor (lay judges), and seriously reduced level of procedural guarantees in the new mode of disciplinary proceedings, one may expect that both new chambers are going to become kangaroo courts subordinated to the executive power and designed to achieve political objectives of the governing party.

All in all, the 'new' Supreme Court would consist of between 60% and 70% of new judges, who have not been elected so far. The new law on the Supreme Court **enters into force in its full scope on 3 July**, which is the critical date after which personal changes in the Supreme Court will be irreversible. After mentioned date up to 40 % of the current members are going to be retired, the vacancies are going to be filled by the new, politically dependent judges and two entirely new politically dependent Chambers are going to be created. Forming of the new politicized quasi-judicial organs with particular scope of competences, particular composition and reduced level of procedural guarantees is characteristic for authoritarian or totalitarian regimes rather than for democratic countries based on the rule of law.