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CLOSE TO THE POINT OF NO RETURN

(newsletter about the situation of the Polish judiciary)
updated for 20 February2020

▶▶ THE MUZZLE LAW

▶A draft comprehensive bill amending the Act on the Organization of Ordinary Courts, the Act on the Supreme Court and the Act on the National Council of the Judiciary was submitted on 12 December 2019, and then voted on by the parliamentary majority in the lower house of the Polish parliament (Sejm) on 20 December 2019. It gained the well-deserved nickname of 'muzzle law', as it seems to be the greatest 'achievement' of the executive and the parliamentary majority on the path leading to the political subordination of the judiciary.

▶ This new law:

- introduces new types of disciplinary torts for judges (a request for a preliminary ruling submitted to the CJEU or the Polish Supreme Court regarding the status of judges appointed with the participation of the neo-NCJ will become a serious disciplinary offence punishable by expulsion from the profession, just as questioning the constitutionality of the central authorities;
- deprives the bodies of the judicial self-government of any significance (e.g. they have lost the right to give opinions on candidates for the office of judge and on candidates for senior judicial positions, as well as the right to adopt critical resolutions regarding changes in the justice administration);
- politicizes new disciplinary proceedings against judges even more (e.g. decisions on waiving a judge's immunity and the temporary detention of a judge will only be made by the Disciplinary Chamber of the Supreme Court, the establishment of which was in conflict with the constitution);
- imposes an obligation on judges to disclose their affiliation to judicial associations (information on this will be posted in the Internet);
- contrary to the Constitution, gives the President the right to correct the defectiveness of the nomination procedure of judges. Most of the changes listed are in conflict with both the Polish constitution and standards of European law;
- enables the ruling party to take over the position of the First President of the Supreme Court when Małgorzata Gersdorf's term of office expires (April 2020), by empowering each member of the General Assembly to nominate its own candidate, reducing the quorum necessary for the election and enabling the Polish President to

nominate the temporary president of the Supreme Court for the election period (it is symptomatic that all these solutions were applied in December 2016, during the political takeover of the position of President of the Constitutional Tribunal).

▶ This bill was rejected in its entity by the upper house of Parliament (Senate), where the opposition parties have a slight majority. However, the Sejm, controlled by 'Law and Justice', then rejected the Senate's objection. Next, the President signed it (this was a pure formality, as he had previously expressed his vivid support for this law in the media), it was published in the Journal of Laws and, after 7 days of *vacatio legis*, on 14 February 2020, it became a binding act of law. The judges of the Kraków courts referred to this day as **'Black Friday for the European judiciary'.**

▶ However, the binding force of this Act is doubtful (to say the least), as – in many respects – it is in conflict with both the Polish constitution and European law (as it undermines the independence of the judiciary and the separation of powers *en masse*). Therefore, it will be questionable whether 10,000 Polish judges will comply with its provisions, or rather contest it by directly applying the constitution and EU law, thereby risking disciplinary proceedings before the politicized Disciplinary Chamber of the Supreme Court. In this last scenario, the Polish government can face further infringement proceedings and the application of interim measures which were initiated at the request of the European Commission.

▶▶ SUPREME COURT RESOLUTION OF 23 JANUARY 2020

▶ Three joint chambers of the Supreme Court (59 judges) issued a resolution on 23 of January 2020, which undermines the foundations of the pseudo-reform of the justice system by questioning both the legality and the independence of the Disciplinary Chamber of the Supreme Court, as well as contesting the independence of the newly created National Council of the Judiciary (the body responsible for protecting judicial independence, as well as appointing and promoting judges).

▶ However, it is important to emphasize that, in this resolution, the Supreme Court, acting within its domestic margin of appreciation, applied a good balance between preserving the rule of law and legal certainty. In doing so, the Supreme Court did not nullify all judgements issued by judges appointed or promoted with the participation of neo-NCJ, but upheld the judgements of the ordinary courts issued up to 23 January. When referring to the judgements passed after 23 January, the Supreme Court decided that they would not be automatically deprived of binding force, but purely at the request of a party. In each specific case, the appellate court will need to assess whether the procedure for choosing the judge who issued the contested decision justifies the presumption that he was not an independent judge within the meaning of Article 47 CFR EU and Article 6 ECHR. Only all judgements issued by the Disciplinary Chamber, regardless of the moment that they were issued, were considered void by the Supreme Court.

▶▶ THE 'LAW AND JUSTICE' RESPONSE TO THE SUPREME COURT RESOLUTION OF 23 JANUARY

▶ The response of the politically subordinated Constitutional Tribunal was almost immediate, as on 29 January 2020, at the request of the Marshall of the Sejm (a member of Law and Justice), it suspended the binding force of the Supreme Court resolution of 23 January 2020, under the pretext of an alleged conflict of competence between the Supreme Court and the Parliament, even though renowned constitutional law experts do not see any conflict.

▶ A fierce black PR campaign was instigated in the state-owned media against justices of the Supreme Court who issued the resolution of 23 January in order to delegitimize the 'old' part of the Supreme Court (see: http://themis-sedziowie.eu/wp-content/oploads/2020/01/Comments_SC_resolution_23_01_2020.pdf)

▶ Despite the CJEU ruling of 19 November, as well as the rulings of the Polish Supreme Court of 5 December 2019 and 23 January 2020 (holding that the Disciplinary Chamber of the Polish Supreme Court is not a court) the Disciplinary Chamber is continuing its work at full capacity. The best example of its ongoing activity is the decision of 4 February 2020 to suspend Judge Juszczyszyn for his request to the Speaker of the Sejm to disclose the lists of support for candidates to the neo-NCJ in order to verify the legal status of the judge who issued the first instance judgement. The decision on the suspension was, in fact, issued on the basis of the 'Muzzle law' which (contrary to the Polish constitution and European law) prohibits verifying the legal status of judges, even though it was still not in force on 4 February. Therefore, the suspension of Judge Juszczyszyn obviously breached the rule of '*lex retro non agit*'. Secondly, the decision on the suspension was issued in gross breach of the newly introduced rules on disciplinary procedure. The original decision of the Disciplinary Chamber of 23 December 2019, issued at the request of the newly-nominated president of the Regional Court in Olsztyn, Maciej Nawacki (as a member of the neo-NCJ he would be directly endangered if the lists of support to the neo-NCJ were to be disclosed) contained refusal of judge Juszczyszyn's suspension. According to the new rules on disciplinary proceedings (namely Article 131 para. 2 and 4 of the Law on the Organization of Ordinary Courts) such a decision is valid and cannot be challenged. In such a case, the Disciplinary Chamber bench, as the second instance court, was required to reject the disciplinary commissioner's appeal as being inadmissible. So the decision to suspend Judge Juszczyszyn was issued by an illegal body, it was lacking legal substantive law grounds and it was issued in gross breach of the procedural rules.

▶ It should be emphasized that disciplinary proceedings against Judge Juszczyszyn are among many proceedings instituted in the last 3 months against Polish judges who followed the recommendations contained in the judgement of the CJEU of 19 November 2020. As many as 15 judges are currently targeted in this respect (see:

http://themis-sedziowie.eu/wp-content/uploads/2020/01/Response-of-Polish-authorities-to-CJEU-judgement_wer11_01_2020-1.pdf,

http://themis-sedziowie.eu/materials-in-english/communication-of-the-disciplinary-commissioner-of-the-ordinary-court-judges-case-judges-of-the-regional-court-in-olsztyn/).

▶▶ STATE OF PLAY AFTER THE DISCLOSURE OF THE LETTERS OF SUPPORT OF THE MEMBERS OF THE NEO-NCJ

▶ The Chancellery of the Sejm published the so-called 'lists of support' for judge-members of neo-NCJ on 14 February, which was the date on which the 'Muzzle law' entered into force. After more than 2 years of hiding these lists from the public, this may seem surprising, but it seems that this was determined by two factors:

- firstly, the letters of support had already been leaked and the first part was published by Poland's largest daily newspaper, 'Gazeta Wyborcza',
- secondly, as mentioned above, the 'Muzzle law' introduced the possibility of removing defiant judges from the profession who would question the legal status of the neo-NCJ, which fully safeguards the interests of the ruling camp,

▶ The starting point for the further analysis is the basic assumption that the election of 15 judge-members of the neo-NCJ by the parliament, instead of by judges, is in breach of Article 187 of the Polish constitution, which grants both chambers of parliament the right to elect only 6 members of the NCJ and only from among MPs. Moreover, the newly-introduced mode of electing 15 judge-members undermines the independence of the neo-NCJ, including in the light of Article 10 of the constitution (the principles of separation and tri-partition of powers).

▶ Regardless of the unconstitutional nature of neo NCJ, the disclosure of the lists of support confirms that:

- the neo-NCJ was elected invalidly, even in the light of the new, unconstitutional Act. The problem is that one of the members, namely judge Nawacki, was lacking the required signatures of support of 25 judges (his list of support includes 28 signatures, but 5 were withdrawn before the list was submitted to the Speaker of the Sejm). As the voting took place as a block vote, the invalidity of one candidacy invalidates the election of all judge-members of the neo-NCJ;

- 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;

- 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 (namely Drajewicz, Dudzicz, Pawełczyk-Woicka, Puchalski, Furmankiewicz, Kołodziej-Michajłowicz, Kondek, Mitera, Nawacki, Styrna). In the case of 8 out of 10 of these people, over 40% of the votes came from judges employed by the Ministry of Justice, which clearly indicates that the politicians of the ruling camp had a decisive influence on the shape of the judicial part of the neo-NCJ;

- the struggle to disclose the lists lasting more than two years (including the government's disregard of a final judgment of the Supreme Administrative Court) in conjunction with serious irregularities in the physical shape of the lists (including the existence of duplicate lists with repetitive numbering, where the names were given in a different font, and part of one list was crossed out) suggests the possibility of manipulation, such as supplementing the lists after they had been submitted to the Speaker of the Sejm, or collecting signatures on blank lists on which the names of candidates were added later;

- the biggest doubts are raised in the case of the following members of the NCJ:

  - Jarosław Dudzicz
  http://www.sejm.gov.pl/KRS/J.Dudzicz.pdf,

  - Marek Jaskulski
  http://www.sejm.gov.pl/KRS/M.Jaskulski.pdf,

  - Joanna Kołodziej-Michałowicz
  http://www.sejm.gov.pl/KRS/J.Kolodziej-_Michalowicz.pdf,

  - Jędrzej Kondek
  http://www.sejm.gov.pl/KRS/J.Kondek.pdf

▶ The conclusion is that the neo-NCJ was not validly elected, even in the light of the new, unconstitutional Law. Moreover, its judge-members are not a democratic representation of the Polish judiciary (which was highlighted as being one of the main objectives of the so-called

reform), but a selected group of people guaranteeing political loyalty, whose election was substantially influenced by the Minister of Justice. It is particularly striking that, according to media reports, as many as 4 out of the 15 judge-members of the neo-KRS (Drajewicz, Nawacki, Dudzicz and Puchalski) were part of the so-called 'Troll farm at the Ministry of Justice', (see: http://themis-sedziowie.eu/materials-in-english/onet-investigation-troll-farm-at-the-ministry-of-justice-or-we-do-not-put-in-jail-for-doing-good/) headed by former Deputy Minister of Justice Łukasz Piebiak, who was also supposed to coordinate the collection of signatures of support for members of the neo-NCJ at the Ministry of Justice. It seems obvious that such a politically corrupt and largely morally compromised body, which was set up in breach of the new Act on the NCJ that is unconstitutional in itself, cannot efficiently safeguard the independence of the judiciary.

▶▶ CRITICAL MOMENT IN THE NEAR FUTURE – END OF THE TERM OF OFFICE OF THE FIRST PRESIDENT OF THE SUPREME COURT

▶ The term of office of the current First President of the Supreme Court expires in April 2020. This will be a critical moment in terms of preserving the independence of the Polish judiciary. At this moment, the 'old' part of the Supreme Court (namely the Civil Chamber, the Criminal Chamber and the Labour and Social Security Chamber) represented by the First President of the Supreme Court, Ms. Małgorzata Gersdorf, is the last standing fortress of judicial independence at central level.

▶ The history of the Constitutional Court shows that, when the ruling camp has at least a small majority of 'its own' (which, in the case of the Supreme Court, means appointed by the neo-NCJ) judges and 'its own' President of the Supreme Court, then 'Law and Justice' will gain effective control over the top Polish judicial authority. Such a situation still can be prevented with swift action by the European Commission.

▶ The final subordination of the Supreme Court to the politicians has two potentially devastating effects:

- EU institutions will lose a partner who ensures the proper and uniform interpretation of EU law in Poland. Although all Polish courts are obliged to apply European law, only an independent Supreme Court, thanks to the authority it has earned and its central position, is able to ensure, on the one hand, uniformity in the application of European rules throughout the country and, on the other, an appropriate balance between the rule of law and legal certainty (as exemplified by the resolution of 23 January);
- it has the potential of breaking the moral backbone and the independence of many of the 10.000 judges of ordinary courts who perceive the "old" part of the Supreme Court as a symbol of judicial independence.

▶▶ FLATTENING THE STRUCTURE OF THE JUDICIARY

▶ The alienation of the ordinary court judges will be increased in the next stage of the pseudo-reform announced by the government, involving the so-called 'flattening the structure of the judiciary'. As the example of the public prosecution office showed, under the pretext of reorganization, it will be possible to replace the presidents of the courts who remain independent with politically loyal ones. It is even possible that judges will be pressed through a sieve of general re-nomination, under the pretext of introduction of a unified position of 'ordinary court judge' (see: https://oko.press/kaczynski-details-pis-plans-for-completing-its-reform-of-the-justice-system/).

►► HOW TO AVOID THE CATASTROPHE

► The term of office of the current first President of the Supreme Court ends on 30 April 2020. The General Assembly of the Supreme Court needs to elect her successor before that date. Unfortunately, the neo-NCJ is, in fact, a politicized committee, which has already pumped a large group of new, politically-subordinated people to positions of Supreme Court judges, who have the right to attend the general assembly of the Supreme Court judges, which will elect the future president.

► The problem is that, in addition to the 10 new judges in the Disciplinary Chamber, there are also 20 new judges in the Extraordinary Complaint and Public Affairs Chamber and 7 new judges in the Civil Chamber (10 more are currently waiting for their presidential nomination). So, even if 10 new judges of the Disciplinary Chamber are excluded from the general assembly, the remaining 27 (or soon even 37) will be able to elect one of 5 candidates to the position of the first President, as Ms. Gersdorf's successor. In such a case, President Duda will certainly choose the candidate that is strictly politically subordinated to the ruling camp. Worse still, the ruling camp is able to pass even more new judges through the neo-NCJ and the president will swear them in even after midnight if this is required for the ruling camp.

► Therefore, all judges appointed by the neo-NCJ should be excluded from the General Assembly of the Supreme Court to secure the ability to elect a candidate who is independent of the politicians.

►In fact, there is a basis for this, as all the new judges of the Supreme Court were wrongfully elected (by an unconstitutionally elected NCJ, following recruitment which was incorrectly announced – without the Prime Minister's counter-signature, which is required by the Constitution and, last but not least, in contrast with the candidates to the ordinary courts, the candidates to the Supreme Court were deprived of the right of effective court control of the NCJ's resolution on the election of candidates).

► This could be achieved under the current infringement procedure regarding the new mode of disciplinary proceedings. Alternatively, the new infringement procedure could be initiated with respect to the neo-NCJ. It may be considered that this is not possible because of the lack of 'hard' common European standards regarding national councils of the judiciary (together with the fact that some countries do not have such a body at all). However, this possibility seems acceptable in the light of paras. 139–144 of the CJEU ruling of 19 Nov 2019, in which the Court specified the criteria for assessing the independence of the National Council for the Judiciary. A new infringement procedure should be conducted in accelerated mode and accompanied by an **interim measure preventing all newly-nominated Supreme Court judges (assessed by the neo-NCJ) from participating in the Supreme Court's bodies** – including the General Assembly, or the same interim measure should be applied as a part of the pending infringement procedure regarding the new mode of disciplinary proceedings.

► Time is running out, as the absolute deadline is the end of March 2020, before the election of the new First President of the Supreme Court.

The battle for independence of the Polish judiciary continues, but immediate action of the European Commission and equally swift subsequent action of the CJEU are necessary to have a chance of winning that battle.